



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr J Chiappini

v

Brook's Club

Heard at: London Central

On: 22 – 23 June 2022

Before: Employment Judge Lewis

Representation

For the Claimant: Representing himself

For the Respondent: Ms J Letts

JUDGMENT

1. The claim for us is not upheld.
2. The claim for wages from 5 November – 2 December 2020 is not upheld.

SUMMARY

1. The claimant worked as a waiter for a Gentleman's Club. He was one of several employees made redundant after the Club lost money due to the effects of the Covid-19 pandemic. The respondent followed a fair selection process. The claimant feels that his markers were biased against him and that he was unfairly marked down. He says this was another example of unfairness going back to the Club's mishandling of his complaints about a colleague's sexual advances and racist remarks 2 – 3 years earlier, and including an inhumane reaction to his need to be in France for a few weeks when his elderly mother was hospitalised with Covid. Although I think the Club could have been more sensitive on both those issues, there is no evidence of any connection with the redundancy marking. Further, the redundancy marking was primarily carried out by the claimant's two immediate line managers, who were not responsible for the

handling of the complaints in 2018/9 or the handling of the claimant's leave to go to France.

2. The claim for unpaid wages failed because the claimant was on unpaid leave.

REASONS

Claims and issues

3. The claimant brought claims for unfair dismissal and pay arrears.

4. He mentioned as part of the pattern of unfairness that the Club had not known how to handle his complaints of sexual advances and racist remarks by a colleague in 2018/9 and more recently had been unfair regarding his need to be in France when his mother contracted Covid. He thought the particular individual who issued warnings in relation to those incidents, the Assistant Club Secretary Alastair Curbbun, had been personally biased against him. I asked whether the claimant was saying that he was selected for redundancy because Mr Curbbun was angry that he had made the complaints about his colleagues in the past. The claimant said not. He said his argument was that it was an accumulation of being unfairly treated - the redundancy was another incident of unfairness. The claimant thought Mr Curbbun was definitely involved in choosing him.

5. I noted that the claimant only ticked the box for unfair dismissal (and pay arrears) on his claim form. He did not tick the box for 'discrimination'. In the light of that, and the claimant's answers to me at the start of the hearing, I took this to be an unfair dismissal claim, and not a claim under the Equality Act. As part of the unfair dismissal claim, I considered whether there was any connection between the key events the claimant mentioned.

6. The issues were as follows:

Unfair dismissal

6.1. Has the respondent shown the reason for the dismissal? It says the reason is redundancy.

6.2. Was the dismissal fair or unfair, applying the band of reasonable responses? As part of that:

6.2.1. Did the respondent follow a fair procedure?

6.2.2. Was it a fair selection pool?

6.2.3. Were the selection criteria fair?

6.2.4. Was there fair consultation?

6.2.5. Was the process for marking fair?

6.2.6. Was the decision pre-determined / were the markers biased?

6.2.7. Were there alternatives to redundancy?

6.2.8. Conclusion: was dismissal within the band of reasonable responses?

6.3. If the dismissal was unfair on procedural grounds, what is the chance that the respondent would have dismissed the claimant even if it had followed fair procedures and on what date?

6.4. If the claimant wins, remedy.

The pay claim

6.5. Does the respondent owe the claimant wages for the period 5 November 2020 – 2 December 2020.

6.6. Was the claim brought in time?

Procedure

7. The tribunal heard from the claimant and, for the respondent, from Ian Faul, the Club Secretary. Mr Faul produced a witness statement. The claimant produced a document called 'the chronicle', which was his witness statement.
8. We worked from a 'trial bundle' which Ms Letts had prepared. This consisted of the bundle which the claimant had put together and numbered. She had then inserted extra pages as, for example, 13A, 13B, 13C etc. The claimant had been given both a hard copy and an electronic copy, but found it easier to work from the hard copy.
9. Ms Letts had noted on the Index both the hard copy page numbers and the pdf page numbers, which did not match because, for example, hard copy page 13A would appear as pdf page 14. At all times throughout the hearing, Ms Letts called out the hard copy and the pdf page numbers. There were 335 pages altogether in the bundle.
10. The claimant would have preferred to have his documents separate from the respondent's documents. I explained to him that was difficult for everyone else because there would be duplication and the documents would not run through in a consecutive order.

Fact findings

11. First I will set out the main facts. I cannot include everything, because otherwise this Decision will be much too long. However, I have considered everything which was said to me and all the documents which I was shown. After I have set out the facts, I will briefly summarise the law. Then I will set out my decision and my reasons under the heading 'conclusions'.

