



EMPLOYMENT TRIBUNALS

Claimant

Mr Mendes

Respondent

Diverse Dining Ltd

v

FINAL HEARING

Heard at: Watford

On: 12, 13 & 14 November 2018

Before: Employment Judge Bartlett, Mrs Smith and Mr Bean

Appearances:

For the Claimant: Mr Williams, of Counsel

For the Respondent: Mr Hussain, of Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant's claims for direct discrimination fail.
2. The claimant's claims for harassment contrary to s26 of the Equality Act fail.

The Issues

3. The issues for the tribunal to decide were as follows:

Harassment on the grounds of sexual orientation, section 26 Equality Act 2010

1. *Did Alice Bailey, of the respondent, say the following to the claimant on 29 July 2017:*
 - a. *if I am honest babe we would not have employed you if we knew you were gay, you know that*
 - b. *no, I am serious. I thought you were straight, that is why I told Simon to take you on as a host*

2. *Did Simon Smith, assistant manager for the respondent, say the following to the claimant on 29 July 2017:*

we did not think you were gay at all. You should have told us that in interview and we would not have taken you on as a host. We would have offered you a position as a waiter instead

3. *Did Vincente Sancho, general manager for the respondent say the following to the claimant on 1 August 2017 when explaining to the claimant why he had been dismissed:*

yes, from what I know, it is due to the fact that they found out that you were gay and they don't want a gay host working in the front of the restaurant

4. *Did Barry Cook, business director for the respondent say the following to the claimant on 1 August 2017 after the claimant had been dismissed:*

unfortunately, the directors had made their decision, that is final - they don't want a gay host working at the front of the restaurant. What they say goes. You are no longer a fit for this role as a host. You don't fit in with the culture.

5. *Did the claimant ask Alice Bailey to keep the fact that he was gay confidential on 29 July 2017 and did Alice Bailey, nonetheless tell Simon Smith and/or other employees of the respondent that the claimant was gay?*

6. *Did Barry Cook look at the claimant in disgust after the claimant's dismissal?*

7. *Was the conduct set out at paragraphs 1 to 6 above unwanted conduct related to the claimant sexual orientation?*

8. *Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

9. *Was it reasonable for the conduct to have had that effect?*

Direct discrimination section 13 Equality Act 2010?

4. *Was the treatment at paragraphs 1 to 6 above because of the claimant sexual orientation?*

5. *Was that the reason, or one of the reasons, the claimant was dismissed because of his sexual orientation?*

6. *Would a hypothetical comparator (a host who was not gay) have been treated in the same manner?*

The law

S13 of the Equality Act 2010 sets out:

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.

S26 of the Equality Act 2010 sets out:

A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) *The relevant protected characteristics are—*

age;
disability;
gender reassignment;
race;
religion or belief;
sex;
sexual orientation.

The Proceedings

7. At the start of the hearing, which was approximately 10:15 on 12 November 2018, the tribunal asked the respondent's representative where its witnesses were as none were in attendance. Mr Hussain's response was that Mr Simon Smith was no longer employed by the respondent and subject to a witness order issued by the tribunal. It originally specified that he should attend on the 2nd day of the hearing and therefore he was not available until 13 November 2018. A further witness Ms Gorecha, was also no longer employed by the respondent and was away in Paris and was not able to attend until 13 November 2018. Alice Bailey, the 3rd of the respondent's witnesses, had been informed she was not needed until the 2nd day of the hearing. The Tribunal made it clear to Mr Hussain that it was expected that the respondent would contact Ms Bailey immediately and ensure that she attended the tribunal on 12 November 2018 in order to give evidence. Mr Hussain was given a number of breaks to facilitate this. Mr Dan Graham from the respondent was in attendance, his job title had been given as HR director and it was expected that he would ensure Ms Bailey's attendance.
8. Regrettably Ms Bailey did not attend the hearing on 12 November 2018. After the lunch break, at approximately 14:15, Mr Hussain informed the tribunal that Ms Bailey was visiting her mother in Birmingham, her mother was sick and as a result Ms Bailey was unable to attend the tribunal on 12 November 2018. However she would be attending on 30 November 2018.
9. Mr Williams made submissions that the respondent had provided no real reason as to the non-attendance of the witnesses and invited the tribunal to make its findings on liability as the evidence stood at 14:15 on 12 November 2018 which was that only the claimant had given evidence. Mr Williams also reserved his position as to make an application for costs on the basis that the afternoon of 12 November 2018 could not be used for any purpose by the tribunal and indeed proceedings closed for the day at 14:40.
10. The tribunal finds that the witness order issued by the tribunal required Mr Simon Smith to attend on 5 September 2018, which was the 2nd day of the hearing, which was postponed. As Mr Simon Smith was no longer employed by the

respondent and was appearing at the tribunal because of the witness order. The tribunal considered that it was not in the interests of justice to make a finding on liability without the respondent's evidence.

