EMPLOYMENT TRIBUNALS

Claimant: **Mr J L Hermosa Mateos**

Respondent: **Whitbread Group Plc**

Heard at: **East London Hearing Centre**

On: **25, 26, 27 September and 1 October 2019**

Before: **Employment Judge Gardiner**
Mr G Tomey
Mr M Wood

Representation

Claimant: In person

Respondent: Mr Bownes, Solicitor

JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant was unfairly dismissed, contrary to Section 94 of the Employment Rights Act 1996. A reduction of 60% shall be made to Claimant's unfair dismissal remedy to reflect the 60% chance that the Claimant would have been fairly dismissed in any event.

2. The Respondent failed to make a reasonable adjustment contrary to Section 21 of the Equality Act 2010, by failing to reduce the Claimant's workload during a colleague's absence on suspension from 28 July 2018 to the 7 October 2018, when he was suspended.

3. The Claimant's dismissal was unfavourable treatment in consequence of his disability, contrary to Section 15 of the Equality Act 2010, which was not a proportionate means of achieving a legitimate aim.

4. A Remedy Hearing is to be listed on 8 November 2019 before the same Employment Tribunal panel to consider the Claimant's application for reinstatement and/or the financial remedy that he is seeking to recover as compensation for the discrimination. Case management directions are set out in a separate Case Management Order.

REASONS

Introduction

1. The Respondent owns and operates several chains of restaurants nationwide. Mr Hermosa was employed by the Respondent as a Kitchen Manager at the Albert, a Beafeater Steak restaurant in Colchester, Essex. He had been employed there since March 2014 until his dismissal on 1 October 2018 for gross misconduct. The stated reason for his dismissal related to nineteen different deficiencies in kitchen practices. The Respondent alleges these were his responsibility and posed a potentially serious risk to the safety of customers eating at the Albert.

2. Mr Hermosa claims that his dismissal was an unfair dismissal, contrary to Section 94 of the Employment Rights Act 1996. He complains that the disciplinary investigation was inadequate and that dismissal was too harsh a sanction given the extent of any misconduct and given the mitigating circumstances. He also alleges that his dismissal was an act of discrimination arising from a disability, contrary to Section 15 of the Equality Act 2010. So far as the issue of disability is concerned, he relies on his ongoing state of health when he returned to work in May 2018 in the aftermath of a serious operation in November 2017, for which he had required several months off work. In addition, he alleges that there was a failure to make reasonable adjustments in the period leading up to the dismissal. This relates to the staffing levels in the kitchen during the first week of August 2018. The Claimant alleges that his workload should have been reduced.

3. The Respondent does not accept that the Claimant satisfied the statutory definition of a disabled person at the relevant time. Even if the Claimant was disabled, the Respondent disputes that there was any failure to make reasonable adjustments and contends that the dismissal was not an act of discrimination arising from the Claimant's disability, and in any event that dismissal was justified given the gravity of the food safety issues identified. It denies that the dismissal was an unfair dismissal.

Evidence

4. The Tribunal has heard evidence in relation to liability over three days from 25 to 27 September 2019. Judgment was given orally on 1 October 2019, the fourth and final day listed to determine the Claimant's claim. It was agreed at the outset of the Final Hearing that the issue of remedy, if it arises, will be decided at a later hearing.

5. Mr Hermosa has represented himself at this Final Hearing. He has given evidence in support of his claims and called evidence from Tracey Beales, who was a Deputy Manager at the Albert. He has also put in a witness statement from Bonnie Agius, although Ms Agius did not attend to give oral evidence. That failure inevitably affects the weight that the Tribunal can give to the contents of her witness statement.

6. For the Respondent, the following witnesses provided witness statements which they confirmed on oath or affirmation and were cross examined by the Claimant about their contents :

    a. Kevin Davies, who was the Albert's General Manager and the Claimant's line manager until about a week before the end of May 2018;

    b. Mr Ross Nash, a General Manager at one of the Respondent's other restaurants. He carried out an investigation into the food safety issues identified in the first week of August 2018 and the Claimant's potential responsibility for those issues;

    c. Mr Matthew Rushmer Risby, another General Manager at one of the Respondent's other Beafeater restaurants, who conducted the Claimant's disciplinary hearing and decided to dismiss him for gross misconduct;

    d. Mr Christopher Adams, another General Manager, who heard the Claimant's appeal against the dismissal decision, and decided to reject the Claimant's appeal.

