



EMPLOYMENT TRIBUNALS

Claimant: Ms T Jenkinson

Respondent: Samuel Smith Old Brewery (Tadcaster)

Heard at: Manchester Employment Tribunal (by CVP)

On: 06 October 2022

Before: Employment Judge Mark Butler
Mr B Rowen
Dr H Vahramian

Representation

Claimant: Mr A Palmer (of Counsel)
Respondent: Mr L Bronze (of Counsel)

JUDGMENT

It is the unanimous decision of the tribunal that:

1. The claimant is found not to have been dismissed on or around 18 February 2022.
2. Consequent to that above, the claims for unfair dismissal and a failure to provide written reasons as to the reason of dismissal pursuant to s.92 of the Employment Rights Act are not well-founded and are dismissed.
3. For the avoidance of doubt, all claims in this case are unsuccessful.

REASONS

Introduction

4. The claimant presented her claim form on 25 May 2022. She brought complaints of unfair dismissal and for a failure by the respondent to provide written reasons of her dismissal following a request.

5. The tribunal was assisted in this case by a file of documents that ran to 121 pages (not including the index).
6. The claimant gave evidence and called no further witnesses.
7. The respondent relied on the evidence of Mr Humphrey Richard Woollcombe Smith, only. He performs the role of Area Manager for the respondent.

Issues

8. Was the claimant unfairly dismissed? The claimant brings this case on the basis that she was dismissed, with an effective date of termination of 18 February 2022. The respondent's primary case is that the claimant was not dismissed.
9. Was the claimant denied a written statement explaining the reasons of dismissal that she was entitled to under s.92 of the Employment Rights Act 1996?
10. With respect both aspects of the claim brought, the question of whether there was a dismissal was an important issue that the tribunal needed to resolve.

Closing submissions

11. In advance of closing submissions, Mr Bronze provided the tribunal with a written skeleton argument.
12. The tribunal heard oral closing submissions made by both Mr Palmer, on behalf of the claimant. And from Mr Bronze on behalf of the respondent. Although these are not repeated here, these were considered when reaching our decision.

Law

13. For claims brought under Part X of the Employment Rights Act 1996, s.95 provides a definition of dismissal as follows:

95 Circumstances in which an employee is dismissed.

- (1) For the purposes of this Part an employee is dismissed by his employer if, but only if—
 - (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
- (2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—
 - (a) the employer gives notice to the employee to terminate his contract of employment, and
 - (b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

14. Where there is dispute as to whether there has been a dismissal, the burden of proof rests with the employee.
15. In deciding whether a dismissal has taken place, the test to be applied is an objective one. The tribunal must be careful to ensure that it takes into account all

the surrounding circumstances and the nature of the workplace, and if there is ambiguity in the wording, the tribunal should ask itself how a reasonable employer or employee would have understood them in light of those circumstances.

16. The principle that if an employee is told that he or she has no future with an employer and is expressly invited to resign, then that employee is to be regarded as having been dismissed can be seen in *East Sussex County Council v Walker* 1972 7 ITR 280, NIRC.
17. To constitute a dismissal the notice terminating the contract must either state the date of termination or contain material from which the date can be positively ascertained.

Findings of fact

18. Mr Smith is the Area Manager for the respondent. The Hark to Topper Public House was one of the public house's that fell within his remit.
19. Ms Linda Stuart is an important figure in the management of the respondent. She fills a crucial role in the company.
20. The claimant's employment started with the respondent on 13 March 2017. She started work as bar staff. She worked at the premises of the Hark to Topper Public House. This was her place of work throughout all material times relevant to this dispute.
21. At some point before November 2020, the then manager of the Hark to Topper Public House, Ms Diveney, decided to retire. Ms Diveney recommended to Mr Smith that the claimant would be a suitable replacement for her.
22. Mr Smith required the claimant to complete an application form for the post of manager of the Hark to Topper Public House. The claimant completed the necessary application form (see pp.33-39) on or around 21 October 2020 (see p.37). There was no interview process.
23. The claimant was appointed to the position of Manager of the Hark to Topper Public House by letter dated 26 May 2021 (see pp.41-43). The start date was recorded as being 17 May 2021, as soon as the claimant had completed the required training.
24. The claimant signed a contract in accepting the offer of the manager role (see pp.43-52).
25. The first two years of the claimant's new role was the subject of a probationary period.
26. On 06 August 2021 at 16.39, Ms Stuart emailed (see p.70) the claimant to explain the following:
 - a. The trade figures for the Hark to Topper Public house were 'really disappointing'.