12. The respondent is a members only club. It is one of the oldest gentlemen's clubs in the world. The claimant started working for the Club as an agency worker in 2008, and was employed on a permanent basis from 8 May 2017 as Breakfast/Spencer Room waiter. His line managers at the relevant times were Maurizio Armano and Paulo Bruno. They were referred to as 'Maurizio' and 'Paulo' throughout the hearing, so I shall do so in this Decision.
13. On 18 February 2019, Alastair Curbbun (the Assistant Club Secretary) wrote to the claimant listing a variety of complaints and requiring an improvement in his work and behaviour. This followed a meeting with the claimant and Maurizio which had been held on 13 February 2019 to discuss performance issues.
14. On 26 February 2019, the claimant was given a first written warning for eating in an area where he should not be eating and for making members wait before they could pay. The warning would be disregarded after 12 months subject to the claimant's conduct and his performance improving.
15. The claimant emailed his appeal letter to Mr Curbbun on 4 March 2019. He said Mr Curbbun had himself admitted he had seen other people eating in the coffee room servery and he had simply told them not to eat. He said he was treated differently to others.
16. The claimant continued, 'As you know, the root of most of my problems goes back to May 2017, when I turned down Salvador's sexual passes at me. Working had become so difficult that I gave you a grievance letter and a recording.' The claimant said things had been OK for about 9 months from March 2018 but had restarted just before Christmas 2018.
17. The claimant then sent essentially the same letter direct to Ian Faul (the Club Secretary), who was deciding the appeal. The appeal was rejected.
18. On 13 March 2019, Mr Curbbun required the claimant to attend an investigatory interview 'in regard to your conduct and poor job performance due to constant allegations against your colleague which are unsubstantiated. We are in a situation where you and your colleague are not respecting or communicating with each other.' The letter went on:

'Your allegations of racist remarks and sexual advances (reported on 8 March) cannot be proven and we are unable to see who is at fault. This has now resulted in poor staff morale and it is affecting the business with poor customer service. All your colleagues and supervisors have to deal with your daily trivialities which when investigated result in the witnesses saying the opposite.'
19. On 18 March 2019, Mr Curbbun wrote to the claimant saying that harassment was not acceptable and they had investigated his allegations. However, he felt that a recording (of 8 March) the claimant had made of his colleague had been entrapment, had forced his colleague to speak against

his will, and was not harassment. The disciplinary process would be dealt with separately.

20. On 22 March 2019, Mr Curbbun issued the claimant with a second written warning for have been wasting management time with false allegations.
21. The claimant appealed unsuccessfully. However, at the claimant's suggestion, the staffing structure was reorganised to ensure the claimant was no longer working with the problematic colleague. This did mean the claimant had to work some split shifts. Mr Faul congratulated the claimant on adjusting so well to the new working regime and said he felt sure that the issues between the claimant and his colleague were now in the past and that everyone could 'move forward with positivity to the extent that these warnings should not need to be considered again'.
22. I was not told of any further problems after this date with the claimant's former colleague or in relation to his allegations or management's response.
23. Until he received his appraisal in October 2020, the claimant thought he was doing fine. I was not told of any hostility or negativity from Mr Curbbun or anyone else towards the claimant in the 18 months following the above incidents.

Appraisal

24. On 8 October 2020, the respondent carried out a performance review. This was the first time appraisals had been carried out in the Club and the staff were suspicious as to the reasons for it.
25. The claimant was given an appraisal form to complete himself. After that, the form was completed by the assistant coffee room manager, Paulo, apart from one section regarding attendance which Mr Curbbun had completed. Then Mr Curbbun held a brief meeting on 8 October 2020 when he showed the claimant the appraisal and read out the scores and comments. On the whole, the claimant had been given lower marks than he had given himself, and on half the competencies, he had been given a 'needs improvement' score.
26. On 18 October 2020, the claimant emailed Mr Curbbun to say that he felt his marks were unfair, particularly under the headings of customer service, team work, and attendance and timekeeping. He had been asking for a copy of the appraisal without success. He asked for a copy to be emailed to him 'whenever you get the chance'.

Covid

27. Later that day, the claimant heard from his father that his mother had been taken to hospital. His parents lived in France. His mother was in her late 80s and his father was 92. He immediately tried to telephone Mr Faul, Mr Curbbun or his line managers to tell them he needed to go to France.

Eventually he got hold of Mr Curbbun. After he explained the situation, Mr Curbbun said , 'Off you go'. Maurizio sent a supportive text. Once on the train, Mr Faul texted the claimant asking if he had been trying to call him. The claimant rang him back immediately and explained the situation. Mr Faul was supportive and did not say the claimant could not go.

28. On 20 October 2020, Mr Curbbun emailed the claimant to say he hoped he had made it home safely and that his parents were comfortable. He added that he did not want to email the performance review, but he would get a photocopy when the claimant got back. He said, 'I see that we have different opinions about your performance and I am sure we can also discuss this.' None of these communications said anything about a requirement that the claimant keep in touch, nor set any date for when contact should next be made.
29. Later on 20 October 2020, the claimant emailed Mr Faul to say it had just been confirmed that his mother had caught Covid. Mr Faul replied that he was sorry to hear that and 'please keep us updated on a regular basis'. The claimant acknowledged the email.
30. The next communication between the parties was 7 days later, when Mr Curbbun emailed the claimant on 27 October 2020. He said he felt that the claimant should have updated them by then. He said the claimant had a duty to keep the club informed and they should be receiving regular communication from him. He said it was unreasonable for the claimant to take unauthorised absence without informing the Club of his anticipated return date. Dependants Leave allows a reasonable amount of unpaid time off, but it would normally be several hours or at most, several days. Obviously the claimant's parents were very important to him and could create mitigating circumstances, but until the claimant let the Club know what was happening, there was no way for them to assess the situation.
31. The claimant replied early the next day. He said that from his communications with the doctors, he may have a clearer idea within a week or so. He said he would do his best to be more communicative and would write again by the end of the next week.
32. On 30 October 2020, Mr Curbbun emailed again, inviting the claimant to an investigatory/disciplinary meeting on 9 November to discuss the claimant's return to work. If necessary, this could be held over a video link. Mr Curbbun said 'I understand that you may require unpaid leave for dependants for a few days' but the Club required regular updates and the leave was never authorised. He said that the claimant had had three weeks of unauthorised absence together with a further 2 weeks to self-isolate, with no further communication with the Club for 11-13 days.
33. The claimant replied, pointing out that he had telephoned on the first day and Mr Curbbun had said 'Off you go'. He said his mother was still under doctor's surveillance. As Mr Curbbun surely knew, most patients with Covid are OK for the first 7 – 10 days, but the situation can change dramatically in