11. When Ms Bailey gave evidence. Mr Williams asked a number of questions about her non-attendance. Her evidence was that she was told at 12 that she was required to attend by one and this was too late and therefore she would not attend on 12 November 2018. The tribunal found this situation most unsatisfactory. It is for the respondent to ensure that its witnesses attended on the first day of the hearing. It is for the tribunal to choose the order of the witnesses and to determine timings. It is extremely presumptive of the respondent to assume that no witnesses would be needed until the 2nd day and to provide no mechanism for obtaining any of its witnesses until the 2nd day.

Applications

12. At the start of the hearing the Claimant made three applications:

- 12.1 to amend his name as he had changed it to Mr Omar Mendes by deed poll. The respondent did not object to this amendment and the amendment was made;
- 12.2 to amend paragraph 12 of the grounds of complaint so that all references are to "Vincente Sancho" rather than Simon Smith. The Respondent objected to the application. The tribunal decided to grant the application on the basis that this was a typographical error and it was clear from the rest of the grounds of complaint and the witness statements that it was not argued by any party that Simon Smith had been present at the dismissal meeting;
- 12.3 to amend the list of issues so that two acts particularised solely as acts of direct discrimination were also pleaded as harassment under section 26 of the Equality Act. The acts were that Alice Bailey did not keep the claimant's sexuality confidential after he requested to do so and that Barry Cook looked at the claimant in disgust after the claimant had been dismissed. The respondent objected to this application on the basis that it was unfair to the respondent. The tribunal granted the application as evidence on these matters should have been prepared for the hearing as they were pleaded as acts of direct discrimination and therefore the amendment related solely to the legal classification of the factual issues. In these circumstances the tribunal did not think this created unfairness for the respondent and the application was allowed.

Burden of proof

13. The Equality Act 2010 sets out the burden of proof in relation to disability discrimination:

s136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Reasons

Background

14. The following background facts are undisputed:

- 14.1 the claimant commenced employment with the respondent on 17 July 2017 as a host;
- 14.2 the claimant had been recruited by the respondent as it was opening a new restaurant under the PF Chang brand in central London;
- 14.3 the respondent is a UK licence holder for a number of restaurant brands including PF Chang;
- 14.4 as part of the claimant's training a mock service was carried out on 29 July 2017 in which the claimant participated;
- 14.5 the claimant's employment was terminated on 1 August 2017 which was his next working day after 29 July 2017;
- 14.6 the evening of 1 August 2017 was a VIP night which was a night to which influencers (instagrammers) were invited;
- 14.7 the claimant submitted a written grievance on 10 August 2017 which set out that he was told he was dismissed because he was gay and which made the allegations that various named employees of the respondent had made discriminatory comments to him about his sexuality, sexual orientation which are detailed in the issues for this tribunal to decide.

Evidence

The claimant

- 15. The claimant appeared as a witness: he adopted his witness statement and was asked a number of questions by Mr Williams, Mr Hussain and each member of the tribunal panel.
- 16. The claimant's evidence was that he had informed the members of his team which was an all-female team of hosts about his sexuality (the claimant is homosexual). He asked them specifically not to tell management as he felt that

male managers in particular treated him differently once they found out about his sexuality.

17. Alice Bailey was a member of this team and manager but he only informed her on 29 July 2017 (which was his last working day before he was dismissed) that he was homosexual by his reference to his boyfriend visiting him from Dubai as the reason for the request for the day off.
18. The claimant's evidence was that he did not receive any negative feedback from anybody at the respondent except on his last working day before he was terminated. This was 29 July 2017 when all of the restaurant's employees were carrying out a mock service. He was told by Alice Bailey to take a breath because he was overwhelmed with excitement.
19. The claimant's evidence was that he had had a meeting with Ms Alice Bailey and Shaunette in which Miss Bailey had told him that those two stood out in the team and got very positive feedback from trainers. His evidence was that he was told that they wanted him to be in charge when Alice and Shaunette were not there.
20. It was put to the claimant that in the interview for the grievance, Ms Alice Bailey said that the Claimant was 80% amazing but there was an issue with 20%. The claimant's response was that there was no mention that that 20% was due to attitude and that the 20% was in relation to the mock service on 29 July 2017, not his whole employment.
21. It was put to the claimant that in the grievance interview, Maria said that the claimant was gossipy and she would not trust him. The Claimant stated that he had a professional relationship with Maria but he did not talk to her much out of the whole group.
22. It was put to the claimant that Shaunette was dismissed at the same time as the claimant. The claimant said he was told she was dismissed because her child was sick and she could not attend on some days.
23. The issues identified by Hala in the grievance interview that the Claimant would joke but insultingly and that he was rude were put to the Claimant. The Claimant denied being rude and said he was respectful to the trainer. The Claimant did not accept that his behaviour could have come across this way because he said he would have received negative feedback and because he did not come from a restaurant background.

