



EMPLOYMENT TRIBUNALS

Claimants: Mr R Cartwright (deceased)
Mrs J Cartwright

Respondent: R & M Gaskarth

HELD AT: Manchester **ON:** 1, 2 and 3 February 2017

BEFORE: Employment Judge Sherratt
Mrs A Booth
Mr P Stowe

REPRESENTATION:

Claimants: Mr A Robinson (Friend)
Respondent: Mr T Gilbert, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that each claimant's claims are dismissed.

REASONS

Introduction

1. The claimants brought their respective claims in July 2016 and at a preliminary hearing on 8 September 2016 Employment Judge Franey combined the two cases. At that hearing, when the issues for determination by the Tribunal were agreed, Mr Cartwright was represented by a solicitor
2. Sadly the Mr Cartwright died in December 2016 and this Tribunal appointed Mrs Cartwright under section 206 of the Employment Rights Act 1996 to continue his claims.
3. Employment Judge Franey set out the complaints and issues in his Case Management Orders as follows:

Mr R Cartwright – Case No. 2401821/2016

Unfair Dismissal

1. Can the respondent show a potentially fair reason for dismissal, namely a reason relating to the claimant's capability?
2. If so, was the dismissal fair or unfair?

Direct disability discrimination – section 13 Equality Act 2010

3. In dismissing the claimant, did the respondent treat him less favourably because of his disability than the respondent treated or would have treated another person?

Discrimination arising from disability – section 15 Equality Act 2010

4. Was the dismissal of the claimant unfavourable treatment because the respondent was looking for the opportunity to dismiss the claimant for financial reasons to replace joint managers with a single manager?
5. If so, was that something which arose in consequence of the claimant's disability in that the claimant's disability gave the respondent the opportunity to take that course of action?
6. If so, can the respondent show that the dismissal of the claimant was a proportionate means of achieving a legitimate aim?

Remedy

7. If any of the above complaints succeed, what is the appropriate remedy?

Mrs J Cartwright – Case No. 2401822/2016

Unfair Dismissal

8. Can the respondent show a potentially fair reason for dismissing the claimant, being some other substantial reason in that following the dismissal of Mr Cartwright the claimant could not continue as a manager when joint managers were needed?
9. If so, was the dismissal fair or unfair?

Direct disability discrimination – section 13 Equality Act 2010

10. In dismissing the claimant did the respondent treat her less favourably because of Mr Cartwright's disability than it treated or would have treated another person?

Harassment related to age – section 26 Equality Act 2010

11. Was the claimant subjected to unwanted treatment related to her age by Mr Smith on 23 February and 9 March 2016 when he made comments to the effect that the claimant was old enough to have her pension, was over 50 and too old to run a pub, and that a younger person would be a better approach?
12. If so, did that conduct have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Remedy

13. If any of the above complaints succeed, what is the appropriate remedy?"
4. At the hearing evidence for the respondent was given by Mr H Smith, director, who made the decision to dismiss the claimants and by Mrs S Baker, Financial Controller, who dismissed their appeals. Mrs Cartwright gave evidence. The case for Mr Cartwright was based upon the contents of his application to the Tribunal and what he is noted to have said in the meetings where transcripts have been provided. There was a bundle containing approximately 120 pages.

Findings of Fact

5. The claimants were employed by the respondent, which is an unlimited company, on a joint contract made on 29 October 2003, to manage licensed premises at The White House, Oldham, from 21 November 2003 until determined in accordance with the terms of the agreement.
6. Within the agreement at paragraph 23.4:

"The manager or manageress may be required during the course of employment to attend a doctor or clinic nominated by the company for the purpose of a comprehensive medical examination to determine fitness for continued employment..."
7. Paragraph 24 dealt with termination by notice and following the probationary period the notice provision was not less than three calendar months' written notice. The contract referred to a pension scheme which both claimants were members of. It was a final salary scheme.
8. In his claim form Mr Cartwright was stated to have had a liver condition for at least five years which had been known to the respondent. He had coped reasonably well with the work despite the condition. The claimant was said to be a disabled person for the purposes of the Equality Act 2010 by virtue of suffering from a liver disease (cirrhosis) which has a significant impact on his day-to-day activities but not to the extent that he could not fulfil his contractual duties.
9. In the grounds of resistance filed on behalf of the respondent it was conceded that the first claimant was a disabled person as defined, but denied that the respondent had discriminated against him on the grounds of his disability as alleged or at all.

