



The

EMPLOYMENT TRIBUNALS

Claimant: Mr K Niewiadomski

Respondent: Geronimo Inns Limited

Heard at: LONDON SOUTH

On: 10, 11, 12, April 2017; 9 June 2017;
(Chambers) 9 August 2017

BEFORE: EMPLOYMENT JUDGE HALL-SMITH

MEMBERS: Ms NA Christoffi
Ms Y Batchelor

Representation

Claimant: In person

Respondent: Mr Richard Hignett, Counsel

JUDGMENT

THE UNANIMOUS JUDGMENT OF THE TRIBUNAL is that:

1. The Claimant was not automatically dismissed by the Respondent and accordingly the Claimant's complaint of automatic unfair dismissal on grounds of making protected disclosures is dismissed.
2. The Claimant's complaints of detriments on grounds of making protected disclosures are not well founded and are accordingly dismissed.
3. The Claimant's complaint of unlawful racial discrimination is not well founded and is accordingly dismissed.
4. The Claimant's complaint of unlawful disability discrimination is not well founded and is accordingly dismissed.
5. The Claimant's complaints under the Working Time Regulations 1999 are not well founded and are accordingly dismissed.

6. The Claimant was not wrongfully dismissed by the Respondent and accordingly his complaint of wrongful dismissal is dismissed.

REASONS

1. By a claim form received by the Tribunal on 16 June 2016, the Claimant, Mr Kamil Niewiadomski, brought complaints of unlawful disability discrimination, racial discrimination, detriments and automatic unfair dismissal on grounds of making protected disclosures, wrongful dismissal, and breaches of the Working Time Regulations against the Respondent, Geronimo Inns Limited.
2. At the Hearing the Claimant attended in person and gave evidence before the Tribunal.
3. The Respondent was represented by Mr Richard Hignett, Counsel, who called the following witnesses on behalf of the Respondent, namely Mr Stephen Bowen, General Manager, Ms Samantha Harper, Mr Xavier Gomez, Head Chef, Ms Siobhan Kennedy, and Mr Christopher Welch, Human Resources Adviser. There was a bundle of documents before the Tribunal.

Disability Discrimination

4. The issues to be determined by the Tribunal were considered at a Preliminary Hearing on 19 October 2016. The Respondent concedes that the Claimant is a disabled person by reason of HIV. The Respondent contends he did not know or could have been expected to know that the Claimant was disabled at the material times. The Claimant contends that he informed Mr Gomez in February 2016. The Respondent does not admit this.

Direct Disability Discrimination

- 4.1 Did the following occur and if so did they amount to less favourable treatment?
 - a) The Claimant was required by Mr Gomez to move to work at the Castle from the Guardhouse;
 - b) The Claimant was falsely accused by Mr Gomez in mid-March 2016 of drinking while working;
 - c) The Claimant was dismissed.
- 4.2 The Claimant is relying upon a hypothetical comparator, namely a sous chef working for the Respondent who did not have HIV.
- 4.3 Are the facts from which the Tribunal could conclude that the treatment was because of the Claimant's disability?

- 4.4 Is the Respondent able to demonstrate that the reason for the Claimant's treatment was not because of his disability? In so far as any such claims prima facie out of time, is it just inequitable to extend time?

Race discrimination

- 4.5 The Claimant is relying upon his Polish nationality as the element of race for his protected characteristic.
- 4.6 Was the Claimant accused of drinking and if so did this amount to less favourable treatment?
- 4.7 The Claimant is relying upon a hypothetical comparator, namely another sous chef who prepared dishes which contained alcohol as a constituent part and are not Polish. The Respondent maintains this is too broad and it should be narrowed to dishes which contained whiskey as a constituent part.
- 4.8 Are the facts from which the Tribunal could conclude that the treatment was because of the Claimant's race?
- 4.9 Is the Respondent able to demonstrate that the reason for the Claimant's treatment was not because of his race?

Indirect discrimination

- 4.10 Were the following PCPs applied?
- a) A refusal to postpone disciplinary hearings to allow an interpreter to be present when such a postponement is requested; and
 - b) A refusal to allow an employee to have an interpreter present over the telephone during disciplinary hearing once that is requested.
- 4.11 The Respondent denies the above PCPs were applied.
- 4.12 If so, were those PCPs supplied to the Claimant?
- 4.13 If so, did this put the Claimant at a particular disadvantage as compared to English speakers? The Claimant maintains that he was put at a particular disadvantage as there was some terminology used at his disciplinary hearing that he did not understand. This is not accepted by the Respondent.
- 4.14 If so, can the Respondent show that it was a proportionate means of achieving a legitimate aim?

Protected disclosures

- 4.15 Did the following amount to protected disclosures pursuant to Section 43B(1)(b) and (d) of The Employment Rights Act 1996?

- a) The Claimant complained to Mr Gomez via email on 29 February 2016 and 1 March 2016 that there was raw meat kept in circumstances where there was a risk of cross-contamination to cooked meats or other products.
- b) The Claimant also complained to the above around March/April 2016 by email to Mr O'Neil and Ms Harper.