7. There was an agreed bundle of documents to which reference was made in the course of oral evidence. In addition, on the second morning, the Respondent produced a photocopy of the Kitchen Record Keeping Book for the last week of July 2018 and the first week in August 2018. The Claimant had previously requested this document when completing the Agenda for a previous Preliminary Hearing held on 25 March 2019. He renewed his request on the first morning of the Final Hearing. It appeared to the Tribunal that this was a potentially relevant document in relation to the matters before the Tribunal. In addition, the Respondent provided its disciplinary policy which had not previously been included in the agreed bundle. Both documents were admitted into evidence.

8. At the outset, in the course of clarifying the issues, the Claimant attempted to argue that there had been a failure to make reasonable adjustments in failing to refer him to occupational health in the weeks before the incidents for which he was disciplined. This allegation was not part of the Claimant's original ET1, it was not raised at the Preliminary Hearing before Employment Judge Hyde on 25 March 2019, and there had been no application to amend to include this allegation before the start of the hearing. The Respondent objected to the late inclusion of this issue. It appeared to the Tribunal that this was a criticism particularly directed at Mr Kevin Davies' successor, Mr Adrian Powlett. Mr Powlett was not one of the Respondent's

witnesses and so the Respondent would be prejudiced in dealing with this late issue if it was to be included in the issues at the Final Hearing. As a result, the Tribunal refused the Claimant permission to include this issue as a discrete additional allegation of disability discrimination.

9. At the conclusion of the case, both parties made oral closing submissions. The Respondent cited *Chubb Fire Security v Harper* [1983] IRLR 311 and *Coral Casinos v Hadjioannous* [1981] IRLR 352, as well as the well-known case of *Burchill v British Home Stores* [1980] ICR 380.

Factual findings

10. When the Claimant was first appointed as Kitchen Manager at the Albert, it was one of the Respondent's worst performing restaurants, if not the worst. Over the next three years, under Mr Kevin Davies as General Manager and his team including the Claimant as Kitchen Manager, the Albert was substantially transformed, winning two company awards (Best Turnaround Restaurant, and Best Restaurant Serving Up Great Memories). During this period of his employment the Claimant was recognised as a hard worker, fully committed to his role as Kitchen Manager, who would often work longer hours than required to ensure that the Kitchen performed well. He was well regarded and had a clean disciplinary record. During the period when he was Kitchen Manager at the Albert, independent audits were carried approximately three times a year. The Albert always passed the audits.

11. In November 2017, the Claimant experienced severe pain in his abdomen and was vomiting. He was admitted to Colchester Hospital as an emergency, where he was diagnosed as suffering from a ruptured bowel. He underwent major surgery, and was fitted with a colostomy bag. He was off work on sick leave until the start of May 2018.

12. On 5 April 2018 he underwent an Occupational Health assessment, which resulted in a report from Dr Ferris dated 19 April 2018. This included the following passage :

> Mr Mateos reported to Dr Fox that he feels that he is now getting back to normal daily activities although is limited as to what weight he can lift. However, since the admission to hospital he has some pins and needles in his left leg for which he has seen a physiotherapy, has some discomfort around the stoma and a sensation that his breathing has not yet fully recovered. My understanding is that no significant complications have been identified and that these residual symptoms will likely improve in time. He is still requiring medication, some regular and some as required.

13. At the time this report was carried out, he was awaiting further treatment. As Dr Ferris noted in the report, it was possible for the stoma to be reversed and the bowel re-joined. This was later scheduled to take place on 22 October 2018.

14. Dr Ferris noted that further time off work may be required if the stoma was reversed, although the period of absence would not be as long as his previous sick leave. In the meantime, he advised that the Claimant could consider a return to work with a number of specific features. Firstly, the return should be phased over a period of a month. Secondly the Claimant should avoid heavy lifting. Thirdly, Dr Ferris also recommended in the short to medium term, breaking up the administrative tasks to give rests from more physically demanding tasks, and he suggested the Claimant should avoid a day of purely administrative work. The Tribunal considers that this recommended adjustment was not restricted to the phased return to work, but was for the "short to medium term" and so could well continue thereafter. Dr Ferris added that this adjustment could be reduced as the Claimant regained his previous level of energy and strength. It is implicit in this comment, that the Claimant had not yet returned to his previous levels of energy and that his energy levels and ability to perform the administrative aspects of the role should be monitored over the medium term.