the second week. He said that his father, who was almost 92, was also finding it difficult to deal with.

34. On 31 October 2020, the claimant emailed Mr Faul 'to ask for your advice'. He said the doctors kept telling him they could not give definite dates. His whole family and especially his 92 year old father was depending on his support. He said he had tried his best to keep Mr Curbbun informed. He asked what he should be doing and offered to have a zoom conversation with Mr Curbbun and Mr Faul.
35. On 4 November 2020, Mr Curbbun emailed the claimant to say 'it seems that you still do not understand that no duration of unpaid leave has been authorised'. The claimant might be entitled to Dependants Leave for a few days, but it could not be open-ended. An investigatory meeting would be held now on 2 December 2020 which might lead to disciplinary action. The delay was because of 'shut down'. Meanwhile, the claimant must communicate with Mr Curbbun by 4 pm every Monday and Friday by 4 pm.
36. The claimant responded the next day. He said he would communicate as required (which he did) and that he would be back in time to quarantine and start work when the Club reopened.
37. On 12 November 2020, the claimant emailed that his mother was leaving hospital the next day. He had booked his return ticket on 17 November and would self-isolate on his return. He would see Mr Curbbun on 2 December.
38. The investigatory meeting was held by Mr Curbbun on 2 December 2020. The coffee room manager, Maurizio, was present to take notes and as a 'witness'. The notes are very short. Maurizio is not a trained notetaker. The claimant said he thought his mother was dying and that his father was 92. Mr Curbbun said several times words to the effect that he understood the claimant's viewpoint, but the business also had needs; the claimant either had to prioritise the job or prioritise his family. He either focussed on his family and his caring, or he focused on the job, but he could not do both. Maurizio's notes do not mention any of these points.
39. A disciplinary meeting was held on 8 December 2020, again by Mr Curbbun. Paulo was present to take notes. Mr Curbbun said that the claimant had considered his return date to work to be an 'open ticket' and gave him a final written warning for unauthorised leave. Paulo's notes were slightly longer than Maurizio's but also not verbatim. The claimant says they were inaccurate in some respects.

The redundancy exercise

40. As a result of reduced business and closures because of the pandemic, Mr Faul decided it was necessary to reduce staffing levels in six departments. The claimant's department for these purposes consisted of seven waiters (though one had left in December) and 1 barman. Mr Faul wanted to reduce this group to a total of six. One more person in that department would

therefore be selected for redundancy. A barperson position would remain, but it did not need to be the current holder of that post and anyone in the waiter/bar pool could apply for that position.

41. Mr Faul had never carried out a redundancy exercise before, so he employed an external employment consultancy (Citation Professional Services), to guide him through the process. Nevertheless, Mr Faul was present at every consultation meeting and made the final decisions.
42. The initial announcement to affected staff took place on 15 January 2021. An explanatory document was sent out. It said that overall the Club had seen a reduction in its catering and accommodation income of 70 – 75% over the previous 12 months. Even with the vaccination, operational income was likely to be reduced by 50% going forward.
43. On 17 January 2021, the claimant emailed to say that he had asked several times over the last 3 months to be given a copy of his appraisal which he felt contained many unfair inaccuracies. He still had not been given a copy. As soon as he was given a copy, he would agree to Citation being given his contact details. Mr Faul replied that the two matters were unrelated and the claimant either gave permission to Citation contacting him or it did not. He said Citation were not interested in the appraisal which was a purely internal exercise.
44. The claimant gave his details for Citation. The respondent did not give the claimant a copy of his appraisal. Eventually he had to submit a Subject Access Request on 2 February 2021 in order to get it.
45. When asked in the tribunal why the claimant was never given a copy on his many requests, Mr Faul said there was no refusal and the claimant had been told he would get a copy when he returned to the Club. That had not happened because of the chaos of lockdown. In hindsight, Mr Faul accepted that it would have been helpful to give the claimant a copy, but he did not see how that would have made any difference to the redundancy scoring.
46. The claimant told the tribunal that not having the appraisal gave him no chance to improve on anything in the three months between that and the redundancy exercise. However, he agreed it would not have made much difference, because he believed the whole decision to make him redundant was pre-determined anyway.
47. The first consultation meeting with the claimant was held on 25 January 2021. It was conducted by Mr Farrar from Citation. Mr Faul was present. Minutes were taken and a letter summarising the meeting sent to the claimant afterwards.
48. The claimant said that wine waiters should be included within the waiter/bar pool as there was overlap in duties and the claimant had experience in that department. Mr Farrar said he would put this suggestion to the Club.