4.16 If so, were these disclosures made in the public interest?

4.17 If so, do the following amount to detriments:

- a) an allegation of gross misconduct was made in April 2016;
- b) the letter of concern that the Claimant received from the Respondent in or around the end of February/beginning of March 2016.

4.18 If so, were either of the above detriments a result of the Claimant making any qualifying disclosures pursuant to Section 47B of the 1996 Act.

4.19 In the circumstances that the Claimant was dismissed as the result of the allegation of gross misconduct, was that dismissal automatically unfair?

4.20 If the Claimant was unfairly dismissed, would he have been dismissed in any event as a result of his prior conviction and incarceration which were not disclosed to ? in accordance with the Claimant's employment contract?

4.21 If so, when would this dismissal have occurred?

Breach of contract

4.22 Was the Claimant guilty of the gross misconduct alleged by the Respondent?

Working time

4.23 The Claimant alleges that he was not provided with breaks between shifts pursuant to Regulation 10 and further that he was not provided with breaks during his shifts pursuant to Regulation 12.

Annual leave

4.24 This claim is stayed pursuant to an Order dated 16 August 2016.

The Facts

- 5. The Respondent, Geronimo Inns Limited, operates a pub retail company.
- 6. The Claimant, Mr Kamil Niewiadomski, commenced his employment with the Respondent as a sous chef at the Duchess of Kent Public House in Islington. The Claimant commenced his employment with the Respondent on 29

November 2015. The Claimant is Polish. The Claimant's contractual hours were 48 hours per week.

7. In 2013 the Claimant was convicted at Southwark Crown Court for offences involving prostitution and was sentenced to a term of imprisonment of three years and four months. The Claimant's conviction and his sentence have relevance in relation to the Claimant's Tribunal claims.
8. The Claimant was released from prison in 2014 and it is his contention he has never denied his past and that, understandably, it was his intention to put his criminal past behind him and to move forward.
9. Following his release from prison, the Claimant undertook a number of courses connected with health and safety and food safety. A selection of the certificates he obtained are at pages 560-569 in the Tribunal bundle.
10. Clause 9 of the Claimant's Contract of Employment, page 164 provided the following, under the heading Employee Disclosure and Date of Issue:

Do you have any unspent criminal convictions, existing bankruptcy orders or County Court judgments against you? (If your answer below raises concerns about your suitability to undertake the position mentioned above, we may withdraw the offer of employment?)

11. Notwithstanding the Claimant's conviction, the Claimant did not tick the box indicating 'yes' beside which the following words were written '*(please give details to your manager)*'.
12. The Claimant contended that he had informed Mr Xavier Gomez, his line manager, of his conviction. Mr Gomez maintained that he knew nothing about the Claimant's conviction until the Claimant had been dismissed. In his evidence to the Tribunal, Xavier Gomez alleged that had he known about the Claimant's conviction for offences involving prostitution, he would certainly have looked into the matter having regard to the fact that the Respondent employed a significant number of female members of staff.
13. The Tribunal did not find the Claimant a credible witness for reasons which are set out in the course of these Reasons. The Tribunal found Xavier Gomez a reliable witness and a witness of truth. The Tribunal noted that although Xavier Gomez, during the course of his evidence to the Tribunal, admitted that he had a drink problem, we accepted his evidence that he would have had very significant concerns about employing the Claimant, with his particular criminal background having regard to his responsibility for female members of staff whom he managed, some of whom were very young.
14. It is common ground the Claimant never disclosed that he had HIV at the time he was employed by the Respondent. The Claimant alleged that he had informed Xavier Gomez in February 2016 during the course of a conversation when they were drinking together in a pub. The Claimant said that Xavier Gomez had disclosed to him that he had an alcohol problem and other personal issues which had encouraged the Claimant to disclose to Xavier

Gomez that he had HIV. The Claimant alleged that following this disclosure Xavier Gomez's attitude changed, that he avoided him and began communicating with him by email or by leaving notes.

15. In his witness statement, the Claimant alleged that he had informed Xavier Gomez about his HIV status on 29 March 2016. In his claim form at paragraph 4 of the details of the claim, the Claimant alleged the following:

In February 2016, Mr Gomez found out about my medical condition (disability) and I heard when he was talking with Ms Harper about "get rid of me". Initially being offered a permanent transfer to another pub (the Castle) which I refused.