15. Dr Ferris added that it was prudent, in his view, for the Respondent to regard the Claimant as being covered by the disability legislation under the Equality Act 2010. Notwithstanding Dr Ferris's opinion, the issue as to whether the Claimant was a disabled person is an issue of law for the Tribunal to determine.

16. On 26 April 2018, the Claimant had a welfare meeting with his line manager, Mr Davies. This detailed his phased return to work with his hours increased from 24 hours per week to 48 hours a week. This reflected the full hours he was required to work under his employment contract. The document recorded the company policy that after each week of the phased return to work, a meeting between the employee and his manager would be conducted to assess how he was progressing and whether any further changes were required.

17. Mr Davies stated in his evidence that informal weekly meetings took place in the Claimant's case for the first three weeks, although there are no records of what was discussed. Mr Davies in his oral evidence told the Tribunal that there would have been a specific review meeting at the end of the phased return to work period to check on how the Claimant was coping. However, by that point, Mr Davies had moved to a different restaurant and was no longer the Claimant's line manager. There is no evidence that this proposed review meeting ever took place, or that there were any subsequent meetings to further review his ability to cope with the full demands of the role. There has been no evidence given by Mr Adrian Powlett who replaced Mr Davies as general Manager, nor any explanation as to why he has not been called as one of the Respondent's witnesses. The Tribunal understands that he is still employed by the Respondent.

18. As a result, there was never any review of the Claimant's ability to cope with the demands of the role at a point where he was back to working 48 hours per week. In fact, due to the general demands of staffing a busy kitchen, the Claimant often worked more than the required 48 hours. As Mr Nash accepted in his evidence, the

Albert was short staffed, including in the kitchen, and further recruitment was needed.

19. During the Claimant's absence on sick leave, the Head Chef, Adnam Hussain, had been paid a supplement to his standard salary to reflect the additional duties he was performing in covering the Claimant's role as Kitchen Manager. This reflected the difference between his salary as Head Chef and the higher salary of a Kitchen Manager. This supplement continued throughout the four week long phased return to work. Thereafter the only evidence as to whether Mr Hussain's additional duties and additional pay continued is from the Claimant. His evidence, which we accept, is that Mr Adnam Hussain continued to receive this supplement until the point at which the Claimant was subject to disciplinary proceedings. If so, then this would be in recognition that the Claimant was not yet expected to carry out all the requirements of the role of the Kitchen Manager.

20. As the Claimant's hours increased, the Claimant's pain increased and he increased his medication to cope with the pain. The Tribunal accepts the Claimant's evidence that this increase in his medication increased the side effects caused by the medication. Whilst the Tribunal does not have contemporaneous medical evidence as to those side effects, it does have a report dated 25 April 2019 from Dr V Babalola. This agrees that the Claimant's medication on his return to work from his substantial period of absence could have caused side effects. It records without criticism the Claimant's position that from May 2018 he had been experiencing poor concentration, poor memory, poor sleep, dizzy spells, feeling weak, depression, nervousness and anxiety. The Tribunal accepts that the Claimant did experience these side effects during the period from May 2018 to the start of August 2018. These side effects had an impact on the Claimant's ability to carry out the administrative aspects of the role of Kitchen Manager, including his ability to remember all the food safety checks that were required and the speed at which he could do them. As Ms Beales, the Albert's Deputy Manager, explained to the Tribunal, it was having a significant impact on his ability to cope with the role.

21. The Claimant told the Respondent that he was struggling with the demands of the role, given his current symptoms. As recorded during the investigatory meeting, he told Kevin Davies and Adrian Powlett that he was struggling. He also mentioned it to Tracey Beales. The Claimant's difficulties were never the subject of further discussion or investigation by the Respondent**.**

22. On 28 July 2018, a food safety audit was carried out at the Albert. This was undertaken by an external organisation, engaged by the Respondent to review its food hygiene standards. The Respondent failed the audit in one critical respect, namely the inappropriate handling of an egg product. The Claimant was not on duty when the audit took place. On the day of the audit, Adnam Hussain as Head Chef was the most senior employee responsible for food safety issues. As a result of the failure, Adnam Hussain was suspended pending an investigation into events that had led to the failure.