Ms Jalpa Gorecha

24. Ms Jalpa Gorecha appeared as a witness for the respondent. At the hearing she adopted her witness statement and was asked a number of questions. Ms G was a HR and payroll manager for the respondent. She is no longer employed by them. Ms G carried out the investigation into the claimant's grievance. As part of the grievance investigation Ms G held meetings with Barry Cook, Simon Smith,

Alice Bailey, Vincente, Maria, Vicky, Hala and Jim Dunn. The notes of these meetings are set out in the bundle.

25. In cross-examination Ms G was asked a number of questions. A number of these questions related to the email sent by Barry Cook to Dan Graham (HR director of the respondent) dated 2 August 2017 at 09:54 which set out alleged reasons for the claimant's dismissal. This email sets out the following:

"Omar Lewis has been unsuccessful in his training for host with our Great Newport Street site.

Despite a positive start on the technical side of his role (including the systems, understanding the processes of reservations and turning tables efficiently), Omar has not displayed the required levels of customer service and guest interaction during training sessions.

During the training, I have received the following feedback from his trainers:

- *not focused or paying attention during the sessions*
- *being disrupted by joking around when supposed to be hosting*
- *slouching around when supposed to be focused on hosting*
- *being disrespectful to Hala (his main trainer) , which caused her to cry*

In general, he has been disruptive and has not displayed the focus on standards associated with customer service that is required for a key role, welcoming guests.

26. A number of cross examination questions focused on whether the responses to Ms G in the grievance investigation meetings identified issues that the interviewees raised about the claimant which corresponded or not with the issues identified by Barry Cook in the 2 August 2017 email. The finds that not all of the issues raised by Barry Cook were replicated exactly in the comments of the interviewees. However, the tribunal finds that issues were raised about the claimant by every interviewee and that the issues raised were focused on his attitude. The tribunal finds that whilst there are differences in the wording used by the interviewees the general theme was that the claimant's attitude was not good enough.
27. After the event with the benefit of time and hindsight, it is possible to criticise every grievance investigation. However the tribunal found that overall, Ms G's investigation was thorough: she interviewed a significant number of individuals and the questions she asked of them were pertinent and covered the issues raised by the claimant's grievance. The tribunal finds that a reasonable grievance procedure was carried out and that no criticisms can be made of Ms G.
28. In cross-examination Ms G was taken through a table which was attached to an email from Crystal Martin to Barry Cook on 14 August 2017. This table set out the names of 5 individuals, including the claimant and set out an evaluation of 8 criteria in which people were ranked by percentage, and there was a comment box for each individual. During cross-examination it became clear that Mr Williams had a redacted version of the table, whereas the copy in the bundle was

unredacted and complete. Mr Hussain was unable to explain why a redacted version had been sent to the claimant and the claimant had not been notified that an unredacted version was in the bundle. Mr Hussain explained that his colleague had been dealing with the matter was in tribunal on this day. I requested Mr Hussain enquire with his colleague but by the end of proceedings on day 2 Mr Hussain had not received a response from his colleague. This was wholly unsatisfactory.

29. The tribunal gave Mr Williams a break of approximately 10 minutes so that he could reconsider his cross-examination in light of the complete and unredacted table to which he now had access.
30. This table marked the Claimant in the red category, which was less than 80%, for the teamwork and respect criteria. The only other individual who received a red ranking for any of the criteria was another host called Shaunette, who was dismissed the day before the claimant. She also received red for the teamwork and respect criteria. The comment section of the table in respect of the claimant set out the following:

“Difficult to get him to focus and respect classroom, has side conversations with others. Displays the knowledge and ability, yet does not work well with the team. Reacts negatively under pressure and stress. Refused to take direction from trainer/manager.”

31. Judge Bartlett asked whether this table was a standard document of the respondent to which Ms G responded *“I don’t think so, I think it was one the trainers made to focus on areas.”* Her evidence where she believed that the table came from Crystal, who was a trainer and that it a document that the training team from the US used.