49. The claimant asked to be considered for the barperson role should it become available. Mr Farrar sent him the job description after the meeting.
50. The next meeting was held on 27 January 2021, again with Mr Farrar and Mr Faul present. Mr Farrar said the Club had reviewed the position regarding the wine waiters but would not change its decision to exclude them from the pool. This was because wine waiters had a different skill set and there had already been a reduction in their team. Although silver service waiters did sometimes help eg with delivery of the wine, the wine waiters had special product knowledge.
51. The meeting also discussed the proposal which the claimant had previously emailed that all staff in the pool agree temporarily to reduce their hours by one hour/day. Mr Farrar said the staff would be asked.
52. Mr Farrar then went through the proposed scoring matrix. The criteria were performance, experience, qualifications, team work, club and product knowledge, time management, computer (point of sale) skills and length of service. The weighting was 1 for length of service, 5 for performance, 4 for qualifications and team work, and 3 for the others. The matrix was accompanied by scoring definitions on each criterion up to a maximum of 5.
53. The claimant suggested adding timekeeping and attendance to the matrix. Mr Farrar said the Club had decided not to include those matters. If an employee was late or absent, the Club would deal with he matter separately. It would be unfair to double punish someone. Also there may be good reasons for absence, eg medical appointments. I add here that Mr Faul explained to the tribunal that he expected employees to keep good time anyway and indeed they did. He was more focused on performance matters in the matrix.
54. The claimant also suggested adding the cost of redundancy to the matrix. Mr Farrar explained that the Club did not think this was appropriate and wanted to focus on employees' performance, not the cost to the Club.
55. Finally the claimant suggested giving more weight to length of service. Mr Farrar said this would be reviewed.
56. Mr Farrar explained that the next stage was for scoring to take place and to be collated. The claimant's scores would be reviewed with him at the next consultation meeting so he could make comments on the scores before the final decision was taken.
57. The scoring for the claimant was carried out by his two immediate superiors, the coffee room manager, Maurizio, and the assistant coffee room manager, Paulo. They did not refer back to the appraisal. They relied on their knowledge of the claimant from working with him every day.

58. The claimant was scored 1 for computer skills, 2 for time management, club and product knowledge, team work and performance, and 3 for experience, qualifications and length of service. After weighting, his total score was 57.
59. On 1 February 2021, Mr Farrar wrote to the claimant, responding to the various suggestions the claimant had made. He said the idea of reducing everyone's hours by 1 hour/day would not work because the others in the pool had been asked, and only one person would consider it. Also there were associated costs linked to the number of employees' employed so the Club would still have the full costs of seven staff members as opposed to six in terms of uniform, staff meals, pension, holiday pay, national insurance etc.
60. The letter told the claimant his score and gave him the completed matrix. It also attached the scores of others in the pool (anonymised) so he could see where he was positioned. This showed the claimant was in seventh place with a total of 57. The next lowest scored 69. The top score was 100. Mr Farrar said no decision had yet been reached and the claimant could discuss his scores and any other ideas at the next meeting.
61. The claimant emailed on 10 February 2021 with his comments on the scores and the process generally. He referred to his appraisal on 8 October 2020, and the refusal to give him a copy of it. He said he was never given an opportunity to challenge the 'unfair, inaccurate and overly critical appraisal which downplays/hides my accomplishments'. Also, was not he supposed to get helpful feedback from the appraisal so he could make improvements?
62. The next meeting was held on 11 February 2021. Mr Farrar went through the claimant's letter commenting on the scores. Mr Farrar said the scores would be sent back to Maurizio and Paolo, being the claimant's direct line managers, and then would go to Mr Faul for his final decision on what the scores should be.
63. The claimant said he was unhappy with Maurizio and Paolo being his scorers because they had been overly critical of his work historically. Mr Farrar asked who should be used instead, but the claimant had no suggestions. Mr Farrar suggested Mr Curbbun or the Head Chef or Sous Chef could step in. The claimant rejected all these suggestions and simply said it was for the Club to make the decision.
64. After the meeting, Mr Faul asked Maurizio and Paolo to review the scores, and then he reviewed them himself. This was the same process he followed for everyone who asked for their scores to be reviewed.
65. As a result of the review, the claimant was upgraded on four criteria, ie from 2 to 3 on performance, team work, and club and product knowledge, and from 1 to 2 on computer (point of sale) skills. His weighted score was now 72. It was Mr Faul who decided what the final score should be.

66. The claimant still scored lowest of the seven people in the pool. The next lowest score was 75. The highest score was 100.
67. As well as this formal review process, Mr Faul asked Mr Curbbun to independently score the claimant. His score was the same as that arrived at by Maurizio and Paulo.
68. At a meeting on 16 February 2021, the claimant was notified of his redundancy with immediate effect and payment of notice in lieu. This was confirmed by letter dated 19 February 2021.
69. The claimant appealed. He pointed out that the people who had carried out the overly critical scoring on his appraisal were the same people who were overly critical on the redundancy matrix.
70. The appeal was conducted with Citation's assistance. It was decided by Mr Spiegelberg, the Chairman of the Managers. By letter dated 6 April 2021, the claimant's appeal was rejected. The letter went carefully through the claimant's points on his scoring (all of which, except length of service, the claimant disputed) and addressed the complaint regarding the impartiality of the scorers. On the latter point, Mr Spiegelberg said he could not see how Mr Curbbun's handling of the claimant's visit to France was related to the redundancy scoring. He said he had not seen or heard any evidence of a history of bias or unfair treatment by the scorers, Maurizio and Paulo. He had been offered the opportunity to suggest other scorers, but he had not suggested anyone. Also the final decision on the scores had been Mr Faul's.