23. The failure of the audit had three immediate consequences. Firstly, Adnam's suspension reduced the core staffing levels in the kitchen from four to three members of staff. Existing staff were expected to cover Adnam's substantial duties as Head Chef during the period of his absence. The Tribunal accepts the Claimant's unchallenged evidence that, as a result, he was working for around 68 hours during the first week in August 2018. This is 40% more than he was contracted to work. Secondly, the Claimant assumed primary responsibility for all issues, including food safety issues, in Adnam's absence, whatever had been the position before his suspension. Thirdly, the Respondent decided to carry out several further audits of the food safety practices at the Albert over the next week.

24. When the Claimant returned to work he would have become aware that the kitchen had failed an audit. He would also have been aware that Adnam had been suspended, pending an investigation. During the following week, there were five visits from Mr Ross Nash. On some occasions he was accompanied by another manager. These inspections took place on days when the Claimant was at work although he was not necessarily in the kitchen at the precise time when the inspection took place. On at least one of the five occasions, the inspection took place with the Claimant present. Even if the Claimant was not physically present when the inspections took place, it is likely that he would have become aware of the issues that had been identified shortly afterwards.

25. In total, those audits identified twenty issues with food safety at the Albert during the period from 31 July 2018 to 7 August 2018. These issues were raised with the Claimant on 7 August 2018 at a meeting conducted by Mr Nash. At the end of this meeting, the Claimant was suspended. That suspension continued until the end of his employment.

26. At the meeting on 7 August 2018 and a further meeting on 8 August 2018, Mr Nash went through the specific incidents point by point to get the Claimant's response. The Claimant accepted that the food safety issues identified were present and that they posed a risk to customers. His explanation was twofold. Firstly, some issues should have been picked up by other members of staff, particularly the General Manager, the Head Chef and the Duty Manager who had the responsibility for signing the Kitchen Record Keeping Book on a daily basis. Secondly, he repeatedly referred to the levels of pain that he was experiencing and his tendency to become tired, lose concentration and make mistakes. He said that this had been raised with other members of staff. He also referred to the kitchen being short staffed and said that other members were also tired and prone to making mistakes.

27. Mr Nash also interviewed Kevin Davies, the Claimant's line manager until mid to late May 2018. In answer to the question "Did you ever tell him not to have to check the KRKB or check the cleanliness or labelling as part of the duties?" Mr Davies answered "No he was doing all of this when I was there and was performing in his role as Kitchen Manager, without heavy lifting". This was not a fully accurate answer, in that the Claimant was still on his phased return to work and therefore was not working the hours to resume all the administrative aspects of his previous

duties. In addition, at this point, Mr Adnam Hussain was being paid to assume Kitchen Manager responsibilities.

28. Mr Nash did not interview Adrian Powlett who replaced Mr Davies, and who had been the Claimant's line manager for two and a half months by the time of the Claimant's suspension. He did not interview the Deputy Manager, Tracey Beales, who was still employed by the Respondent during August 2018, nor any other employees to ask them to what extent they bore responsibility for the specific food safety failings or enquire whether the Claimant's health could have had an impact on his performance. Instead, Mr Nash took comfort from Mr Davies' evidence that the Claimant appeared able to cope with his duties during the time that he was the Claimant's line manager.

29. Mr Nash prepared an investigation report, which identified what he described as multiple failures of food safety standards, which he numbered from 1-20, attaching photographs to evidence his findings. His recommendation was expressed in the following terms :

> Given the fact that [the Claimant] is an experienced Kitchen Manager with a full understanding of what is expected of a kitchen manager and the number and seriousness of the offences over an 8-day period, together with the risk to guests and the Company, it is my opinion that there is a disciplinary case for him to answer and I therefore recommend that the matter is referred for a disciplinary hearing, in line with the Company's internal procedures.

30. The Claimant was invited to a disciplinary hearing on 21 September 2018. It was adjourned midway through the hearing, so that the Claimant could attend a medical appointment. It resumed on 28 September 2018. During the hearings, the Claimant repeated his points that he was taking a lot of medication for his pain, and that the pain caused him to be tired and stressed and made it difficult for him to focus. He said that his medication included morphine, and the notes record that there was a break in the first meeting so that the Claimant could take his morphine.