Mr Simon Smith

32. Mr Smith appeared as a witness as a result of a witness order which was issued by the tribunal. Mr Smith had not prepared a witness statement.
33. Mr Williams made an application for Mr Smith’s evidence to be excluded from the tribunal on the basis that he had not prepared a witness statement. Mr Williams asked Mr Smith some questions surrounding the need to obtain the witness order and whether he was willing to prepare a witness statement. Mr Smith gave answers which indicated that if he had had to he would have prepared a witness statement. The tribunal interpreted these comments that if he had been ordered to do so by the tribunal he would have prepared a witness statement but that he would not have done so voluntarily. Mr Smith is no longer employed by the respondent and as such the respondent has very little control over him
34. The tribunal refused the application to exclude Mr Smith’s evidence on the basis that this would cause substantial unfairness to the respondent as it would not be able to produce witness evidence on core issues raised in this case. The tribunal

recognised that there was some unfairness to the claimant as without a witness statement he would not know Mr Smith's evidence in advance. The same could also be said for the respondent.

35. Mr Smith refuted the claimant's claim that he had made adverse comments about the claimant's sexual orientation and any of the comments alleged in the list of issues.
36. Mr Smith gave evidence that Barry Cook had a gay partner, two waiters were gay and that it was possible that more gay people were employed by the respondent after the claimant's dismissal. He stated that sexuality was not an issue. The tribunal gave little weight to this evidence: the respondent regrettably failed to call Barry Cook as a witness and Barry himself would have been able to give evidence on such issues. The failure of the respondent to call Barry Cook was deeply regrettable as he is the individual who would have been able to give fulsome evidence about the claimant's dismissal and the tribunal was deprived of this.
37. Mr Smith's evidence was that he was not aware of the claimant's sexuality until after the grievance investigation started. He had had an inkling from conversations with the claimant that he was gay but it was not an issue. The tribunal did not accept this evidence. It was contradicted by the evidence of Ms Alice Bailey, who had more detailed recall, and it also did not correspond with the statement of Vincente in the grievance investigation that he was aware that the claimant had a boyfriend because of his request for a day off. The tribunal found that Mr Smith was aware of the claimant's sexuality prior to the grievance investigation.
38. Mr Smith's evidence was that the opening of this restaurant was an unusual situation. Mr Smith had recently been involved in a restaurant opening and he and his deputy had carried out all the training. However due to the particular corporate structure the training was carried out by the US brand owner with its international training team and Mr Smith had limited involvement in the training. Mr Smith's evidence was that he dipped in and out of the training as he was mainly involved in operational issues. Mr Smith's evidence was that he was involved in the mock service which was carried out on 29 July 2017. His evidence was that during the opening period he did not make decisions about dismissing individuals but afterwards he did.
39. Mr Smith's evidence was that the primary reason that the claimant was selected to work the VIP night on 1 August 2017 was because he had rota availability. His evidence was that he needed to motivate people to work these long hours and therefore he emphasised to employees that it was a select event and they were lucky to be chosen for it.
40. Mr Smith's evidence was at the end of the day the managers and trainers would come together in a huddle and the trainers would feed back to the managers about events of the day. Online trends, which were repeat day to day trends about the performance of individuals, would be discussed. He did not think any

notes were kept. Mr Smith made reference to the table set out at page 85 of the bundle which set out scoring and comments about performance. His evidence was that this was an online document on an internal system called ignite. Crystal, the trainer would update this document continuously with feedback and as a result there were no earlier versions of the document. His response to questions was that if somebody had had a very good service on 29 July it could have had a positive impact but it would not have made up for some bad days. His evidence was that the table was a document used by the host brand which was PF Chang for international openings.

