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THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant

and

Respondent

Mr M Huntley

Stonegate Pub Company Limited

Held at London South

On 7 January 2019

BEFORE: Employment Judge Siddall (Sitting Alone)

Representation

For the Claimant: Ms K Tracey

For the Respondent: Ms D Burke

JUDGMENT

The decision of the tribunal is that the Claimant was not dismissed and he resigned. Therefore, the claim for unfair dismissal is not well founded and it does not succeed.

REASONS

1. The Claimant claims constructive dismissal in relation to his resignation on 13 June 2018. I heard evidence from the Claimant himself and from Mr Colin Brown, Mr Colin Hawkins and Mr Steve McMahon on behalf of the Respondent. Although the Respondent submitted two additional witnesses, it was agreed that it was not necessary for me to hear evidence from them as their evidence

related to events following the resignation, concerning the consideration of the Claimant's grievance.

2. The facts I have found and the conclusions I have drawn from the evidence of both parties is as follows.
3. The Respondent is a chain of pubs and the Claimant started employment as a General Manager on 5 January 2015. He worked at a variety of venues including 'the Vineyard' and 'Henry's Piccadilly'. According to the evidence of Mr Brown he was viewed as a good manager and he received top marks in all his appraisals. I have seen a selection of emails in the Bundle which make it clear that there was regular contact between the Claimant and his area manager Mr Brown and that there was regular discussion of a variety of issues, including areas for improvement at the various sites where he worked, but there is nothing in the nature of a performance improvement programme, nor anything that would amount to either a formal or informal warning about his capability.
4. Around the end of March 2018, the Claimant became the manager at the 'Sports Bar and Grill at Waterloo'. It was agreed by both parties that as this site had just been acquired by the Respondent, it needed a lot of work done quickly to reach the standards expected by the Respondent. A number of regulations applied because it was based in a train station and this called for liaison with Network Rail, meaning that it could be difficult to get particular pieces of work completed.
5. The chain of key events in relation to this claim started as follows. The Claimant returned from holiday on Friday 23 May 2018. There was a bank holiday on 28 May and in the following week G4S, the security company which had a contract to transport cash, had not collected the cash as the site had run out of cash bags. The Claimant agrees that he had not banked the cash that week in breach of the Respondent's stock and cash procedures which required that cash should be banked at least three times per week. As a result, there was quite a lot of money in the safe.

6. The Claimant had taken his train home on the evening of 30 May and a Deputy Manager who I will refer to as A, had locked up. It was A's last day at work. Unknown to the Claimant A had been suspected of involvement in a previous theft which had taken place around Christmas time.
7. On the following day, 31 May, the Claimant realised that £10,000 was missing from the safe and he informed Mr Brown. Mr Brown arranged for an audit team to attend site. He said he was not under an obligation to notify the Claimant that this was going to happen. When the audit team arrived on the 1 June 2018 it was a surprise to the Claimant. He said he was very stressed, he put his keys down at Waterloo and left the site. He then called Mr Brown and it was arranged that he would meet with him and with Ms Burke, who was looking after Human Resources matters, at the 'Comedy' Pub. They met that afternoon. This meeting was treated as an investigation meeting. Following the meeting, the Claimant was suspended.
8. At the end of the meeting Ms Burke left and the Claimant's account of what happened next is set out in his grievance on page 176 of the Bundle.
9. Mr Brown asked the Claimant what should happen now and what the best way forward was. According to his grievance "I replied that I had a couple of stressful days and what does he want me to do. He said it was up to me and asked what I wanted to do. I explained that the way I felt at the moment was that I could easily hand in my resignation and walk away. He reiterated that it was up to me did I want to hand in my resignation, I repeated that it was the way I felt as I have had a couple of really stressful days. At this point Colin again said it was up to me and leant over and put a pen on the table in front of me implying that I should write out my resignation".
10. The Claimant walked out of that meeting. He lodged a grievance in which he referred to Mr Brown's conduct the next day. As a result of this, Mr Brown took no further part in the investigation and on 5 June 2018 an investigation meeting was held by Steve McMahon at which Ms Burke was also in attendance.