31. During the first meeting, he said the difficulties were raised with Mr Powlett and Ms Beales. He told them that they had lost three chefs in two weeks and the General Manager had also changed. In the second meeting, he was asked if he had made anyone aware that he was not performing 100%. His answer was "No, I couldn't we were short staffed". In evidence, he explained this answer, saying that they were already aware of his difficulties.

32. Mr Rushmer Risby did not carry out any further investigations. After the conclusion of the second meeting, Mr Rushmer Risby decided to dismiss the Claimant for gross misconduct. He informed the Claimant of this after a break in the second meeting. He issued a dismissal letter on the same date, stating that the Claimant was summarily dismissed. The reason for the dismissal was stated as :

> Serious breach of Food Safety Standards which would potentially expose our guests, our team and the Company to serious risk.

33. Mr Rushmer Risby prepared a disciplinary outcome report summarising his conclusions. He found that each of the food safety issues had been proved with the exception of the issue numbered 16. He said that his understanding of the occupational health report was that administrative tasks were not highlighted as an activity to be avoided as part of the return to work process. The outcome report included the following paragraph :

> [The Claimant] discussed the medication that his is now taking to reduce the pain that he is experiencing due to his illness, however there is no record of [the Claimant] having expressed any concerns to any other member of management team in site or to his ROM, in respect of his ability to satisfactorily complete his job role, nor has there been any request on his part to revisit Occupational Health.

34. Mr Rushmer Risby was relying on the absence of any written record that the Claimant was unable to perform all aspects of his role. However, the Respondent had chosen not to make any record of the weekly meetings carried out by Mr Davies. The Tribunal finds that there were no weekly meetings when Mr Powlett took over as General Manager.

35. The Claimant appealed against his dismissal and an appeal hearing took place on 19 November 2018. Again, the Claimant reiterated the effect of his pain and medication on his ability to perform his job, and that he was working over 48 hours each week. He said that the Head Chef was still performing the role of Kitchen Manager and his role was more of a consultant.

36. The appeal was unsuccessful, and the Claimant was informed of the outcome of the appeal on or about 19 November 2018. Mr Adams referred to the Claimant's mitigation, namely his health and the site being short staffed. His conclusion was that these matters would not restrict him from checking and completing the Kitchen Record Keeping Book or completing daily checks.

37. The Respondent's Disciplinary Policy lists examples of gross misconduct which include :

> Behaviour likely to seriously damage the relationship between guests and the Company and/or to bring the Company into disrepute
>
> Failure or refusal to carry out legitimate reasonable instructions
>
> Any act which jeopardises or is likely to jeopardise any of the Company's licences or the Company's trading position
>
> Serious breach of Company health & safety rules (including food safety)

Relevant legal principles

Unfair dismissal

38. Where the Respondent's reason for dismissal is conduct, that is a potentially fair reason for the dismissal. The role of the Tribunal is to assess whether the dismissal of the Claimant was fair. It will be a fair dismissal if the Respondent genuinely believed in the Claimant's guilt, and if that belief was a reasonable one reached after a reasonable investigation (*British Homes Stores v Burchill* [1980] ICR 380). Finally, the gravity of the misconduct as reasonably believed by the Respondent must be sufficient such that it was reasonable to dismiss the Claimant for this misconduct. In assessing both the reasonableness of the investigation and of the decision to dismiss, it is not the role of the Tribunal to decide whether it considers that the investigation was sufficient or whether the misconduct was sufficiently grave to merit dismissal. Rather it must consider whether the investigation fell within the band of reasonable investigations and whether the outcome fell within the band of reasonable outcomes open to a reasonable employer. In other words, the dismissal will be fair if a reasonable employer could have dismissed for the misconduct, even if another reasonable employer could have decided that the conduct was insufficiently serious to merit dismissal.

39. It is possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between an employer and employee so as to justify summary dismissal, even if the employer is unable to point to any particular act that, on its own, amounts to gross misconduct – *Mbubaegbu v Homerton University Hospital NHS Foundation Trust EAT 0218/17*.

Disability

40. The statutory definition of disability in Section 6 of the Equality Act 2010 is as follows :

> A physical or mental impairment which has a substantial and long-term adverse effect on the Claimant's ability to carry out normal day to day activities.

41. The Tribunal must assess whether this definition is satisfied as at the date of the alleged discrimination, by reference to the evidence as to that point in time. The Tribunal is to deduce the extent of the impairment caused by the underlying condition, where possible, if the Claimant was not taking medication.