16. It was put to the Claimant in cross-examination that he was all over the place in relation to the date when he alleged that he had informed Xavier Gomez about his condition of HIV. The Claimant replied that he remembered the occasion as 29 March 2016, when he was having a drink with Mr Gomez.
17. It was also put to the Claimant that if it had been the case that Mr Gomez's attitude towards him had changed following such disclosure, the Claimant was on annual leave on the following day on 30 and 31 March 2016 and that when he returned to work he and Mr Gomez were working on separate shifts. It was further put that during the Claimant's subsequent disciplinary hearing he had never stated that he felt any treatment about which he was complaining was because of his HIV status nor indeed that he had HIV, although he did raise the issue of disability.
18. The Tribunal noted that by 29 March 2016 the Claimant had been informed that he was to attend a disciplinary hearing, and that in such event we consider that it would have been unlikely the Claimant would have disclosed his HIV status at that late stage to his manager or would even have been out drinking with his manager.
19. The Tribunal also noted that at page 288 of the Tribunal bundle there was an email from the Claimant requesting an adjournment of the disciplinary hearing as he was on holiday the following day namely 29 March 2016 and in a PS to his email the Claimant added the following:

"I am still happy to attend the hearing but you should contact Mr Gomez and he can change the rota, putting me on a rota on Tuesday therefore I will be able and have to come over of course. While I am on holiday, I am not entitled to attend work/hearing".

20. Having regard to the inconsistencies of the Claimant's evidence relating to the date of occasion when he alleged that he had informed Xavier Gomez about his HIV status, and what we found amounted to unreliability in his evidence generally, we were unable to accept that the Claimant had informed Xavier Gomez or indeed any individual within the Respondent organisation of his HIV status during the course of his employment.

21. It was the Claimant's case that after he had alleged he had informed Xavier Gomez that he had HIV, Xavier Gomez endeavoured to transfer him to work at a different public house. The Tribunal found that the Claimant himself had requested to be moved to a different pub. In an email to Xavier Gomez, the Claimant had made a number of complaints about his work and he had asked to be transferred to a different pub. Again, in an email dated 6 March 2016 to Xavier Gomez, pages 225-226 the Claimant included the following:

The email has been sent only to you but in the future I reserve rights to copy this email to Mr Wayne/Mr Shane, while I will be asking for a transfer as if this situation be carrying on I can't see a place for myself in the Guardhouse with Emanuel.

22. In February 2016, the Claimant had been transferred to work at the Respondent's public house, the Guardhouse, which was located in Woolwich. The Claimant had in fact been employed to work at the Guardhouse which had been purchased by the Respondent in July 2014 and had subsequently been closed to allow extensive refurbishment to take place. It was due to be opened on 14 February 2016 and the Claimant started working there on 2 February 2016, to assist in setting up the kitchen and in establishing the menu.
23. All staff working at the Guardhouse were new, with the exception of the Deputy Manager, Samantha Harper. The Guardhouse had two kitchens, namely the main service kitchen, where most of the food preparation took place and there was a second preparation kitchen upstairs.
24. The Respondent was required to comply with the food safety control measures as set out in the monthly kitchen diary pages 507-550. As part of its health and safety requirements, the Respondent had to comply with very detailed proforma documents on which entries had to be made. The requirements are very specific relating to opening checks and closing checks, temperature records and food safety.
25. In his evidence to the Tribunal, Xavier Gomez gave a detailed account of the safety measures which were required to be undertaken by the Guardhouse in its operation of providing food and drink to the public. The kitchen could only open once all the opening requirements had been complied with and documented. Similarly employees were not permitted to finish until all the closing requirements were completed and appropriately documented.
26. The individual in charge of the kitchen was responsible for completing all the required checks, and depending upon who was on shift, the responsibility fell either to the Claimant or to Xavier Gomez
27. In February 2016 the Claimant and Xavier Gomez began working on opposite shifts and they would update each other on what had happened during their own shifts. The Claimant started sending Xavier Gomez lengthy emails. On 24 February 2016 in an email to Xavier Gomez, the Claimant complained about staffing issues, page 96. On the following day the Claimant raised a number of issues about food matters, the existence of a leak and the fact that

the kitchen had not been cleaned properly. The Claimant attached ten photographs, pages 200-201.

28. On February 29 2016 the Claimant complained about rotten food, labels a mess in the upstairs kitchen, which he alleged he had mostly sorted out. The email attached a significant number of photographs. The email was sent at 1.10am and it was put to the Claimant that he must have taken a significant amount of time to have taken all the photographs. There were about ninety photographs and the Claimant stated that it took him about ten to fifteen minutes to take them.
29. The Tribunal found that the Claimant, during his shifts at the Guardhouse, had responsibility for ensuring the kitchens under his control met the required health and safety standards. It was clear that the Guardhouse, when it first opened, experienced a number of teething problems.
30. On 29 February 2016 an environmental health audit to identify health and safety, food safety and fire safety hazards was carried out at the Guardhouse. According to the audit report pages 552-555, the Claimant did not appear to be present at the time of the audit. The audit report did not reveal any major criticism of the operation at the Guardhouse and the audit summary stated that standards were generally well managed. The report also stated that all high risk foods were found to be correctly date labelled. The hygiene section of the audit report included the following, page 533:

“The kitchen was found to be well managed in general. The kitchen diary was found to be well completed. Food storage controls were generally noted to be in line with hygiene principles and company policy, however secondary lidded containers are recommended for storage of any opened dried goods and refrain from using bin liners to store foods. Due diligence records are required for the foods displayed. All other checks and records were found to be in order”.

