

JERSEY / JUDGMENT

Lukasz Aniol v Atlantic Hotels Limited

COURT

IN THE EMPLOYMENT AND DISCRIMINATION

TRIBUNAL

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IN THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

IN THE MATTER:

BETWEEN

Lukasz Aniol

CLAIMANT

AND

Atlantic Hotels Limited

RESPONDENT

TRIBUNAL

JUDGMENT

Reference: [2018] TRE 143 Hearing Date: 20th and 23rd May 2019 Before: Advocate C R Davies, Deputy Chairman Appearance: For the Claimant: In person For the Respondent: Advocate M Preston

JUDGMENT

The Tribunal finds that the claimant was not unfairly or wrongfully dismissed. THE REASONS The Claimant was employed by the Respondent as a pastry chef at the Respondent's hotel from July 2016 until August 2018 when he was dismissed for misconduct. In September 2018, the Claimant brought claims for unfair and wrongful dismissal. A further claim for holiday pay fell away after the Respondent (without admission of liability) paid the small sum of money that was in dispute. I was provided with an agreed file of documents for the hearing, which was very useful. Where I found a document to be particularly relevant, I have identified it in this judgement. I heard evidence on oath from a number of witnesses and I summarise below their evidence on the relevant points. I would summarise the background to the case as follows:

- a. During the course of his employment, the Claimant worked with a man named Krzysztof Kulaczowski. There was a difficult history between the two men. On 15 June 2018, during an intense argument, the Claimant accepts that he swore and put his hand on the neck/upper chest of Mr Kulaczowski, pushing him up against a wall. He 'lost it'. The Claimant said that Mr Kulaczowski had provoked him, Mr Kulaczowski denied that (the employer found that there had been provocation).
- b. Initially, not much happened. The Claimant's line manager reported an altercation to the general manager but Mr Kulaczowski made no formal complaint. Mr Kulaczowski did make a formal complaint of verbal and physical assault in July 2018 and on 3 August 2018, the Claimant was suspended pending an investigation. The investigation was concluded, a disciplinary meeting was held and on 31 August 2018 the Claimant was dismissed for gross misconduct the reason given being "you have admitted pushing a member of staff on his neck". There was an appeal in September/October 2018. The disciplinary action was upheld.
- c. It is fair to say that the Claimant apologised after the incident in June 2018, and that this incident was out of character. The Claimant had no disciplinary record with the employer and he was a very talented and conscientious employee. However, the fact remains that this was a very unpleasant incident in the workplace. The disciplinary process followed by the employer seems to me to have been thorough. The Claimant's case was built on several arguments. To summarise them: he had not received a staff handbook, and could not be expected to know that an incident of this type could result in summary dismissal for gross misconduct; he had been provoked, and that the employer had not put enough weight on that provocation; That there had been previous incidents in the work place (some of which involved Mr Kulaczowski) but that nobody had been dismissed or disciplined. To resolve this I heard evidence as to what the employer knew about those other incidents at the time they happened and saw the available records; The Documents The contract defers to the staff handbook on matters of discipline. The staff handbook refers to gross misconduct, one example given is "dangerous behaviour, fighting or physical assault". The outcome for cases of gross misconduct is stated to be dismissal without a warning and without notice. I saw the documentation from the investigation, disciplinary and appeal. I note that the Claimant was candid in admitting what had happened. The employer did consider the reason for the delay in the complaint being made, and the reason given by Mr Kulaczowski was that he had told the sous chef and Mr Nowakowski who said he would deal with it. The documentation appears to be in good order and suggests a reasonably well run disciplinary process. The correspondence sent to the Claimant was clear. The Claimant mentioned during the Tribunal hearing that he did not have an interpreter for every meeting, however a Polish speaking person was at the meeting and able to assist him. There was, in any event, no real dispute as to what happened on 15th June 2018. The Claimant raised a number of previous incidents, which, he felt, were handled inconsistently. I saw the disciplinary papers relating to those matters. The investigation notes support the Respondent's case that the facts reported at the time were less serious and that, where appropriate, disciplinary action was taken although none of the incidents resulted in dismissal. The Witness Evidence I would

summarise the relevant parts of the Claimants evidence as follows:

- a. He had an ongoing argument with Mr Kulaczowski, which related to a private matter. Mr Kulaczowski was causing problems for him outside the work place that were affecting his relationship with his partner. After exchanging words in the car park, Mr Kulaczowski had followed him into the building and challenged him. The Claimant accepted that he pushed Mr Kulaczowski up against a wall by placing one hand at the level of his neck. He also accepted that he was angry, that he lost control and wanted to scare his colleague. It was a stupid thing to do and he had let go quickly, realising that his actions were wrong. However, the Claimant felt that he had been provoked by Mr Kulaczowski, and that more weight should have been given to that;
- b. The Claimant knew that his behaviour was unacceptable and he apologised. It was only in late July 2018 that the employer took any action and when it did it had failed to take into account previous incidents which had involved physical and verbal conflict;
- c. The Claimant had not been given a staff handbook. If his behaviour was unacceptable, he should have been warned. He had not realised that an assault at work would be a disciplinary matter because of the previous incidents mentioned above; Karolina Frackowiak gave evidence in support of the claimant. Her evidence related to the previous incidents in the workplace. She told me that she had witnessed a fight between a member of staff and Mr Kulaczowski in the kitchen in December 2016, which resulted in facial scratching; an incident in January 2017 involving two employees where there was a push and an incident in July 2018 between her and Mr Kulaczowski when he had sworn at her – she had made a formal complaint. Nobody had been disciplined. Ms Frackowiak mentioned another incident between two members of staff where she had not been present but was aware of rumours. She accepted that the employer had asked her about one of the incidents and that she had not been particularly forthcoming at the time. Ms Frackowiak said that she had not been given a staff handbook. Joe Hepple also gave evidence in support of the Claimant, and he again spoke about the historic incidents mentioned by Ms Frackowiak. Again, he had perhaps not been particularly forthcoming in the information he had given the employer at the time of these incidents. He said that he had not received a handbook. Jarek Nowokowski, the Claimant's line manager at the time, gave evidence about the incident – which he had heard but not seen. He reprimanded the Claimant and reported the incident to the hotel manager (Mr Walley). Mr Walley had not done anything to investigate at the time. Mr Nowakowski had not been asked to give a statement during the investigation and he felt that was wrong. I note that Mr Nowokowski had not seen the incident, and that he did provide information for the appeal process. Patrick Burke is the managing director of the Respondent. Inevitably, day to day he relies greatly on his managerial staff and in particular on the general manager. A relatively small business, the Respondent took external advice on human resources issues and had done so throughout this disciplinary process. As soon as Mr Burke became aware of the incident, he initiated a formal process and appointed people to deal with it. He did not take any role in the investigation or disciplinary process

himself, so that he could deal objectively with any appeal. Mr Burke explained how he had conducted the appeal, and described a thorough and careful process. Before the appeal hearing he invited the Claimant to produce information and evidence about the other incidents that had happened in the past, and he made sure that he had a good understanding of the Claimant's concerns – which were essentially the same as those at the heart of this claim. At the appeal hearing, Mr Burke had listened to the claimant and to his witnesses. He considered each ground of appeal. Mr Burke looked into the previous incidents, he could find no record of some and the others were not comparable – based on what the Hotel had known about them. In any event, disciplinary action short of dismissal had been taken where appropriate. When he wrote to the Claimant on 30th November 2018 to tell him that the appeal had not been upheld, Mr Burke explained his decision. In his evidence, Mr Burke (candidly) explained that the kitchen could be a stressful environment and there are minor incidents from time to time, but none that would compare with the assault admitted by the Claimant. Whilst he upheld the summary dismissal because of the physical assault, Mr Burke did accept that Mr Kulaczowski had sworn at Ms Frackowiak in an earlier incident without a serious consequence and that the Claimant was entitled to similar leniency in that regard. He also concluded that the Claimant had been provoked and that this had triggered the incident - but found that this did not excuse his behaviour. It was difficult to fault the process described by Mr Burke and I felt that it was important to him both to be fair and to be thorough. He did not find the decision easy, and held the Claimant in high regard as a chef. I heard evidence from Treena Burke, who has an administrative role in the business and is a Director of it. Mrs Burke had not taken an active role in the investigation or disciplinary process. She had been the note taker at the appeal. Mrs Burke felt that the Claimant had received a staff handbook, and pointed out that he accepted that to be the case at the disciplinary hearing. She said that a copy of the handbook is also kept on the staff notice board. The hotel now has a new procedure in place to make sure that all staff sign for handbooks early in their employment. I heard evidence from Mr Kulaczowski, who described the Claimant as a complicated character. He did not accept that he had provoked the Claimant and said that Mr Aniol had thrown himself at him and grabbed him with no warning. He had delayed in reporting the incident formally because he hoped that the atmosphere between him and some of the kitchen staff (including the Claimant) would improve. When it did not, he made the complaint. It is hard to believe that this incident happened completely 'out of the blue' and I agree with the employer that there was provocation. I also find that Mr Kulaczowski may have exaggerated the incident to some extent. However, the findings ultimately made by the employer were correct and not disputed. Nicholas Walley gave evidence. He was the hotel manager at the relevant time and was experienced in dealing with disciplinary matters. In June 2018, Mr Nowakowski had told him that there had been an argument between the Claimant and Mr Kulaczowski, but his understanding was that it was minor, that there had been an apology and that it had been resolved. He was not told the detail of what had happened and was not aware of any allegation of physical assault. When a complaint was made some time later, he had been the disciplinary officer and had made the decision to dismiss based on the evidence he had and