42. An impairment is long-term if it has lasted or is likely to last for at least 12 months. The phrase 'likely to last' means 'could well' last. An impairment is substantial if it is

more than trivial. The focus is on what the Claimant cannot do, rather than on what he can do.

43. The Tribunal must have regard to the Secretary of State's Guidance on matters to be taken into account in determining questions relating to the definition of disability. Of relevance to the present case :

> B2 : The time taken by a person with an impairment to carry out normal day-to-day activity should be considered when considering whether the effect of the impairment is substantial. It should be compared with the time it might take a person who did not have the impairment to complete an activity.

44. It is for the Claimant to prove, on the balance of probabilities, that he satisfies the definition of disability.

Discrimination arising from disability

45. Section 15 Equality Act 2010 is worded as follows :

(1) A person (A) discriminates against a disabled person (B) if-
   a. A treats B unfavourably because of something arising in consequence of B's disability; and
   b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

46. The first issue for the Tribunal to assess is whether the Claimant's dismissal was influenced to any significant extent by any consequences of the disability. This requires a focus on the reasoning in the mind of the dismissing officer, Mr Rushmer Risby. The Tribunal needs to consider the conscious or unconscious thought processes of the alleged discriminator, keeping in mind that his actual motive in acting as he did is irrelevant.

47. In *York City Council v Grosset* [2018] ICR 1492, the Court of Appeal considered the extent of knowledge that was required under Section 15(1). In short, there is none. If there is a causal link between the consequences of the disability and the dismissal, it is not necessary that Mr Rushmer Risby knew of that connection (see paragraph 39).

48. Section 15(2) provides a limited statutory defence. That is that there is no discrimination arising from disability if the Respondent shows that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability. However, as Sales LJ put it in *Grosset* "if the defendant does know that there is a disability, he would be wise to look into the matter more carefully before taking unfavourable action" (paragraph 47). By reference to an example at paragraph 5.9 of the EHRC Employment Code of Practice, he stated (at paragraph 51) that "it is not suggested that the employer has to be aware that the employee's

loss of temper was due to her cancer, but only that the employer should be aware that she suffers from cancer (ie so that the employer cannot avail himself of the defence in subsection 15(2))". Here if the employer knows that the Claimant suffered a bowel condition with some ongoing impairments, it is not necessary that the employer should also know of the Claimant's pain levels or their effects or that the medication taken for this condition had particular side effects.

49. If the dismissal decision was influenced by any consequences of the disability, then it is for the Respondent to show, under Section 15(1)(b) on the balance of probabilities that the decision was justified. That requires that the Tribunal form its own assessment of whether the dismissal was a proportionate means of achieving a legitimate aim. This is a different analysis from the range of reasonable responses approach required when considering the unfair dismissal claim.

50. In assessing proportionality, the Tribunal must assess whether on a fair and detailed analysis of the working practices and business considerations involved, the decision was reasonably necessary in order to achieve the legitimate aim (*Hardys & Hansons Plc v Lax* [2005] ICR 1565). In *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160, Lord Justice Elias said (at paragraph 26) :

> An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment — say allowing him to work part-time — will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and, if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified.

51. The EHRC Employment Code of Practice states as follows (at para 5.21) :

> If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.

Failure to make reasonable adjustments

52. The Tribunal must assess whether the Respondent applied a provision, criterion or practice which placed the Claimant at a substantial disadvantage in comparison to those employees not sharing her disability. If so, the Tribunal must consider whether a reasonable adjustment might have eliminated or reduced that disadvantage.

53. Paragraph 20 of Schedule 8 to the Equality Act 2010 is worded as follows :

> An employer is not subject to a duty to make reasonable adjustments if the employer does not know, and could not reasonably be expected to know …

that the employee has a disability and is likely to be placed at a disadvantage.