41. Mr Smith's evidence was that the issues with the claimant were his attitude and that he was argumentative and disruptive. He was unable to give specific dates or examples, except to say that Shaunette and the claimant giggled in meetings messed around and egged each other on. He could not identify in which training session that happened. Mr Smith's evidence was that, from recall, the claimant's performance deteriorated during the training. He was told that he had made the trainer Hala cry and had made her walk away. He was told these comments in a huddle session. He had also witnessed Hala cry.
42. It was put to Mr Smith, that in the grievance interview Hala did not state that she was made to cry but she did state that she was not personally offended by the claimant. Mr Smith responded that an individual could be eager and gifted but working in a team with attitude was not what was needed and the respondent could not have that coming across. He also stated that one could cry out of frustration rather than offence.
43. Mr Smith only recalled having one conversation with the claimant about his performance. He could not remember what was said but it was along the lines that this is a stressful situation and that the claimant needed to take it easy.
44. Mr Smith denied sending a text message to Vincente instructing him to dismiss the claimant. Mr Smith's evidence was that the claimant's dismissal happened when Mr Smith was away from work. He believed that Jim Dunn had been given feedback from the night before and Jim Dunn and Barry Cook discussed the situation. The tribunal asked Mr Smith, who decided to dismiss the claimant and he responded Barry Cook, but Jim Dunn was involved more than usual because of the importance of this restaurant opening to the US brand owner. Barry sort of had a dotted reporting line to Jim Dunn despite Jim being employed by the US brand owner and Barry being employed by the UK entity. Mr Smith's evidence was that the hierarchy was as follows Jim, Barry, Mr Smith, Vincente, Alice. Mr Smith also stated in response to other questions that he thought Jim took the final decision to dismiss the claimant and that Mr Smith himself was not involved in the decision. In response to further questions from the tribunal Mr Smith stated that *"overall [the claimant's] performance was good but if someone is not a team player. They can have a massive effect on the team. He interviewed very well, he had good transferable skills, but how he conducted himself in training was not conducive."*

Ms Alice Bailey

45. Ms Alice Bailey appeared as a witness where she adopted her witness statement and was asked a number of questions and answers. Ms Bailey denied making the comments the claimant alleged in the list of issues.
46. Ms Bailey's evidence was that she did not undergo the same training as the claimant as she was a manager. She popped in and out of training. Her job at that time was as head host and as all the hosts were split between training groups she had to oversee all of the host training. She thought she had been in the claimant's training group on the day when Hala became upset but she did not witness the incident directly. Ms Bailey said that she spoke to Hala about it and she said she had been upset and had to stop the training.
47. Ms Bailey's evidence was that the only notes that she took about the claimant were during the mock service and she had not kept them. After the mock service the claimant came to her and asked for feedback and she told him directly.
48. In cross-examination Ms Bailey was asked about her comments in the grievance investigation meeting that the claimant was a "shining star". Ms Bailey's evidence was that "*he was brilliant. I pushed to hire him. His performance was great, but over the last few days, his attitude and disruption took over his performance.*" Ms Bailey's evidence was that at some point, which she could not identify, she had a conversation with the claimant and Shaunette in which she told them they had been great but they had started to become very chatty and disruptive. Ms Bailey denied having a conversation alone with the claimant in which she said he was doing very well and that he had been chosen to take over if Ms Bailey and Shaunette not there.
49. Ms Bailey's evidence was that she believed that the claimant's issues could have been managed but the icing on the cake was when he upset Hala. She was asked to explain what she meant by saying they could have been managed to which she responded that the claimant was very chatty and he was too eager to learn but he could turn that down. However his aggression and attitude was a problem.
50. It was put to Ms Bailey that Hala did not mention that the claimant was aggressive in the grievance interview. Ms Bailey said that Hala had used that word in a conversation with her and that she felt that telling somebody to calm down was what would be said to somebody who was aggressive. Her evidence was that Hala had told her that the claimant was speaking over her so she could not finish the training. This was overseen by Jim Dunn and that was the reason why the claimant was dismissed.
51. Ms Bailey's evidence was that she was not involved in the huddle on the night of 29 July 2017 and that her notes about the claimant were solely based on the mock service and not the training.

52. Ms Bailey's evidence was that the first time the claimant asked for a day off he mentioned that this was because it was his boyfriend's birthday. She was adamant that the claimant said this on the first occasion that he asked for the day off which was before 29 July 2017. She recalled clearly that the claimant asked for the time off when they were training in the hotel rather than the restaurant. They transferred to the restaurant on 29 July 2017 and therefore his request must have been before that. She stated that she had a clear memory that the claimant had made the request in the hotel as he had waited until everybody else had left and then made the request. Her evidence was that she had told Simon that the claimant wanted the day off because his boyfriend was visiting. She stated that she was trying to get the claimant the day off. She denied that the claimant had asked her to keep his sexuality confidential.
53. Ms Bailey's evidence was that the claimant's performance was very good until the last few days. She believed that the decision to dismiss came from Jim Dunn but he could have had a conversation with Barry. She knew that the claimant would be dismissed before 1 August 2017 because Shaunette was dismissed the day before. Ms Bailey was asked if she was surprised that the claimant was dismissed, to which she responded "*yes and no. He had high performance but I soon realised that his attitude would not be tolerated within that brand but I had only been employed with them for 2 weeks.*"
54. In cross-examination Ms Bailey stated that she had observed the claimant slouching around and that in his last few days his focus had slipped and he had become very chatty with Shaunette. Ms Bailey was asked why she did not mention these things in the grievance interview and she stated that she was not asked the questions.