The redundancy scores

71. We spent some time at the tribunal hearing discussing the scores the claimant was given under each criterion in the matrix. I was also shown emails, meeting minutes and other documents which set out the claimant's points and the respondent's reasoning. This includes the claimant's grievance letter of 10 February 2021 and the redundancy appeal outcome letter. I am not going to repeat everything here, because it will make this decision even longer than it already is. I will mention a few of the arguments which the claimant repeated most often during the tribunal hearing, but I have taken everything into consideration, whether I set it out here or not
72. On 'Performance', the claimant was initially scored 2 (performs to required standards for the majority of the time) which was then increased to 3 (performs to required standards, works well with members and guests, maintains club standards). The claimant thinks he should have been scored 4 (exceeds requirements, good eye for detail, maintains standards, good relationship with members and guests). The claimant gave as some supporting examples that he came in half an hour early every day to ensure he got everything done when he worked as a breakfast waiter in his first two years. He also points out that in the letter of 12 April 2019, rejecting his appeal against a disciplinary warning, Mr Faul congratulated him on adjusting so well to the new working regime.

73. The markers said that the claimant met sufficient performance at times but did not exceed requirements. His best performance was back of house. He had a good relationship with some members, although there had been some complaints in the past. The markers gave examples of mistakes he sometimes made.
74. On experience, the claimant was scored 3. The scoring guidance included 4 (good level of experience; high problem solving skills; calm under pressure) and 3 (experience in the role; can problem solve; presents a professional demeanour). The claimant believes he should have been scored at least 4. He has worked in the Club in different roles for 13 years altogether and previously had worked in many other private clubs.
75. The markers said they had witnessed many occasions when the claimant did not remain calm under pressure. The respondent says experience with other employees is not relevant.
76. On qualifications, the claimant was scored 3 (has qualifications relevant to role; willing to attend training required). He says he should have got 4 (exceed qualifications relevant to the role; willing to attend all training required and to develop within their role) because he attended training and showed willingness to learn. He says he completed all training successfully. During lockdown training, he had received very positive feedback and he received the highest score on a quiz, In his appraisal, he had said he would like to carry on floating and become familiar and confident in every position.
77. The respondent says that the successful training was marked equally with everyone in the pool. The only person who received higher marks was a waiter who had gained a wine qualification.
78. On teamwork, the claimant was scored 3 (up from 2). He believes he should have been scored at least 4. The scoring guidance included 4 (works well within the team; will help others when required and takes on additional responsibility), 3 (works well within the team and helps out others where required) and 2 (works within the team).
79. The claimant gave as his main example a list of the most commonly ordered wines and their numbers which he had put up for all his colleagues as working in the dispense bar was new to most of them when their duties were changed in September 2020.
80. The markers said that the claimant did not show willingness to help often enough and in fact often said he was busy when asked for help.
81. On club and product knowledge, the claimant was scored 3 (up from 2). He believes he should have been scored at least 4. The scoring guidance included 4 (good level of knowledge about the club and its origins; very high level of knowledge about the products the club supplies and knows club layout), 3 (reasonable level of knowledge about club and its origins; high level

of knowledge about Club products and knows layout) and 2 (some knowledge about Club and its origins; reasonable level of knowledge about products club provides).

82. The claimant says he has good knowledge having worked with the Club for so many years, first through an agency and then permanently employed. He referred again to the excellent feedback he received on knowledge tests. Apart from one example, these were tests which followed specific training during the lockdown period. The exception was a quiz in June 2019 which was marked 'bravo, good work'. The questions appear to relate to allergens.
83. The respondent says the quiz was not good evidence of product knowledge because it was not designed to be a serious test of the Club's offering. The markers said the claimant does not have constant reliable knowledge across the board.
84. On time management, the claimant was scored 2. He believes he should have been scored at least 4. The scoring guidance included 4 (very good time management skills; high level of task prioritisation; can always complete admin and practical tasks accurately, efficiently and on time), 3 (good time management skills; able to prioritise tasks accurately and on time) and 2 (reasonable grasp of time management; able to prioritise tasks).
85. The claimant says that he worked alone on the breakfast service every Monday until September 2020. This required good organisation and management because he would have to sit people down, take orders, serve, clear plates and do the paperwork accurately and on time at the end. He also pointed out that he had been given a high score in his appraisal for administration.
86. The respondent says that administration is only part of the 'time management' criterion. Regarding the breakfast example, it says that very few people come in for breakfast, often just five for example.
87. On computer (point of sale) skills, the claimant was scored 2 (up from 1). He believes he should have been scored at least 4. The scoring guidance included 4 (very good knowledge and understanding of computer (point of sale) system; able to assist other members of the team where required and provide training, 3 (good understanding and practical knowledge of the system; able to assist colleagues on some occasions with queries, 2 (reasonable understanding and practical knowledge of the system) and 1 (some understanding and practical knowledge of the system).
88. The claimant says he worked alone as cashier every day in his first two years and if there was any problem, it would have been dealt with. He also says he has trained others. The respondent says that he had some understanding of the system, but still got very confused and struggled with a number of operations. There was no evidence he had formally trained anyone. He had a reasonable understanding but no more than that.