31. On 29 February 2016, Shane O’Neill(?), Operations Director who wrote the following letter to the Claimant, pages 210-211:

Following our conversation today I am issuing this letter of concern.

I have grave concerns regarding both service and process at the Guardhouse during your shift on Sunday 28 February.

Through your own admission, you remained in the prep kitchen from 7pm that evening.

After shift you sent an email detailing the failures of the evening staff. Finally the incorrect labelling and bad practise that you found.

However, contrary to the company food safety policy you failed to record these matters in the monthly diary. Likewise you failed to inform the manager on duty so that waste could be recorded on Torex.

This potentially puts the company at serious risk. In this situation I will suffice with this letter of concern, but please be clear that a failing of this nature will not be tolerated again.

In a separate discussion it was established that no prep sheets are prepared on a shift by shift basis. I find it hard to believe effective planning and stock control is achieved without these basics in place.

Planning and preparation are vital components of getting it right. As such please keep all prep sheets for review until the end of our trading week every week. Should you need any further training, or if there is anything which is not clear, please contact Wayne Pike in the first instance.

These actions are expected to happen with immediate effect. Should I find that there are any situations which potentially put the company at risk, I will use this document in any future appraisal.

Please review the systems we already have in place to ensure that we don't find ourselves in a similar situation again.

A copy of this letter will be placed on your staff file and will remain there for six months.

32. In view of the contents of the audit report and the extent of the Claimant's own responsibility for health and safety issues and food hygiene we were driven to the conclusion that the Claimant in his emails about the state of the kitchen was exaggerating and that he had his own agenda for raising such issues with the Respondent, particularly having regard to the length of his emails written in the early hours of the morning and the time he must have taken to take and attach so many photographs. We were unable to conclude that the issues raised by the Claimant amounted to genuine concerns on his part.
33. The Claimant contended that between 9 February 2016 and 29 February 2016 he received no rest breaks during his shifts on a number of occasions. The Claimant particularised the occasions in an email dated 28 October 2016.
34. The Tribunal found that on those occasions when the Head Chef was not present, the Claimant himself undertook the responsibilities of the Head Chef and accordingly it was his responsibility to ensure that he took or scheduled his own rest breaks. On the evidence, the Tribunal heard that as is the case with most pubs and food outlets, the quieter period falls between 3.30pm and 6pm which is when most members of staff take their breaks. The Claimant was unable to provide any explanation why he was unable to take breaks during the quieter periods of the day in common with other members of staff on those days, which were the subject of his Tribunal complaint.
35. The Tribunal noted that in an email dated 1 March 2016 to the Guardhouse's email address, page 218, the Claimant did not complain about being denied rest breaks but stated that he wanted his hours recorded correctly for the purposes of calculating the tronc. The Claimant's email included the following:

Although I am on salary, I will be thankful if you could put accurate hours (e.g. tronc or in the future discuss my contract) BTW, I would like to have a copy of my contract though.

36. Samantha Harper, Deputy Manager of the Guardhouse, did not consider that the Claimant's email was alleging that the Respondent was in breach of the Working Time Regulations in relation to the Claimant's entitlement to rest breaks. In her witness statement at paragraph 9 Samantha Harper stated the following:

I viewed the Claimant's emails in this regard as notifying me that he had worked more than his scheduled hours, in order that I could record the additional hours on the payroll system. This would ensure that he was paid correctly for the full hours that he worked including any extra. Indeed the email of 1 March 2016 (page 218) makes express mention of this".

37. The Respondent contended the Claimant's complaints under the Working Time Regulations were out of time.
38. The Respondent operated a strict policy related to drinking at work. The Respondent's Handbook under the heading "Alcohol, Drugs and Gambling" page 168 stated the following:

It is a company requirement that staff shall not drink alcohol or play gaming/video machines whilst on duty. Staff shall not drink alcohol during breaks or periods throughout starting duty, for example when ? shifts. The company also requires employees to not undertake illegal drug activity, to not work under the influence of drink or drugs or become incapacitated through drink or drugs whilst at work. Failure to comply with this requirement will be regarded as a disciplinary matter."

39. The Respondent's disciplinary policy under the heading "Standards of Conduct" included 'unauthorised drinking wine or incapacity through drink or illegal drugs whilst at work' as an example of gross misconduct.
40. On 14 March 2016, the Claimant was working on shift at the Guardhouse. On 15 March 2016, Samantha Harper, Deputy Manager, was informed by Reggie Rogers, the front of house team member that he had been working the previous afternoon at the Guardhouse and had checked with the chefs whether they would like a drink, namely water or a soft drink. Reggie Rogers stated that the Claimant had asked for a whiskey and coke, but that he had refused to provide the Claimant with such because he believed the Claimant had wanted it for personal consumption, which was not permitted.
41. Reggie Rogers further alleged that the Claimant came to find him in the bar area and had asked him aggressively to make him a whiskey and coke. The Claimant's request was ignored but the Claimant persisted in making his

request. Accordingly to Reggie Rogers the Claimant threatened to give him "shit" staff food later when Reggie Rogers took his break.