Grievance interview with Vincente Sancho

55. The interview dated 4 September 2017 between Ms Gorecha and Vincente records the following:

"Were you aware of Omar's sexual orientation? Yes, because I knew he had a boyfriend that he requested a day off because it was his boyfriend's birthday. It's 2017, this is nothing I need to be aware of..."

"Has anyone else been dismissed during their probationary period? Shannade. Not sure when, a few days before. I believe because of lateness, attitude, resting face, laziness..."

"Were any concerns with Omar's performance raised with him prior to his dismissal? We were not operational, so we wouldn't see if he was good or not. During training, you could see he was not paying attention with the trainers."

"Did you pull him up on this? Not then as I did not know this at the time."

"Did the instruction for Omar's dismissal come through Barry? Yes."

"So you didn't liaise with Simon? No, Simon was not here."

“Did you say at any point during the meeting, that the reason for dismissal was that he was gay? That is not true. I would never bring that matter up for a dismissal.”

Submissions

56. Mr Williams and Mr Hussain made oral submissions which are set out in full in the record of proceedings and I will not repeat them here.

Findings of fact

57. The tribunal makes the following findings of fact:

57.1 the respondent is a UK entity which is akin to a licence holder of the wider US brand;

57.2 the respondent was part of a complex corporate structure relating to the US brand owner, the Kuwaiti license owner and the UK business entity;

57.3 prior to 29 July 2017 the Claimant had received almost wholly positive feedback from employees of the respondent;

57.4 prior to 29 July 2017 the claimant had undertaken almost wholly training related activities for the respondent;

57.5 the training that the claimant and other employees of the respondent received was carried out by a specialist training team which comprised individuals from the US and also an individual called Hala who was based in Kuwait. This training team were from the US brand holder and they were not employees of or under the control of the respondent;

57.6 the tribunal accepts the Claimant’s evidence, given in response to questions from the tribunal that the mock service was the first day when senior management, including Barry Cook and Jim Dunn were observing and assessing the employees including the claimant;

57.7 the tribunal finds that the mock service was a more testing situation for the employees than the previous training;

57.8 the tribunal accepts the evidence of Mr Simon Smith which was that in a usual restaurant opening he would have been in charge or had significant input into the training of the employees. However, because of the corporate structure, even though he was notionally in charge he was not in charge. He played a limited role in the training and the training was carried out by the US brand owner team;

57.9 the interview Ms G carried out with Hala records that *“basically, the feedback was given by their managers. We sit down with them, but the managers will speak to them, give them feedback. Trainers should be like the good guys, but I only had 3 days, so did not have the time to have a one-to-one. We do sit down with them, but the trainer should be the good cops, we leave the managers to speak to them and give them feedback on any negative behaviour.”* The tribunal finds that the trainers did not give feedback directly to the hosts and waiters but managers did;

57.10 there was consistent evidence from the respondent identifying that the Claimant had an attitude that was not acceptable to the US brand owners. This had been identified from his conduct in at least one training session which was conducted on 29 July 2017. The evidence on which the tribunal relies is as follows:

57.10.1 the interview for the purposes of the grievance carried out by Ms Gorecha with Hala sets out the following *“The incident happened 2 days before his termination. I asked them to sit back after the wrapup was done, but he had an attitude and he wasn’t interested. So I stopped the class and told them that they can leave if they are not interested to continue. They asked me to continue and said that they are not bothered, but the opposite was obvious. I gave them the speech about the need to work hard in order to open the store on time so I continued for 5 minutes and then stopped and let them leave. When I finished I raised this to the senior team. But yes, at that moment it was rude. You want to train, but someone is giving you a hard time. Omar was not the only host to show this attitude, but the other terminated lady called Shaunette. But yes, at that moment it was rude. You want to train them, but someone is giving you a hard time finishing.”*

57.10.2 The claimant was asked by the Tribunal about the incident to which Hala referred and the claimant explained that *“it happened at the end of a very long day. Simon or Vicky would say that we had all been doing well and then Hala said that we needed to go through something. It was a very long day and so we may have appeared disinterested. It was at the end of the shift. There was no feedback passed on to them and this was the first time I had heard about it.”* The tribunal finds that the claimant’s own evidence accepts that there was an incident involving the training with Hala where he came across as disinterested. This may have appeared to the claimant as a very minor event particularly in light of the fact that he had received positive feedback from the trainers and from Alice previously. However the tribunal finds that senior managers including Jim Dunn from the US brand holder and Barry Cook were observing on the 29 July 2017 and that they received feedback directly from the training team. The tribunal finds that the feedback from the training team on the claimant was negative as regards his attitude. The tribunal finds that Alice Bailey was not a decision-maker and neither was Simon Smith in relation to the claimant’s dismissal. Instead the decision to dismiss the claimant was taken by Barry Cook and/or Jim Dunn, and that the decision was made for reasons wholly unrelated to the claimant’s sexuality. The