Conclusions

Unfair dismissal

54. The Tribunal's conclusion is that the investigation that took place fell outside the band of reasonable investigations that any reasonable employer in the position of the Respondent would have carried out. Any reasonable employer would have :

    a. Interviewed the current General Manager, Mr Powlett. He was the Claimant's line manager who could give direct evidence as to the extent to which the Claimant had been able to cope with the demands of the role over the ten-week period since Mr Davies had ceased to work at the Albert; and the particular demands on the kitchen during the week of the regular inspections. Mr Powlett had, on our findings, continued to pay Mr Adnam Hussain to perform the role of Kitchen Manager until the point at which he was suspended. It would have been important from Mr Powlett to establish the extent to which the Claimant was told to assume all the responsibilities of the role of Kitchen Manager at the point at which Mr Hussain was suspended. In addition, the Claimant was specifically stating during the course of the disciplinary process that he had specifically raised with Mr Powlett that he was unable to perform 100% of the role. A reasonable investigation would have asked Mr Powlett what he had been told by the Claimant about his difficulties in performing the role, given his health and the current staffing levels.

    b. Investigated the Claimant's health, given past failures to follow procedures and what the Claimant was saying in the course of the disciplinary process. An employer of the Respondent's size would have noted that the Respondent's process for returning an employee to full duties after an extended period of sick leave had not been followed. From the fourth week of the return onwards, there had been no regular reviews of the Claimant's fitness to work, at a point at which the phased return to work had not yet been complete. In circumstances where the Claimant had not been reviewed for the last 10 weeks, and was raising serious concerns about his fitness for his role, a reasonable employer would have carried out a further assessment of his health. This could have been done in a variety of ways, perhaps by asking the Claimant to provide a letter from his GP or perhaps by re-referring the Claimant to occupational health.

55. Some employers may also have chosen to interview other members of the kitchen team to find out more about the Claimant's ability to cope. This could well have been relevant in circumstances where others in addition to the Claimant had a responsibility for the contents of the Kitchen Record Keeping Book which was central to several of the allegations against the Claimant. However, we do not find

that the failure to interview these other members of staff in itself took the investigation outside the band of reasonable investigations.

56. In relation to the gravity of the misconduct as found by the Respondent, the issues can be grouped into the following categories. Some incidents related to failures to label products correctly, some related to food not being cooled in accordance with appropriate practices, some related to food being stored in an inappropriate place, some related to out of date products being retained rather than discarded, and some related to the Kitchen Record Keeping Book not being correctly completed.

57. Taken as a whole, within an eight-day period, these amount to serious failings in relation to the Respondent's food safety processes. Whilst there were fortunately no consequences for the Respondent's customers nor has the Tribunal been made aware of any adverse publicity as a result of these failures, the investigation identified potentially serious risks to customers' health. As Kitchen Manager, the Claimant remained responsible for food safety in the kitchen and was on duty on each of the days in which the inspections were carried out. Since Mr Hussain's suspension he would have realised that he would be expected, at least for the time being, to resume all aspects of his job unless he informed the Respondent that he was unable to do so.

58. Without any mitigating factors, given the Claimant's role, these breaches were sufficiently serious for a reasonable employer to regard this as a sufficient basis to dismiss for gross misconduct. This was particularly the case, given the wording of the Disciplinary Policy as cited above, giving examples of gross misconduct. These included series breaches of rules relating to health and safety (including food safety).

59. There were potentially significant mitigating factors in the Claimant's case. Firstly, the Claimant had an exemplary track record without any previous disciplinary sanction. He had been part of the team that had turned around a failing restaurant to one worthy of two of the Respondent's awards. The restaurant had never previously failed an inspection. Secondly, the restaurant was understaffed at the relevant time and this made it more difficult for the Claimant to attend to all of his administrative responsibilities, particularly with Adnam off work during the period in question. Thirdly, the Claimant was not 100% fit and the occupational health report had emphasised that even administrative duties should be varied until his energy levels were back to normal.

60. The first two matters are not in themselves matters that would have rendered a dismissal outside the range of reasonable responses, given the potential seriousness of the food safety failures. However, the third matter – his health - had it been properly investigated, taken in conjunction with the other two mitigating features, may have caused a reasonable employer to issue a lesser sanction than dismissal. We consider that if the Respondent had carried out a full investigation and so appreciated the extent to which they had failed to follow their own practices in assessing the Claimant's ongoing fitness for the full requirements of the role,

there was a 40% chance that the Respondent would have reached a different conclusion, and not dismissed the Claimant. There should therefore be a 60% reduction to the unfair dismissal award made to avoid the Claimant being overcompensated.