42. At the end of the working night, Reggie Rogers alleged that when he went to obtain some staff food, all that he was provided with was a little bit of chicken. While he was eating it the Claimant came over, sat down and said "*I'm hungry, give me some food*" and started putting his hands on Reggie Rogers's food. Reggie Rogers took his plate away from the table so that the Claimant could not touch his food. According to Reggie Rogers the Claimant then told him that all other members of staff had had chicken, chips and gravy for their staff food and then said "*I told you you'd get shit for your staff food*".
43. Samantha Harper was concerned about what she had been told and decided that she should investigate the allegation. She asked other members of staff who had been on shift if they had seen or heard anything to support Reggie Rogers's account and a number stated that they had felt that the Claimant had been out of order. One member of staff, Shannen Wimble, a front of house team member, stated that the Claimant had called her mentally disabled. Reggie Rogers and Shannen Wimble provided written statements confirming their accounts which they provided to Samantha Harper, pages 249-250.
44. On 23 March 2016, Samantha Harper wrote to the Claimant, page 248. Her letter included the following:

I am writing to advise you that a disciplinary hearing will be held on Tuesday 29 March 2016 at 2pm ... and you are required to attend.

The purpose of the interview is to consider whether to take disciplinary action against you, under the company's disciplinary procedure, following your alleged. It is alleged that you asked for alcohol during your shift on numerous occasions in a threatening manner and displayed inappropriate and offensive behaviour towards a member of staff.

Mihai Gavrilov, General Manager of the Cow, will be conducting the hearing. You are entitled to be accompanied by a work colleague or trade union representative if you wish to do so

45. The letter also pointed out the following:

You should be aware that any allegations of drinking on shift as well as bullying and threatening other staff members are considered gross misconduct and summary dismissal is among the range of outcomes which may result from this meeting.

46. The Claimant was provided with the statements from Reggie Rogers and Shannen Wimble. The disciplinary hearing did not take place as scheduled on 29 March for a number of reasons including the fact the Claimant had been on leave.

47. The hearing took place on 11 April 2016. Before the hearing the Claimant had been provided with two further statements from Liam Woolrich, Supervisor, page 304 and from Marion Kirk-Henry, page 305. Marion Kirk-Henry stated that the first group of staff had had half a chicken with chips and vegetables but that he and Reggie Rogers were only given chicken and that the Claimant then took a bite out of his chicken.
48. In his statement Liam Woolrich stated that he had been with Shannen Wimble when the Claimant had made comments about Shannen Wimble's mental state.
49. Stephen Bowen, General Manager of the Prince Albert Public House, was requested by Samantha Harper to hear the Claimant's disciplinary hearing. Stephen Bowen was provided with the statements from the individuals who had given their accounts of the circumstances of the allegations involving the Claimant. Stephen Bowen also had a defence statement prepared by the Claimant, an article from the Guardian newspaper stating that new figures had revealed a dramatic increase in hate crimes against Polish people, and a number of emails and other documentation of various descriptions, bulleted at paragraph 11 of Stephen Bowen's witness statement.
50. Stephen Bowen had not met the Claimant prior to the disciplinary hearing and his knowledge of the Claimant was restricted to the information provided to him in relation to the disciplinary hearing.
51. There was an issue raised by the Claimant, namely that he wanted an interpreter and that he would not be able to understand the full contents of the hearing in circumstances where he was Polish and not fluent in English. The Claimant had in fact been granted permission to be accompanied by his own interpreter, but the Claimant stated there was a problem whether the interpreter was able to attend.
52. Stephen Bowen, after speaking to the Claimant, considered that the Claimant was able to understand English and that he did not appear to have any problem in understanding what he was saying. The Tribunal noted that the Claimant was able to communicate forcefully and at length during the course of his email correspondence prior to the disciplinary hearing and we did not consider that the evidence supported his contention at the disciplinary hearing that the Claimant had any significant difficulties in understanding the English language.
53. The Claimant also raised another issue, namely the statements of the individuals who had provided their accounts relevant to the allegations against the Claimant had not been signed. Stephen Bowen agreed to adjourn the hearing to enable him to obtain signed copies of the statements. Before the meeting was adjourned, the Claimant handed Stephen Bowen a letter headed Formal Grievance was the fact that the statements taken from witnesses had not been signed by them.
54. On 13 April 2016 the Claimant wrote a letter to Tracy Read, Director of People (HR), page 347. In his letter the Claimant had stated that he had been

subjected to a detriment within the workplace as a result of raising concerns under (Youngs') policy. The Claimant stated that he had reported verbally to the Head Chef or Deputy Manager about a number of matters including poor performance and a failure to comply with health and safety or hygiene regulations.