tribunal recognises that the claimant may have thought that the training incident on 29 July 2017 was insignificant and understandable because it was the end of the day. However the tribunal accepts Ms Bailey's evidence that certain conduct was not tolerated by the US brand owners. The claimant's conduct fell within this category and that this was the reason for his dismissal. It may well have been unfortunate or bad luck that this conduct occurred on a day when Jim Dunn was paying more attention than he would have done on other occasions.

57.10.3 the tribunal finds that Hala's account is an accurate description of what happened on 29 July 2017. The claimant's own evidence did not significantly dispute it;

57.10.4 the interview for the purpose of the grievance carried out by Ms Gorecha with Barry Cook sets out the following "*we did mention that there was a difference in culture. Some have said he was aggressive and rude to Hala. She complained and did say that he was rude to her. I did tell him that culturally, that is not right for us, yes.*"

57.10.5 in the interview for the purposes of the grievance carried out by Ms Gorecha with Vincente, Vincente was asked "*were any concerns with Omar's performance raised with him prior to his dismissal?*" To which Vincente answered "*we were not operational, so we couldn't see if he was good or not. During training, you could see he was not paying attention with the trainers.*"

57.10.6 in the interview for the purposes of the grievance carried out by Ms Gorecha with Vicky, Vicky was asked "*whether any performance issues were raised?*" To which she responded "*he was not directly in my team, he was with Alice, but I could see his reaction that he was not interested.*"

57.10.7 in the interview for the purposes of the grievance carried out by Ms Gorecha with Jim Dunn, Jim was asked "*Do you recall getting any feedback for Omar Lewis during training?*" To which he responded "*yes. During training there was one male and one female host. They were not smiling may have said they need to loosen up a little being front of house as hosts. They were being disrespectful and not listening much during the training. Think it was Barry or may have been trainers from the US, I don't recall it was a while ago. However I usually liaise with the operation team.*"

57.11 in addition to the evidence from all of these individuals as part of the grievance process, which contradicted the claimant's claims. The email dated 2 August 2017 from Barry Cook and the table at page 85 of the bundle (which was compiled by the largely US trainer team) also contradicted the claimant's claims and provided further evidence that was consistent with that set out in the grievance evidence and that all evidence of the respondent's witnesses that the reason for his dismissal was in fact attitude and behaviour. It is the combination of this evidence, taken together, which the tribunal finds particularly persuasive;

57.12 the tribunal found that Mr Smith had limited involvement in the claimant's dismissal. The theme running through Mr Smith's evidence was that he

had much less control than he would normally have in restaurant opening situations and this was because of the significant input from the US brand owners. The tribunal finds that he did not make the decision to dismiss the claimant. Even the claimant's own evidence was that Vincente carried out the dismissal. The tribunal does not accept that Mr Simon Smith sent a text message instructing Vincente to dismiss the claimant. Mr Simon Smith's evidence and Vincente's interview record both do not support this claim;

57.13 the tribunal found that Ms Bailey was able to clearly explain why she called the claimant a shining star. Even at the tribunal she maintained that he was a shining star but that fundamentally certain parts of his behaviour were not acceptable to the US brand owner. Ms Bailey repeatedly stated that she came to realise that his conduct would not be tolerated by the US brand owner. The tribunal finds that Ms Bailey did not have a material input into the decision-making about the claimant's dismissal. The tribunal finds that Ms Bailey had given the claimant largely positive feedback before 29 July 2017. However this does not undermine the respondent's claim that the claimant was ultimately dismissed because of concerns over his attitude and that that attitude was unacceptable to the US brand holder. The tribunal accepts that in Ms Bailey's oral evidence she described more problems with the claimant's performance than was set out in the grievance interview and that this may have been an embellishment with hindsight. However it does not undermine the core of her evidence;

57.14 the Claimant's conduct as evidenced by his behaviour at the training on 29 July 2017 was the reason for his dismissal;

57.15 the tribunal finds that the email from Barry Cook, dated 2 August 2017 sets out clear and cogent reasons for the claimant's dismissal. The tribunal finds that these are the reasons for the claimant's dismissal;

57.16 the tribunal finds that the table set out at page 85 setting out the performance of the hosts, including the claimant clearly identifies issues with his attitude and conduct which fell below the required standard and that these were the reason for his dismissal;