11. Following that meeting with the Claimant, Mr McMahon decided to lift the suspension that had been imposed on the Claimant and allow him to return to work. He decided there had been breaches of the stock and cash procedures, including a lack of cash handovers and failure to bank the money. He therefore decided that the Claimant should be called to a disciplinary hearing with a possible sanction of a formal warning, rather than dismissal.
12. The Claimant returned to work on 7 June 2018 and on that day, he met with Mr Brown and with Colin Hawkins. Their evidence was that the purpose of that meeting was to engage with the Claimant, get him back to work and 'back on track' in terms of his performance as a manager. The Respondent did not take any notes of this meeting. The Claimant made a note of the meeting at the end of the day which he emailed and that email is contained at page 195 of the Bundle. Because the Claimant made that note on the day of the meeting and in the light of the absence of any notes from the Respondent, I have to conclude on the balance of probabilities that the Claimant's note is a more or less accurate account of what took place at that meeting.
13. During that meeting, the Claimant's performance as a manager was criticised, both in relation to what had taken place at Waterloo and at previous sites. This was a shock to the Claimant because as stated he had never before received significant criticisms of his performance as a manager. It was suggested at the meeting that the Claimant should be moved from Waterloo. It is recorded in the notes that Mr Hawkins suggested that Waterloo might be 'too much' for him. The Respondent says that the Claimant had said he 'fucking hated' Waterloo but the Claimant says that the Respondent stated he could not return there, although he agreed in evidence that he did not like working at Waterloo. The Claimant's note is not completely clear as to where the suggestion came from and I find on the balance of probabilities that he did indicate that he did not like working at Waterloo and that as a result the Respondent looked at possible alternatives.
14. The Claimant alleges and records in his note that he was told that a close eye would be kept on him and if there was not an improvement he could be let go.

Mr Hawkins denies saying this but in light of the fact it is clearly recorded in the Claimant's note in two places, I find that it is more likely than not that this was said.

15. The Claimant was asked to give a decision about which site he would like to move to and a number of possibilities were suggested to him. He was asked for a decision by the end of the day but he asked for more time and that was given to him. He was given the weekend to consider the situation.
16. On Friday 8 June, Mr Hawkins called him to discuss what his thoughts were following the meeting on the 7th and what his preference was in terms of the sites that had been potentially offered to him. The Claimant says that he was interested in returning to the Vineyard, the site he previously worked at, but Mr Hawkins told him that in fact that was not going to be a possibility. They then discussed the possibility of another site at Deal in Kent.
17. On Monday 11 June, the Claimant returned to work. He was placed at a site in Stratford. The same day a letter was sent out by the Respondent calling him to a disciplinary hearing on 15 June to face charges of breaches of stock and cash policy and failure to adequately protected company money.
18. On Tuesday 12 June, the Claimant worked for one day at the Sports Bar and Grill at Victoria Station, but he concluded that a number of the issues that he had been facing at Waterloo, in relation to security and other matters, also existed at the site in Victoria and that therefore this was not a safe option for him.
19. On Wednesday 13 June, he resigned with immediate effect and on the same day he lodged second grievance complaining about the way the meeting on 7 June 2018 had been conducted. The grievance itself was dealt with after his resignation had taken effect and therefore it was agreed at the outset of the hearing that the conduct of the grievance process is not relevant to this claim for unfair dismissal. The Claimant started Employment Tribunal proceedings on 13 August.

20. My decision is as follows.
21. It follows that if you bring a claim for unfair dismissal you have to show that you have been dismissed. Under Section 95 (c) of the Employment Rights Act 1996, dismissal includes a situation where the employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
22. The test as to the type of conduct that will justify a claim for constructive dismissal has been set out in case law. The substance of this claim is that the employee is complaining about a breach of the implied duty of trust and confidence. The employee needs to show that the conduct of his employer was 'intended to or likely to destroy the working relationship'. (*Malik v BCCI [1998] AC 240*). Case law makes it clear that this is a high hurdle for employees to overcome. Is not enough to show that the Respondent had acted unreasonably, it must be conduct that goes further than that and which effectively brings the employment relationship to an end.
23. Ms Tracey Burke relies upon the following alleged breaches of the duty of trust and confidence. She says that the Claimant resigned in response to the conduct of Mr Brown on 1 June, the conduct of Mr Brown and Mr Hawkins on 7 June 2018, the failure to address the grievance in a timely manner and the removal of 'the Vineyard' as a relocation option for the Claimant when he spoke to Mr Hawkins on 8 June.
24. One of those points I can deal with very quickly, which relates to the grievance. The first grievance was dated 2 June. This was followed up by a further letter on 13 June, the date the Claimant resigned. I accept that there simply had not been time for the Respondent to deal with the grievance in depth at the point at which the Claimant resigned and I do not find that a failure to deal with the grievance promptly amounted to a breach of contract in this case.
25. I have considered very carefully what happened at the meetings on 1 and 7 June. I turn to the meeting on 1 June first of all.