89. Length of service – I have already mentioned the claimant's comments on this. The respondent did not think it appropriate to count in service through an agency, which in any event was a different role (banqueting waiter) and more closely monitored.

Grievance and pay

90. On 10 February 2021, the claimant lodged a grievance regarding various matters including his redundancy scoring, his appraisal, his final written warning and pay queries including the fact that he was not paid from 5 November – 2 December 2020. Matters related to the redundancy scoring were dealt with as part of the redundancy process. A grievance hearing was held on 4 March 2020. The meeting was facilitated by Citation. Mr Faul was present as decision maker.
91. Mr Faul sent an outcome letter to the claimant on 4 March 2021. The final written warning was removed. Mr Faul acknowledged that communication could have been made clearer to the claimant and he now believed the claimant had understood that he had permission to take the time off.
92. Mr Faul said no pay was due for the period 5 November – 2 December 2020 because the claimant was on unpaid leave. As he was out of the country and not available for work, he was not eligible for furlough payments and the Club had not made any furlough claim to HMRC for that period.
93. I accept Mr Faul's evidence in the tribunal that no furlough claim was made for the claimant in that period and that the first claim for him was made on 1 January 2021. The respondent's claim for furlough for January 2021 was in the papers for the tribunal with the names of other employees blacked out, but the claimant's name was there. I was not shown a print out for November 2020, but a document with blacked out names would not prove anything anyway. Nor does the January 2021 document prove what happened previously. However, Mr Faul stated that it could be verified with HMRC and he is unlikely to have said that if it was untrue.
94. The claimant argues that Mr Curbbun had not accepted that he was on unpaid leave and that at the disciplinary, he had told him that after the initial stages, 'we went into furlough' and 'during furlough you've got a duty and if the Club decided to do something, you could be called in'. I accept this was said at the disciplinary as it is in the transcript of the recording. Nevertheless, I am more inclined to believe Mr Faul when he says the claimant was not included in the November furlough claim. Mr Curbbun was not focused on that point. He was really trying to head off any argument that it did not matter if the claimant was absent because the Club was closed.

Law

95. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the

reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

96. Redundancy is a potentially fair reason under s98(2). Under s139(1)(b)(i) an employee is taken to be dismissed for redundancy if his dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.
97. Under s98(4), 'the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.'
98. Where the dismissal is for redundancy, a tribunal must consider, inter alia,
- (1) Whether the claimant was properly warned and consulted about the redundancy,
 - (2) Whether there was a fair selection pool;
 - (3) Whether the selection criteria were objectively chosen and fairly applied.
 - (4) Whether there was proper consideration of suitable available alternative employment.
99. The tribunal should not embark on a reassessment exercise or an over-minute examination of how the employer applied selection criteria. The central question is whether the employer set up a fair system and administered it fairly and genuinely and without bias. (Eaton Ltd v King [1995] IRLR 75, Bascetta v Santander UK Plc [2010] EWCA Civ 351).
100. The tribunal has reminded itself that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for the tribunal to substitute its own decision.

Conclusions

Has the respondent shown the reason for dismissal was redundancy?

101. The first question is why the respondent dismissed the claimant. I find the reason is redundancy. There was a genuine redundancy situation. The respondent had lost substantial catering and accommodation income during 2020 as a result of lockdowns and other restrictions arising from the Covid-19

pandemic. In early 2021, it looked very likely that operational income would continue to be reduced. The respondent made 6 redundancies altogether (including the claimant) spread across different departments. There is nothing I find strange about reducing the waiting staff by two, one having already left in December. Indeed, at the time of the redundancies, the respondent was operating only one dining room. A new waiter has been recruited more recently, but only after the Spencer Room reopened in April 2022. I therefore believe that the claimant's dismissal was genuinely for redundancy. Whether it was fair to select him rather than someone else is a different question which I shall discuss below.

Did the respondent follow a fair procedure?

102. The next question is whether the respondent followed a fair procedure. Different employers might follow different reasonable procedures. There is not only one type of procedure which might be reasonable. The question for me is whether a reasonable employer could have followed the particular procedure which the respondent followed, even if other reasonable employers might have done things differently.
103. I find that the procedure which the respondent followed was reasonable. I am going to explain why.
104. As a first point, I note that the respondent engaged a consultancy to ensure a proper procedure was followed, but Mr Faul was present at all the consultation meetings and made the key decisions. The Club chairman made the appeal decision.

The selection pool

105. It was reasonable to choose the areas of the business where redundancies could be made and to divide this into different selection pools.
106. The respondent chose a fair selection pool from which to choose a waiter. The pool was other waiters and the barman. Although the respondent decided to keep the post of barperson, it was sufficiently interchangeable to include in the pool. The claimant's key objection to the pool is that wine waiters should have been included. He raised this at the time. The respondent's reason for not including them was that the Club needed to keep their specialist knowledge. The claimant tried to persuade the respondent – and me – that silver service waiters such as himself did heavily overlapping duties with the wine waiters. The respondent did not accept that. It said that waiters might bring the wine to table, but they did not have the skills to advise in depth about choices. I accept that the respondent's true reason for not including the wine waiters in the pool was their specialist knowledge and I believe a reasonable employer could make that decision. The claimant showed me rotas when no specialist wine waiter was on duty. However, he told me that the silver service waiters did not on that occasion give advice on wine because it was the managers who took food and drink orders. It was therefore

not proved to me that the respondent was unreasonable in wanting to keep the specialist skills of its wine waiters.