57.17 the tribunal finds that this table was a document used by the US training team. It was a type of standard document. It finds that it was completed by the trainers and that this feedback was fed to Barry Cook and Jim Dunn. This identifies the claimant as having performance which was below the acceptable standard and the tribunal finds that it is for these reasons that the claimant was dismissed. The tribunal finds that the claimant's sexual orientation was not part of the reasons for his dismissal;

57.18 the tribunal finds that the grievance interview with Vincente Sancho has the ring of truth about it;

57.19 the tribunal finds that Ms Bailey did not say the following comments:
if I am honest babe we would not have employed you if we knew you were gay, you know that

no, I am serious. I thought you were straight, that is why I told Simon to take you on as a host

- 57.20 the tribunal finds that Mr Smith did not say the following comments:
we did not think you were gay at all. You should have told us that in interview and we would not have taken you on as a host. We would have offered you a position as a waiter instead
- 57.21 the tribunal finds that Vincente Sancho did not say the following comments:
yes, from what I know, it is due to the fact that they found out that you were gay and they don't want a gay host working in the front of the restaurant
- 57.22 the tribunal finds that Mr Simon Smith did not send a text message to Vincente Sancho ordering the claimant to be dismissed;
- 57.23 the tribunal finds that Barry Cook did not say the following:
unfortunately, the directors had made their decision, that is final - they don't want a gay host working at the front of the restaurant. What they say goes. You are no longer a fit for this role as a host. You don't fit in with the culture.
- 57.24 the tribunal finds that Barry Cook did not look the claimant up and down with disgust due to his sexual orientation;
- 57.25 the tribunal does not accept that Barry Clark looked at the claimant in disgust after he had been dismissed because of the claimant sexuality. The Tribunal finds that this is the sort of behaviour that people may engage in after they have dismissed an individual for all manner of reasons including but not limited to the fact that the dismissing managers can be reminded of their own behaviour which they find uncomfortable or they can be disappointed that an individual has not reached the required standards;
- 57.26 the tribunal finds that the claimant could have no expectation of confidentiality as regards his sexuality. On the claimant's own evidence he told 5 or 6 individuals in his host group. He had only known these individuals for a week or two and he could have no expectation that such a significant number of individuals would keep his sexuality confidential. Further, when he disclosed his sexuality to Alice he did so because she was a manager and therefore this was a disclosure to management. In these circumstances the claimant can have no expectation of confidentiality;
- 57.27 the tribunal finds that Ms Bailey did communicate the claimant's sexuality to Simon Smith. The tribunal prefers Ms Bailey's evidence over Mr Smith's in this regard. The tribunal found that Ms Bailey had more detailed recall

than Mr Smith about these events. The tribunal accepts that Ms Bailey did so because she was trying to obtain the day off for the claimant.

57.28 even if the tribunal were wrong and the claimant could have an expectation of confidentiality about his sexuality the tribunal finds that these acts cannot be considered as an act of harassment. In the circumstances they cannot be considered as acts having the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Further, it was not reasonable for the conduct to have had that effect.

Decision

58. In essence, the claimant's claim was that four employees, namely Mr Simon Smith, Ms Alice Bailey, Mr Barry Cook and Mr Vincente Sancho all made directly discriminatory comments about his sexuality, dismissed him because of it and then in some way conspired together to cover it up. The tribunal found the email dated 2 August 2017 from Barry Cook about his performance and the table at page 85 of the bundle were persuasive evidence. The claimant did not put his claim that these documents were fabricated after the event. His argument is in essence that the reasons set out in those documents were not sufficient for his dismissal or they were not the real reasons for his dismissal. The tribunal finds that this argument is unsustainable. As detailed above the tribunal finds that there is substantial evidence from numerous sources from the respondent that the reason for his dismissal was his conduct and that it had no connection to his sexual orientation.
59. As a result of the findings of facts set out above the tribunal finds that the respondent has established to the required standard of proof that it has not contravened section 13 and section 26 of the Equality Act 2010.
60. The Claimant's own evidence was that he asked Vincente in the dismissal meeting if the dismissal was because he was gay. This was the claimant raising his sexuality before anybody else had. The tribunal considers that this reflects the claimant's sensitivity about his sexuality which may have affected his interpretation of events. The Tribunal recognises that different participants in a conversation can take away a very different understanding of it and that with time an individual's recall of events can become confused by later thoughts. This may be what happened in relation the events recalled by the claimant.

Employment Judge Bartlett

16/11/2018

Sent to the parties on:

28/11/2018

For the Tribunal:

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