55. The Claimant's letter also stated that after he had raised concerns he had become subject to a detriment within the workplace, had become a victim of conspiracy which was the Respondent's intention to lead to his dismissal.
56. The Claimant also included in his letter an explanation about his request for whiskey on 14 March 2016. The Claimant enclosed a copy of an invoice, page 245, which revealed that a green gammon ham had been requested to be delivered to the Guardhouse on 14 March 2016 and that the recipe for whiskey ham, page 246, required 100 mls of Glenfiddich per joint of ham. The Claimant's letter covered just over four pages and in our judgment, did not reflect or evidence any difficulties the Claimant had in expressing himself in English. The Claimant's letter also included an allegation that in his opinion he had become a victim of stereotyping which led into direct discrimination.
57. Stephen Bowen spoke to Xavier Gomez as Head Chef at the Guardhouse. Xavier Gomez told him that the recipe for whiskey ham involved covering the ham joint with mustard, placing it in the oven and glwhicazing the joint with whiskey while it was being cooked. According to Xavier Gomez the whiskey ham would not be covered in whiskey at the point of service but when the joint was being cooked.
58. Stephen Bowen also considered that witness statements which had been obtained also corroborated the accounts of both Reggie Rogers and Shannen Wimble and he also noted that the allegation had involved the Claimant asking for a whiskey and coke and not simply whiskey which he considered would have been more consistent with a genuine request for an ingredient for a particular recipe.
59. Stephen Bowen concluded that the Claimant had requested alcohol for personal consumption and that the Claimant's conduct towards Shannen Wimble and Reggie Rogers had amounted to rude and aggressive behaviour. Having regard to the Claimant's short length of service and his conduct Stephen Bowen decided to summarily dismiss him.
60. On 15 April Stephen Bowen wrote to the Claimant, pages 354-355 informing him of the outcome of the disciplinary hearing, namely that he had been summarily dismissed. Stephen Bowen's letter included the following:

During our meeting you stated that you required the whiskey in order to prepare the whiskey gammon dish to the company's required specification. In addition you wanted a staff drink and requested coke. It was your view that Reggie had misunderstood your request for a whiskey and coke. He made you the coke but you insisted that you still wanted the whiskey.

On investigation I found that the gammon ham is prepared by the prep chefs and made first thing in the morning so it gives them time to have the ham marinated before service. During our meeting you mentioned the use of the whiskey each time the portion is ordered. Given the ham was prepared earlier in the day I do not accept your mitigation that you needed to use whiskey each time a portion of ham was ordered.

The company's policy for staff drinks are cordial and soda and not coke. I believe that you requested the whiskey and coke for your own consumption and not as two separate drinks as you suggested.

Shannen mentioned in her statement you accused her of having a mental disability, this was also witnessed by Liam. You continued telling her that she had a disability and that Liam had to have a word with you. He also mentions this was not the first time that you were being offensive to staff, trying to pass it off as humour.

The company views bullying most seriously. All the witness statements agree how aggressive you were to the staff when they did not give you the whiskey and coke. As you did not provide a defence, I have been unable to consider an alternative version of events.

After investigation and consideration of the facts, including any mitigating factors you put forward, I consider your repeated request for alcohol on shift in a threatening manner and inappropriate and offensive behaviour towards a member of staff to amount to bullying as well as threatening and abusive behaviour.

In the light of the above I consider this incident to amount to gross misconduct. In accordance with the company's disciplinary procedure, your employment is terminated with immediate effect".

61. The Claimant appealed against the decision to dismiss him, page 362. The Claimant's letter of appeal dated 19 April 2016 requested that Shane O'Neill, who had been due to hear the Claimant's grievance should not hear the grievance of appeal. The grievance hearing had been scheduled to take place on 26 April 2016 and Siobhan Kennedy, Operations Manager, had been appointed to hear the Claimant's grievance.
62. The Claimant requested his appeal to be dealt with on paper. The Claimant's grounds of appeal were set out in an email from the Claimant dated 23 April 2016 pages 375-382. On 18 May 2016 Christopher Welch, HR adviser, wrote the following to the Claimant, page 409:

I understand that you prefer that your appeal is heard in your absence. As you will lose the opportunity to put forward your case in person I urge you to reconsider your decision. Please notify me as soon as possible, if you wish to attend a re-scheduled hearing. However if your decision remains to not attend the appeal hearing please will you provide further information regarding discrimination and the hate

crime you allege you are the victim of. Specifically, how you have been discriminated against and/or when did the hate crime take place, on how many occasions this occurred, what were the dates of the incidents, who committed the acts of discrimination and/or hate crime and who witnesses these events.

With regard to your view that you are the victim of stereotyping leading to direct discrimination, who has alleged that you are an alcoholic, when were these allegations made and were there any witnesses to these incidents?

In addition, please will you provide any additional information you believe is relevant to your appeal and, once this information has been received Ms Kennedy will consider your appeal.”