26. When Mr Brown asked the Claimant what he thought the way forward was, I find that this was more likely than not an invitation to the Claimant to discuss whether he wanted to resign. Having said that I note from the Claimant's record that it was the Claimant himself who referred first to the possibility of resignation. Once he does that Mr Brown did not put any pressure on him to resign. He said quite clearly, according to the Claimant's account on two occasions, that it is 'up to you'. I accept that Mr Brown offered the Claimant a pen and paper. In the context of that meeting this has given me some concern, but overall I find that Mr Brown was acting in response to what he understood to be the Claimant's intention to resign. What happened after that is that the Claimant walked out of the meeting. It is also significant that the following day Ms Burke contacted the Claimant to check what his intentions were. When he said he did not want to resign, his employment continued, the suspension was lifted and the other processes that were in place, including the disciplinary and grievance process continued. This was not a situation where the Claimant was given no option but to resign or where he was effectively being forced out. I find that on 1 June he did have a genuine choice about what he wanted to do.
27. I come to the meeting on 7 June 2018. It is strange that Mr Hawkins and Mr Brown decided that it was appropriate to hold an informal meeting of this nature with the Claimant while he still subject to disciplinary proceedings. I find that there was a degree of prejudgment about what had happened and the level of the Claimant's default when in fact a disciplinary hearing was due to take place on 15 June. It is also strange that this meeting took place despite the fact that the Claimant had already lodged a grievance of which Mr Brown, in particular was the subject. Overall I find that it was not particularly sensible to hold a meeting of this type while those proceedings were still ongoing, but I accept that the primary intention of that meeting was to get the Claimant back to work and to encourage him to improve his performance and to address the issues that had been identified following the theft. Having said that, I also accept that the meeting was a shock to the Claimant because he considered himself to be a good performer, he had not had criticisms of this type before and I am sure that in the context of everything else that was happening this was quite

distressing for him. Again, in light of the fact that the Respondent does not have notes of this meeting and the Claimant did make a note soon afterwards, I accept that it is more likely than not that the Claimant was told that if he did not improve his performance he could be let go.

28. Having made those points, I have to take into account that this discussion took place against a background of the loss of a large sum of money and the identification of significant deficiencies in the cash handling processes at the Waterloo site. It was reasonable for the Respondent to commence an investigation into the circumstances in which that money had been stolen and reasonable for them to suspend the Claimant pending the outcome of that investigation. I accept that rather than lift the suspension and consider a formal warning, the company could have invited the Claimant to a disciplinary hearing to consider a charge of gross misconduct or possibly gross negligence. Instead by the time this meeting took place the Claimant was aware that he would be permitted to return to work and that he would not face a possible dismissal but only a written warning.
29. On the question of relocation, I note that the Claimant had left Waterloo on 1 June and had left his keys there. He denied that he said that he “fucking hated Waterloo”, but he agreed that he was not happy there. The Claimant’s notes record that Mr Hawkins suggested that Waterloo was possibly too much and again I accept that it was more likely than not that that was said. There is no evidence to suggest, however, that when Mr Hawkins and Mr Brown started to discuss alternative sites with the Claimant he raised any objection or insisted that he wanted to return to Waterloo. When Mr Hawkins called him the following day, again there was no suggestion that he was rejecting the idea of being moved and wanted to return to the Waterloo Sports Bar and Grill.
30. When I look at the discussion that took place on 7 June overall, I find that it was a robust discussion that came as a shock to the Claimant. Issues were being raised about what had happened at previous sites, issues that had not been drawn to his attention before. The timing was unfortunate and possibly inappropriate. Overall, I find that the company was not acting unreasonably in

seeking to have the identified deficiencies addressed on the Claimant's return to work. Nor was it unreasonable to discuss his relocation in the context of what had happened and the views he had expressed. I accept that the intention of Mr Hawkins and Mr Brown when they commenced the meeting was not to get rid of the Claimant but to get him back to work and performing appropriately. If the Respondent was keen to terminate the employment of the Claimant they would have simply continued the suspension and considered dismissing him at the disciplinary hearing.

31. The way in which the management meeting on 7 June was conducted is at the far edge of what might be considered acceptable managerial behaviour given the lack of any concerns raised previously. In another context this might have amounted to a constructive dismissal, but in the context of the management failings that had been identified leading to the loss of £10,000 I find that the Respondent was not acting unreasonably and I find that the effect of the meeting was not to destroy the working relationship with the Claimant.
32. It is of note that the Claimant did not resign immediately following that meeting. He considered the offers of alternative sites that had been made to him and he did return to work, first at Stratford on the following Monday 11 June and then for one day at the site at Victoria on Tuesday 12 June. I find also that by 13 June it is more likely than not that the Claimant would have received the notice calling him to a disciplinary hearing on 15 June.
33. I am certain that when the Claimant resigned on 13 June, what had happened at the meeting on 7 June was still a factor in his decision. Ultimately however I find that it was not the sole reason why he resigned. He was facing formal disciplinary action as a result of what had happened and his decision was that he had enough and that his decision was to walk away. I have noted that the Claimant obtained new employment approximately two weeks after the date of his resignation.
34. In all the circumstances I find that the Respondent's actions did not amount to a fundamental breach of the Claimant's contract of employment. I therefore find

that he was not dismissed, he resigned and therefore the claim for unfair dismissal cannot succeed.

Employment Judge Siddall
Date: 16 January 2019