- b. That she had information that showed that in the period 04 July 2021 to 31 July 2021, net takings were 23.6% lower than the same period the previous year.
 - c. Inviting the claimant to put forward ideas on how to improve trade.
 - d. And explaining that trade could not continue to decline in the way that it currently was.
27. The claimant responded to Ms Stuart's email on 06 August 2021, at 21.49 (see p.71). She disputed the figures presented to her and calculated that net takings had only reduced by £29.10 over the period in question. She provided her explanation as to what she considered were some of the difficulties the public house was encountering, which may have been affecting turnover.
28. On 13 October 2021, Mr Smith made an unannounced visit to the public house and met with the claimant. There is a dispute in terms of what was the outcome of that discussion. The claimant in her evidence says that Mr Smith ended up agreeing with her position that there was little difference in turnover for the period in question. Whereas Mr Smith, in his evidence, maintains that he explained to the claimant that there had been a drop in takings for the week ending 09 October 2021 compared to the previous year, and that the claimant acknowledged that this performance had to improve. The tribunal preferred the evidence of Mr Smith on this matter. The evidence of Mr Smith is consistent with the contemporaneous evidence that exists following this meeting. The tribunal had sight of a letter written by Mr Smith dated 19 October 2021. This is some 6 days after this meeting, and the contents of it is consistent with Mr Smith's evidence in terms of what was said at that meeting. And is also consistent with the theme present in the conversation between Mr Smith and the claimant in January 2021, recorded in the claimant's witness statement (in particular, see para 15 of the claimant's witness statement). Given the consistent theme across the 06 August 2021 email (noted above), the details of the letter dated 19 October 2021 (discussed below) and the conversation on 24 January 2022 between the claimant and Mr Smith, on balance we find that Mr Smith's evidence that he raised the issue of a decrease in income for the week ending 09 October 2021 and that the claimant acknowledged a need to improve, was most likely.
29. Mr Smith wrote a letter dated 19 October 2021 (see p.73). This is a follow up letter to the meeting of 13 October 2021. In this letter he explained that in the week ending 09 October 2021, the takings at the Public House were down from £2,226 the previous year. To £1,329. He described this as an 'enormous drop'. Mr Smith ascribes this drop to the claimant's lack of popularity, and that the claimant had not succeeded in creating a welcoming social atmosphere. Mr Smith equates the claimant's popularity to the taking's figures.
30. Mr Smith did not send the letter personally. He passed it to an employee to photocopy the letter and send it to the claimant. We accept that Mr Smith did this. And that the letter was sent to the claimant.
31. On 21 January 2022, there was an unannounced walk-in stock take at the Public House. This resulted in the claimant needing to call Mr Smith.
32. The claimant called Mr Smith on 24 January 2022. In this phone call Mr Smith explained to the claimant that the takings were down on the previous year, that he considered the claimant to be unpopular and that the claimant should resign

from the manager role and find somewhere else to live. During this conversation, Mr Smith was explaining to the claimant that probation period for the manager role was being ended. And that she would be being placed back into her previous role as bar staff. Although this is disputed by the claimant, we accept Mr Smith's evidence on this. Supporting this finding is the consistency of this finding with subsequent discussions/engagement on this matter between the claimant and the respondent (noted below).