The selection criteria

107. I find that a reasonable employer could choose the selection criteria which the respondent used. There was a mixture of criteria, which is considered good practice these days, and they were carefully weighted.
108. The claimant said that timekeeping and attendance should have been added to the matrix. The respondent did not want to do this, because it was more focused on criteria which were relevant to job performance. Mr Faul felt it was obvious that staff should be good on timekeeping and attendance, but if they were not, then that would have been dealt with separately under the disciplinary procedure. He felt it would not be fair to then hold it against the employee again in the redundancy selection criteria. He also felt that attendance could be misleading because people could be absent for legitimate reasons, eg medical appointments. He wanted to focus more on performance of the job. Although some reasonable employers do include timekeeping and attendance as selection criteria, others may not. It is perfectly reasonable for the respondent to have decided not to include those criteria for the reasons it gave.
109. The claimant felt that the cost of making each employee redundant should also be part of the selection criteria. The respondent felt it was wrong to focus on what the cost was to the Club. It wanted to focus on employees' performance. I find that is a decision which a reasonable employer could take. Indeed I would think that taking into account the cost of making different individuals redundant could well be an unfair criterion.

Consultation

110. The respondent went through a fair consultation process. Three meetings were held with the claimant before a final decision was made. Each meeting was carefully minuted. A letter of confirmation was sent out afterwards. The claimant's suggestions were taken into account and responded to. The claimant was given the chance to comment on the selection pool, the selection criteria and his marks. He was given the opportunity to make suggestions to avoid redundancies. He was given the right of appeal, which was conducted by a different and senior person.

The marking

111. The marking was carried out by the two people who knew the claimant's work the best: the coffee room manager, Maurizio, and the assistant coffee room manager, Paulo. They worked with him on a daily basis. When the claimant objected to them having carried out the marking because he felt they were biased against him, he was offered the opportunity to be marked afresh by another marker, eg Mr Curbbun, the Head Chef or the Sous Chef. The marker would have to know his work and be sufficiently senior. I find that the

respondent acted reasonably in offering these different options. I cannot see who else could practically have carried out the marking, and the claimant did not at the time – or in the tribunal - make any other suggestions. He simply said that Maurizio, Paulo and Mr Curbbun were biased. He said the Chefs would not have had sufficient knowledge of his work.

112. I was disappointed that none of Maurizio, Paulo and Mr Curbbun attended the tribunal to be questioned, particularly as the claimant's case was that his marking was biased. However, I have taken their reasoning from what was noted and written at the time, and also from Mr Faul's evidence. Mr Faul was present at all the consultation meetings and he also had his own impressions, albeit on a more limited basis, from eating in the restaurant and generally wandering the Club checking all was in order. The claimant never objected to Mr Faul's involvement or suggested Mr Faul was biased.

113. I understand that the claimant strongly disagrees with his scores and feels he was unfairly and indeed deliberately undermarked. It is impossible for me to say the scores were unfair on the evidence which I have. It is not enough that the claimant has a different assessment of how he meets each criterion. People can have different opinions about performance-type criteria. Also, it is difficult for a person to judge their own performance. Very often the different levels of mark were due to the difference between 'reasonable', 'good' and 'very good'. It is possible that the managers had higher expectations of everyone in the pool. The fact that the claimant was scored 2 or 3 on many criteria rather than 4 does not mean that he was performing his job badly.

114. The markers were able to give examples to explain their viewpoint. They were reasonable examples. The claimant's examples were not strong enough to suggest to me that the marking was wrong.

115. The markers understood the claimant's job, worked with him daily, and applied their minds to the scores. They were flexible enough to give the claimant the benefit of the doubt on some criteria after he had made his representations and to increase marks on four criteria. Mr Curbbun was asked to do an independent scoring and came up with the same marks. Mr Faul had the final word, and was happy with his managers' explanations. At the appeal stage, Mr Spiegelberg went through the criteria very carefully and explained why there was not enough evidence to challenge the scoring.

Was the decision pre-determined / were the markers biased?

116. The claimant says I should not trust the marks and examples given by Maurizio and Paulo (or the independent check by Mr Curbbun) because they were all biased against him. I have thought about this very carefully. I have decided there is no evidence that the marking was biased or the decision pre-determined.