61. So far as contributory fault is concerned, we consider that there was no contributory fault. In order to a reduction for contributory fault under Section 123(6) of the Employment Act 1996, the conduct must be morally culpable. There was no moral culpability on the Claimant's part in failing to mention his difficulties to the the Respondent. The Claimant had spoken about his difficulties with management – with Tracey Beales, Adrian Powlett and with other managers. The primary responsibility remained on the Respondent to fully investigate the Claimant's health, given it knew or ought to have known that there may be residual health concerns after the end of the phased return to work period. The Claimant was attempting to soldier on given his pride in his job and his reluctance to take sick leave in circumstances where he was expecting to require further time off work for further major treatment later in the year. He cannot be fairly criticised for not doing more.

Disability

62. The Claimant was a disabled person, in that his impairment satisfied the statutory definition. His condition clearly continued to have an impact on his normal day to day activities that was more than trivial. He was unable to carry out heavy lifting and we have found that his concentration and memory was significantly impacted by the pain and the side effects of the medication for that pain. These symptoms had been present since November 2017 to varying degrees and could well last beyond November 2018, given that he was scheduled to have a second operation in October and would require a reasonable period of time off work thereafter whilst recuperating from that operation. It was therefore a condition that could well last more than 12 months and so was a long-term condition.

Reasonable adjustments

63. The Respondent had a practice that existing staff would cover for staff who were absent for relatively short periods whatever reason. This practice put the Claimant at a substantial disadvantage because it required or expected that he worked for 68 hours in the week in which Adnam was off sick. The effect of working 68 hours, given his current health condition, was to increase his stress levels and tiredness, in circumstances where his energy levels had not yet returned to the levels at which he had been previously performing.

64. We consider that the Respondent ought to have known the potential impact that this practice would have had on the Claimant. No attempt had been made to review his energy levels. His lower energy levels had been flagged in the occupational health report in April 2018. In addition, the Claimant had raised concerns verbally

with his line manager Adrian Powlett, after his return to work about his current energy levels and diminished ability to cope.

65. In these circumstances, we consider that steps should have been taken to reduce the impact of the practice on the Claimant's working hours. The Respondent has demonstrated that there were other managers who were potentially able to visit the restaurant - various managers attended the Albert during the first week in August, throughout the time that Mr Adnam Hussain was suspended. The Tribunal has heard no evidence from the Respondent that it would been impossible or particularly difficulty to have provided temporary cover for at least part of Mr Adnam's duties during the time that he was suspended. There has been a failure to make a reasonable adjustment in this respect.

Section 15 Equality Act 2010 – discrimination arising from disability

66. The Claimant's dismissal was a decision taken because of something arising in consequence of his disability. His performance at work was significantly impacted by his disability, namely his bowel condition and its consequences, in that he was in pain, he was tired, he was unable to concentrate for long periods of time, and his memory was impacted. These consequences of his disability were at least in part the reason for the food safety failures for which he was dismissed, even if the food safety failures were also in part the result of the understaffing.

67. Applying the guidance given in the *Grosset* case cited above, the statutory requirement under Section 15(1) has been satisfied. It is not relevant whether the Respondent knew the full impact of the Claimant's bowel condition so long as it knew or ought to have known sufficient facts from which to conclude that the Claimant satisfied the definition of disability.

68. The Respondent is unable to rely on its lack of knowledge as a defence to this Section 15 claim. That is because it knew of the Claimant's disability even if it had not accepted the facts amounted to a disability as a matter of law. It knew the facts that caused the condition to have a substantial adverse and long-term effect on normal day to day activities.

69. The final issue for the Tribunal to consider is whether the Respondent can establish that the decision to dismiss was a proportionate means of achieving a legitimate aim. The Respondent contends that dismissal was a step which was taken in order to safeguard the health of guests, the health of the team and the reputation of the company. We accept that these are potential legitimate aims. However, we do not consider that it was proportionate to dismiss the Claimant for these legitimate aims, given the findings we have made as to the understaffing in the kitchen at the time of the alleged misconduct, the Respondent's failure to take the reasonable adjustment of arranging suitable cover for Mr Adnam Hussain so that the Claimant would not have to increase his hours substantially during his absence to cover or partially cover his role.

70. Weighing the discriminatory impact of dismissing the Claimant against the health and reputational risks to the Respondent, its staff and guests, we consider that it was disproportionate to dismiss the Claimant. The failings noted during the first week in August were largely the result of the Claimant's inability to cope with the onerous workload in circumstances where his health and performance was significantly impacted by the consequences of his bowel condition.

Employment Judge Gardiner

Date : 17 October 2019