33. The claimant did not agree to returning to the role of bar staff, nor did she accede to Mr Smith's request to resign from the manager role. Despite this, Mr Smith, in no uncertain terms, told the claimant that she had failed her probation period as manager and was to be demoted back to bar staff. And this would have the consequence of her having to leave the pub accommodation.
34. In consequence, on 24 January 2022 (see p.74), the claimant sent a text message to Mr Smith asking for him to give her a date when he wanted her to be out of the pub, and she needed to apply for housing. This was in relation to leaving the pub accommodation, that accompanied the role of manager.
35. Mr Smith replied at 16.15 by asking, in effect, whether 4 weeks' notice would be enough.
36. The claimant replied at 16.26 for the Mr Smith to put his wishes in writing. This was to assist her in claiming benefits.
37. We find that the claimant did not then call Ms Stuart for confirmation as to what this all meant for her, during which she was informed that she would no longer be working for the respondent. The claimant at the outset of being cross-examined confirmed that she had included all important matters to her case in her initial claim form. This is clearly a crucial and important matter in her case. Especially given, according to today's evidence, this is the moment when the claimant says she was first told that she would no longer work for the respondent. Not including such a conversation, after having confirmed all important matters were contained in the claim form, led the tribunal to conclude, on balance, that this conversation simply did not happen. This is further supported by reference to any such phone call being omitted from the claimant's grievance, where she details the events that she says led to her dismissal (discussed below).
38. On 31 January 2022, the claimant raised a grievance by email with the respondent (being sent to Ms Stuart), after having first discussed the matter with ACAS. The contents of the grievance is at p.80. In it she states:
 - a. She has contacted ACAS regards her situation and dismissal.
 - b. That she was informed by Mr Smith on 24 January 2022 over the phone that "...takings have gone down since Mrs Diveney left... I think you are unpopular. I think you should find somewhere else to live and resign."
 - c. I have not resigned, but have been given 4 weeks' notice to leave the pub.
 - d. She seeks a response to her grievance in writing, together with reasons for her dismissal.
39. Neither Mr Smith nor Ms Stuart replied to this grievance.

40. On 08 February 2022, the claimant called Ms Stuart. Ms Stuart explained to the claimant that she had not been dismissed but had been demoted back to bar staff. The claimant did not agree to this change. The claimant followed up this conversation with a text message to Mr Smith on 08 February 2022, at 16.57. In this message, the claimant wrote:

Good evening Mr Smith its Tracey at The Hark to Topper. On January 24th i was asked to resign by yourself and find somewhere else to live. I havent resigned either verbally or in writing, but was given 4 weeks notice by yourself by text message. I have just spoken to Mrs Stewart about my stocking out date and when my beer will be lifted. I also asked for your wishes in writing about my dismissal and i have now been told i havent been dismissed but demoted back to bar staff. This is something i am unaware of , have not agreed to or again have not had confirmed in writing . Could my employment status with Sam Smiths please be confirmed to me in writing please Mr Smith. I have now found somewhere else to live as you requested and will be leaving the flat as soon as i am stocked out and all my furniture is removed ..Regards Tracey Jenkinson

41. The claimant did not receive a response to this message from Mr Smith.
42. The claimant emailed Ms Stuart and Mr Smith on 14 February 2022. She wrote the following:

From: Tracey Jenkinson <jenkinson57@yahoo.com>
Sent: Monday, February 14, 2022 6:10 AM
To: Linda Stuart <lstuart@samuelsmiths.biz>
Subject: Letter from yourselves re Demotion

Good morning Linda/ Mr Smith,

As you are aware i am being stocked out as Manager of the Hark to Topper on Friday, February 18th. As previously informed by yourself and Mr Smith I have now been demoted back to bar staff and a zero hour contract.

, zero hour contract enables me to apply for Universal Credit and also enables me to get help with my housing costs/rent as i have now found somewhere to live as requested by Mr Smith on January 24th, when i was asked to move out of the tied in accommodation and resign. I was then given 4 weeks notice via text message, which takes us all to the 18th.