117. As I have already said, there is nothing in the marking itself which suggests any bias, and in fact I note a willingness to upgrade the marks on four criteria, even though the markers were doubtful.
118. I do not think that the fact that the claimant received an appraisal which was not particularly glowing three months previously means that the redundancy marking was biased. The appraisal was not used for the redundancy marking. But more to the point, it simply shows that the markers had the same opinion of the claimant on each occasion.
119. I do not think the fact that it was so hard for the claimant to get a copy of the appraisal means there was any bias. His first request was immediately before the circumstances dramatically changed because he had to rush to France. By the time he came back, there was all the chaos of lockdowns. Mr Curbbun had agreed to provide a copy of the appraisal. He just did not get round to doing it.
120. I would add at this point that I think it is reasonable for an employer to consider that it made no difference in terms of the claimant's ability to improve prior to the redundancy exercise that he did not have a copy. For most of the intervening time, he was not at work anyway. He was also generally aware of the appraisal contents because they had been read out to him.
121. The claimant says that the notes taken by Maurizio and Paulo at his disciplinary over his visit to France shows they were biased against him because they did not note his most important points or the negative comments made by Mr Curbbun. I looked at the notes carefully. They are very short. They are not like a recorded transcript. Maurizio and Paulo are not professional notetakers, I do not think the discrepancies are necessarily significant. I do not think that they prove anything. They note down the essence of the conversation but not all the detail. There is not enough regarding what was left out for me to say it shows they were biased against the claimant.
122. The claimant says Mr Curbbun was biased against him, which is clear from the 'inhumane' way he was treated in 2018/9 when he complained about his colleague's harassment, and again over his visit to France.
123. The first thing I would say is that Mr Curbbun's only role in the redundancy selection process was doing an additional fairness check on the claimant's marks. He agreed with the views of Maurizio, Paulo and Mr Faul, so he did not affect the scoring. There is also no evidence, except for guesswork, that Mr Curbbun influenced Maurizio and Paulo against the claimant. He was more senior than them, so it is not impossible, but I see no evidence of it.
124. As for whether Mr Curbbun was generally biased against the claimant, I understand why the claimant feels so upset about the two issues he refers to. It may be that Mr Curbbun avoided dealing properly with the claimant's original allegations of harassment. It seems harsh to have issued him with a warning for false allegations. However, that was a long time ago and it all

appears to have been resolved once the claimant moved so that he did not work with the other waiter any more. The Club and the claimant moved on. The claimant worked happily on his new shifts. There is no evidence of ongoing hostility from Mr Curbbun or anyone else in the 18 months up to the appraisal. Indeed, Mr Curbbun sent some friendly and positive emails regarding the training tests.

125. I do think that Mr Curbbun's attitude towards the claimant's absence to look after his parents in France was very harsh indeed. I am extremely surprised he issued a final written warning over the matter. Indeed it is revealing that Mr Faul overturned the warning on appeal. The claimant had received permission to go to France. The Club had failed to be clear about how often the claimant should communicate and how long he could stay in France. In any event, his parents being in France meant the claimant inevitably had to be absent from work to assist them. Mr Curbbun knew that the claimant feared his mother might die, and at that stage in the pandemic, that was a real risk. In those circumstances, to tell the claimant he should choose between prioritising work and prioritising family was indeed inhumane. This was not a case of an employee who had gone missing for no good reason or who failed to respond when contacted or who had a track record of this kind of behaviour.

126. I am conscious that this incident happened only a few months before the redundancy exercise. However, it does not necessarily mean that Mr Curbbun was generally biased against the claimant. It might just mean he is a harsh manager, or harsh about that kind of issue, or maybe he was feeling the pressures of the pandemic himself. In any event, as I have said, he was not the person who scored the claimant on redundancy. I also note that the appraisal, which is consistent with the redundancy marking, was undertaken before the France incident, so it can't be said that the France incident unfairly infected the managers' views against the claimant.

127. For all these reasons, I do not think the redundancy marks were biased.

Alternatives to redundancy

128. There was no suitable alternative employment which was available to offer the claimant. It was reasonable for the respondent not to take up the suggestion of cutting an hour/day off everyone because all but one of the other employees in the pool did not want to accept it, and also because the Club would still be incurring the base cost of employing seven as opposed to six employees.

Conclusion on unfair dismissal

129. For all these reasons, I find that the decision to select the claimant for redundancy was within the band of reasonable responses. The respondent followed fair procedures, the marking was unbiased and the claimant scored the lowest marks in his selection pool. Issues 6.3 and 6.4 therefore do not arise.

The pay claim

130. The claimant claims his unpaid wages for the period 5 November 2020 – 2 December 2020. The respondent argued that the pay claim was out of time. I disagree with that. The claim would only be out of time if made as a claim for unauthorised deductions from wages. There is no reason why the claim could not be brought as a contract claim and thus be in time.
131. The reason the claimant was not paid in that period and the reason he had not been put on furlough was that he was on unpaid leave in order to visit France and look after his 92 year old father while his mother was in hospital with Covid. Although disputes later arose as to how much the claimant should remain in touch and how long the leave should last, the claimant was given permission at the beginning and was never formally instructed to return.
132. Mr Curbbun regarded the leave as unpaid Dependants' Leave which had gone on too long. He referred in his emails of 27 and 30 October 2020 to 'unpaid' leave. The claimant challenged him regarding whether going on leave had been authorised at the outset, but never suggested that the leave should be paid.
133. Following the claimant's later grievance on the matter, and overturning Mr Curbbun's warning, Mr Faul conceded communication could have been clearer and classified the period as 'unpaid leave'.
134. Taking everything into account, I find that the claimant is not entitled to pay for the period 5 November 2020 – 2 December 2020 because he was on unpaid leave and not available for work.

Employment Judge Lewis
28th June 2022

Judgment and Reasons sent to the parties on:

28/06/2022

For the Tribunal Office