63. The Claimant failed to particularise his grounds of appeal as requested and stated that the allegations would be heard in an Employment Tribunal, page 412. The Respondent in emails to the Claimant, pages 409-417, made further attempts to obtain the information and requested from the Claimant but decided not to proceed with the appeal in the circumstances of the Claimant's stated intention to take the matter to an Employment Tribunal.

Submissions

64. The Tribunal heard submissions from Mr Hignett on behalf of the Respondent. Mr Hignett supplemented his oral submissions with written submissions. The Tribunal Judge read back his note of the Claimant's oral submissions to the Claimant.

The Law

Disability Discrimination

65. The Claimant's complaints of disability discrimination are complaints of direct discrimination. Section 13 of The Equality Act 2010 provides:

(1) 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.

66. The Claimant was a disabled person at all material times by reason of HIV. The Respondent contended that it had no knowledge that the Claimant had HIV, nor could it have been reasonably expected to know that the Claimant was a disabled person, and that accordingly any treatment complained of by the Claimant could not have amounted to direct discrimination.

Direct Racial Discrimination

67. The Claimant relies upon his Polish nationality as the element of race for his protected characteristic. The Claimant alleged that he had been subjected to a stereotypical assumption that as a Pole, he was a heavy drinker and/or

alcoholic and that being falsely accused of drinking and subsequently his dismissal amounted to less favourable treatment.

68. In relation to indirect discrimination, the Claimant contended that the refusal to postpone disciplinary hearings to allow an interpreter to be present and a refusal to allow an employee to have an interpreter present over the telephone amounted to PCPs which have been applied to the Claimant and which put him at a particular disadvantage as compared to English speakers. Section 19 of The Equality Act 2010 provides:

- (1) a person (A) discriminates against another (B) if (A) applies to (B) a provision, criterion or practise which is discriminatory in relation to a relevant protected characteristic of (B's).**
- (2) for the purpose of sub-section (1), a provision, criterion or practise is discriminatory in relation to a relevant protected characteristic of (B's) if:-**
 - (a) (A) would apply to persons with whom (B) does not share the characteristic,**
 - (b) It puts, or would put, persons with whom (B) shares the characteristic at a particular disadvantage when compared with persons with whom (B) does not share it,**
 - (c) It puts, or would put, (B) at that disadvantage, and**
 - (d) (A) cannot show it to be a proportionate means of achieving illegitimate aim.**

Public Interest Disclosure

69. The Claimant alleged that he had been subjected to detriments and that he had been dismissed on grounds of making protected disclosures. Section 43(B) of The Employment Rights Act 1996 provides:

- (1) In this part a qualifying disclosure means any disclosure of information which, in the reasonable belief of the work and making disclosure, is made in the public interest and tends to show one or more of the following:-**
 - (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
 - (d) That the health or safety of any individual has been, is being or is likely to be endangered.**

70. The Claimant alleges he has been subjected to detriments as the result of making qualifying disclosures and that he had been automatically dismissed on such grounds – Section 103A of the 1996 Act.

Wrongful Dismissal

71. The Claimant contended that he was wrongfully summarily dismissed in breach of the notice provisions of his Contract of Employment. The Respondent contended that the Claimant was summarily dismissed for reasons of gross misconduct. It is for the Respondent to show on the balance of probabilities that the conduct alleged amounted to gross misconduct, thereby justifying the Claimant's summary dismissal.

Working Time Regulations

72. Regulation 10 of the Working Time Regulations 1998 provides:-

(1) A worker is entitled to a rest period of not less than eleven consecutive hours in each twenty four hour period to which he works for his employer.

73. Regulation 12 of the Working Time Regulations 1998 provides:-

(1) Where a worker's daily working time is more than six hours, he is entitled to a rest break.

Conclusions

74. The Tribunal reached its conclusions having regard to the evidence, to the summations of and on behalf of the parties and to the relevant Law.

Direct Disability Discrimination

75. In relation to the Claimant's allegations of direct disability discrimination, the Tribunal found it a fact that during the course of his employment with the Respondent the Claimant had never raised with Xavier Gomez or with any individual in the Respondent's organisation the fact that he had HIV. The Tribunal have set out in the course of these reasons why it did not find the Claimant a credible witness and we considered that there was some force in Mr Hignett's cross-examination of the Claimant that the motivating factor behind the Claimant's Tribunal claims was his wish to recover a large sum of money. The Claimant's own documents included various articles and extracts from Law reports relating to awards in Employment Tribunal cases.
76. In the absence as we found, of any actual or constructive knowledge of the Claimant's status as a disabled person, we concluded that there was no substance to the Claimant's complaints of disability discrimination. In any event there was no evidence before the Tribunal that the dismissing officer, Stephen Bowen, was aware of the Claimant's condition, and accordingly the Tribunal concluded that the Claimant's complaints of unlawful disability discrimination were not well founded and that they are accordingly dismissed.
77. The Claimant himself, at the Tribunal Hearing, did not seriously pursue his complaints of disability discrimination, apart from his evidence that he had informed Xavier Gomez that he had HIV.