I rang Oldham Council on January 24th and declared myself homeless and i have been lucky enough to obtain a flat which i can move in to as soon as i have removed all my belongings from the living accomodation above the pub. Could i please request my above change in employment status with the brewery in writing please as soon as possible, as i will have to apply for UC very soon and they may ask for proof of my change in employment status. Your help with this would be greatly appreciated.

Many Thanks
Tracey Jenkinson

43. On 24 February 2022 at 0840, after the flat had been inspected, Ms Stuart wrote an email to the claimant to explain the following (see p.96):

Thank you Tracey

Please could you confirm who is inspecting the flat and as soon as they are there please get them to ring me and I can get Mark to pay your bond in to your account same day (i.e. today)

Would you also be kind enough to advise your new address and I can send a letter stating that you were previously bar staff then manager then reverted to bar staff?

Thank you

Kind regards

Linda

44. The claimant replied to this email on that same day, at 10.09 (see p.100). She wrote:

Hi Linda,

A gentleman called Neil inspected the flat and also took photos. He also took the keys off me . He was still there when i left checking the boiler in the cellar as its gone off again.

Sorry i missed your call.

My new address is

10 The Grange

Bartlemore Street

Oldham

OL1 4DP

Thanks

Tracey Jenkinson

07513 662159

45. On 20 February 2022, the claimant received a P45 in the post, which had a leaving date recorded as being 18 February 2022.

Conclusion

46. The tribunal weighed up all the circumstances in this case. And have concluded that there has been no dismissal of the claimant by the respondent by 18 February 2022.
47. The claimant was initially promoted to manager at the Public House in question. However, when the respondent deemed this to be an unsuccessful promotion of the claimant, it consequently demoted the claimant back to her previous role.
48. On our findings, there is no unambiguous statement of dismissal by the respondent. And this is supported by the claimant herself on several occasions asking for clarification as to her employment status. At its height, the claimant asked for confirmation of when Mr Smith wanted her out of the pub to which he replied, "if we gave you 4 wk's notice?" This conversation was clearly concerning accommodation, which was tied up with the managers role. This is not sufficient to satisfy the burden that rests on the claimant in establishing that she has been dismissed.
49. The email sent by the claimant to Ms Stuart on 14 February 2022 is an important email. In this the claimant entitles the email using the term 'demotion'. She further explains that she has 'now been demoted back to bar staff...'. The claimant explains that being put on this zero-hour contract enables her to apply for Universal Credit and also enables her to get help with housing benefit. In the final paragraph she then asks that the change in her employment status be put in writing, as she will have to apply for Universal Credit, and she may need to prove this change in her status. This change in employment status cannot be referring to dismissal and must be referring to a continuing contract but in the role of bar staff given that explained in the first and second paragraphs of this email. The claimant at this point knew that her contract was continuing.
50. This continuing of her contract is further supported by the correspondence between the claimant and Ms Stuart that then followed. Ms Stuart agreed to send such a letter to explain that the claimant was no longer a manager but had

reverted back to being bar staff in her email of 24 February 2022. She explained that to do so she would need the claimant's address. The claimant's response was to provide Ms Stuart with her address. There was nothing in the claimant's response, which was sent on 24 February 2022, which disputed the ongoing contractual relationship. She did not in her response explain that she had not reverted back to being bar staff but had been dismissed. The ongoing contractual relationship must, taking everything into account, have been the correct state of affairs.

51. In these circumstances this tribunal has concluded that the claimant has not been dismissed from her role on, or has an effective date of termination of, 18 February 2022 as alleged. The claimant's contract with the respondent continued, albeit in a different role.
52. We are minded that there is no constructive dismissal complaint in this case. And therefore, do not consider it necessary to take this decision any further.
53. Given that we find that there has been no dismissal in this case, the claim of having been unfairly dismissed and in respect of a failure by the respondent to provide written reasons of dismissal in accordance with s.92 of the Employment Rights Act 1996, do not succeed and are dismissed.

Employment Judge **Mark Butler**
Date_17 October 2022_____

JUDGMENT SENT TO THE PARTIES ON
18 October 2022

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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