the admissions made by the Claimant. The Facts I find the following facts: I find that the Claimant probably did see a copy of the staff handbook, but I understand why he may have forgotten that to be the case. If I am wrong in that, I find that any reasonable employee would think that a physical incident of this kind in the workplace would be considered gross misconduct and could lead to dismissal – that seems to me to be common sense; On or around 15th June 2018 the Claimant ‘lost it’ in the workplace and put his hand against the neck area of a colleague, pushing him up against a wall. He was very angry. The Claimant had been provoked and was apologetic. I find that this was for any employer a very serious incident in the workplace;

- c. I find that the incident was reported to Mr Walley, but that he was not told how serious it had been. When a formal complaint was made, the employer dealt with it reasonably quickly;
- d. The investigation, disciplinary process and appeal were conducted fairly – both substantively and procedurally;
- e. There had been previous unpleasant incidents in the workplace between staff. It is entirely possible that the employer was not given the full facts about those incidents, but it had acted appropriately based on what it knew. Action had been taken where appropriate, but none of these incidents (as they were reported at the time) was on a level with the conduct of the Claimant. The Law The Law in this area is well rehearsed. Article 61 of the Employment (Jersey) Law 2003 (the ‘Law’) states that an employee shall have the right not to be unfairly dismissed. Article 64 of the Law states that the employer is required to show a fair reason for the dismissal. In this case, the employer’s reason for dismissing the Claimant was his misconduct. That is a potentially fair reason for dismissal. The Tribunal must then decide whether the dismissal was fair or not by considering whether in all the circumstances (which includes the size and administrative resources of the business) the employer acted reasonably or not in treating the Claimant’s actions as a reason for dismissal. I must make my decision in accordance with the principles of equity (fairness) and the substantial merits of this case. Where misconduct is the reason for dismissal, the Tribunal is guided by the legal test established in the English case of *British Home Stores Limited v Burchell* [1980] 1CR

303. The employer has to show that:

- (i) he believed the employee was guilty of misconduct; (ii) he had in his mind reasonable grounds upon which to sustain that belief, and (iii) at the stage at which he formed the belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances. I must decide whether the employer’s decision to dismiss the Claimant fell within the range of reasonable responses of a reasonable employer in all the circumstances of the case. I must not try to put myself in the shoes of the employer. The application of the law to this case is straightforward bearing in mind the facts that I have found. The misconduct was admitted, but the employer in any event carried out a proper investigation. I cannot say that the decision to dismiss was outside the range of reasonable

responses. I do not feel that the process used by the employer was defective. I find that the dismissal was not unfair. Was this gross misconduct? I find that it was. An act of aggression such as this in the workplace, where one employee assaults the other by placing a hand on their neck to push them against a wall must go to the root of a contract of employment. The staff handbook covers it, but in any event, I do feel this is common sense. Has there been a wrongful dismissal? In other words, should the Claimant have been paid a notice period. I have found (and he admitted) the facts of his behaviour. I have found that this behaviour was sufficient to amount to gross misconduct. The breach of contract by the employee was sufficient to enable the employer to terminate the relationship without notice. Lastly, I would like to thank the Claimant and Mr Burke for the way that they conducted themselves during this case, they were courteous to each other and to the Tribunal throughout this hearing. This claim is dismissed. Advocate CR Davies, Deputy Chairman Date: 29 July 2019

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