Racial Discrimination

78. It was the Claimant's case that he had been treated less favourably because of a stereotypical assumption on the part of the Respondent that all Polish people drank heavily and that such assumption had coloured the Respondent's approach to the allegation that he had asked for alcohol whilst on duty.
79. The Tribunal found that the evidence did not support any contention that the Respondent had adopted a stereotypical assumption but we reminded ourselves that employers rarely, if ever, admit to conduct involving unlawful discrimination. However in the circumstances of this case we concluded that the sole reason for the Claimant's dismissal was his conduct on 14 March 2016 and that neither race nor disability played any part in the decision to dismiss him or to subject him to a disciplinary process.
80. The Tribunal found no facts on which it could have concluded in the absence of any other explanation that the Respondent had discriminated against the Claimant.

Public Interest Disclosure

81. In relation to the Claimant's whistle-blowing complaints, the Tribunal concluded that the emails relied upon by the Claimant which contained allegations relating to breaches of food safety rules amounted to disclosures of information within the meaning of Section 43B of The Employment Rights Act 1996.
82. We considered there was some substance to Mr Hignett's submission that in making disclosures about kitchen hygiene issues, the Claimant was effectively reporting his own wrongdoing. In any event it was clear that by the time the auditor was undertaking its report on 29 February 2016, the Claimant had himself prepared the kitchen and the auditor made no complaints in relation to its state apart from the areas identified in the auditor's report.
83. The Tribunal considered that there was no evidence to support any contention that there was a causal link between the detriments complained of by the Claimant and his dismissal. Stephen Bowen's letter dismissing the Claimant, in our judgment, clearly identified the reasons why the Claimant was dismissed, and we found that the reason for the Claimant's dismissal was his conduct identified in Stephen Bowen's letter and that there was no substance to the Claimant's contention that he had been automatically dismissed by the Respondent or that he had been subjected to any detriments, as he alleged, on grounds of his disclosures.

Working Time

84. There were occasions when the Claimant worked double shifts, pages 98-99, which revealed the Claimant did not have eleven hours' rest between shifts. At the material time, the Claimant's concern was that his hours should be

recorded correctly on the payroll system to ensure that his pay was correctly calculated for the hours that he worked and for his tronc payments. The Claimant was complaining that he should have been paid for the extra hours he worked. The Tribunal concluded on the evidence that the Claimant himself managed his own hours and that there was no requirement by the Respondent that he should have worked the extra hours.

85. Under Regulation 30(1) of the 1998 Regulation a complaint may be made to an Employment Tribunal that the employer has refused and permitted to exercise his rights in connection with daily rest. Regulation 30 also provides that a complaint under Regulation 30 must be presented within three months of the date on which the right should have been permitted unless it was not reasonably practicable to do so.
86. The Claimant's claim was received on 16 June 2016. The breaches complained of occurred more than three months before the Claimant's Tribunal claim was received. On the evidence we concluded that it was reasonably practicable for the Claimant to have presented his complaint in relation to working time issues within the statutory time limit of three months.
87. In any event the Tribunal found that on the occasions when the Claimant deputised for the Head Chef it was his own responsibility to ensure that he scheduled his own rest breaks and we noted that during the pub's quiet hours between 3.30pm and 6.00pm, when most members of staff took their breaks, the Claimant could not provide any explanation why he could not have taken his breaks during such periods.
88. In relation to the Claimant's allegations relating to rest periods, again such complaints must be presented within three months of the date on which the right should have been permitted unless it was not reasonably practicable to do so. The Claimant who spent a significant amount of time sending emails about the state of the kitchen, had never complained about a refusal of the Respondent to permit him to exercise his right to any rest periods. In his submissions to the Tribunal Mr Hignett reminded the Tribunal of the Respondent's shift patterns including split shift patterns, page 287 and that in the event that staff worked as rotad, sufficient rest periods were always accommodated for.
89. Samantha Harper was concerned about the number of hours the Claimant alleged he was working but the Claimant never raised a complaint about daily rest but wanted to be paid for additional hours understandably.
90. The Claimant's complaints relating to rest periods are out of time and accordingly the Tribunal has no jurisdiction to hear and determine such complaints.

Wrongful Dismissal

91. The Tribunal found as a fact that the Claimant had asked for whiskey to consume whilst on duty, conduct treated by the Respondent as gross misconduct, page 174, and that he had bullied members of staff, namely

Shannen Wimble and Reggie Rogers. Such conduct, we conclude, amounted to gross misconduct. and accordingly the Respondent was justified in summarily dismissing the Claimant as a result of the Claimant's repudiatory breach of contract by his own conduct. The Claimant's complaint of wrongful dismissal is not well founded and is accordingly dismissed.

Employment Judge Hall-Smith
10 October 2017