10. Mrs Cartwright accepted that she and Mr Cartwright had been made the subject of performance management procedures in 2006 and 2010 resulting in an improvement in the financial performance of The White House. There were no further procedures but in early 2016 by a letter dated 13 January Mr Humphrey Smith writing in the capacity of Area Manager wrote to the claimants inviting them to a performance review meeting. He referred to the previous process between October 2010 and November 2011, and then stated that in the first six months of the company's financial year the takings were down by nearly 20% compared with the previous year and the premises had made a loss of £9,056 which he said was unsustainable. He felt he had no alternative than to start the capability performance procedure again and this would start at a meeting on Wednesday 20 January 2016 at the premises. The meeting was to give the opportunity to discuss poor performance and the reasons for it and to try to agree targets going forward and future dates for review. The claimants were entitled to be accompanied by a work colleague or trade union representative. If they were unable to attend they were to contact Mr Smith.

11. Mrs Cartwright contacted Mr Smith to say that Mr Cartwright had a hospital appointment on 20 January 2016 and so she asked him to rearrange the meeting. She told Mr Smith that Mr Cartwright had a valid sick note and according to her Mr Smith said, "I cannot discipline you can I if you're off sick", then put the phone down after which there was no further contact with him. In cross examination Mr Smith accepted what Mrs Cartwright says he had said to her on the phone when she rang him on 14 January 2016. She understood it to be the law that if someone was on sick they could not be disciplined.

12. Mr Smith decided that Mr Cartwright's medical condition should be investigated and sought a report from Dr Ian Pinder, the respondent's Occupational Health adviser. We have no evidence as to the content of any letter or words of instruction given to Dr Pinder.

13. It would appear that Mr and Mrs Cartwright were not made aware by the company of the referral of Mr Cartwright to Dr Pinder. The first they became aware of it was when Dr Pinder's secretary rang to ask them to attend for an appointment. Because Mr Cartwright was unwell they could not attend at his surgery and it was later arranged that Dr Pinder would visit them at The White House.

14. Dr Pinder prepared a medical report on Mr Ronald Cartwright on the basis of seeing him at home on 2 February 2016. According to the history Mr Cartwright had been suffering from liver disease for over five years, confirmed by medical certificates. He had been coping fairly well until September 2015 when he started with increasing breathlessness and weakness. Tests had been inconclusive but confirmed the previous diagnosis. He was on multiple medications but was not improving. He was awaiting an appointment at the chest clinic to investigate changes on his chest x-ray. At present he was quite breathless and had to stop when going up the stairs in the pub and could hardly walk outside. He was quite weak and unable to sleep well. On examination he was said to be breathless moving around the room on the level. In the opinion of Dr Pinder he was not fit to be at work and there was no prospect of him regaining the fitness required to manage a pub. He would be prepared to support ill health early retirement if available under the pension

scheme. Dr Pinder describes himself as an Occupational Physician with the letters FRCP Edin and AFOM after his name.

15. Mrs Cartwright gave evidence as to the visit from Dr Pinder. He arrived as arranged and she took him upstairs to the flat where Mr Cartwright was sat in the chair. At no time did Dr Pinder ask to examine him or determine his illness. He did not leave the chair. The only time Dr Pinder touched him was to shake his hand on entering and leaving.

16. The report was provided to Mr Smith who wrote to Mr Cartwright on 19 February 2016, noting that he had been absent from work due to ill health on two separate occasions from 5 September to 1 December 2015 and 10 January to 11 March 2016. He supplied a copy of the report of Dr Pinder and wanted to arrange an informal meeting on Tuesday 23 February 2016 at The White House to discuss the health assessment and to ask Mr Cartwright for his view on the content of it. They would also discuss his intentions in relation to returning to work with the opportunity to put forward any suggestions Mr Cartwright may have on how the company could assist. Mr Smith would conduct the meeting and a recording would be made. Mr Cartwright could bring a fellow employee or trade union representative.

17. Sick notes for Mr Cartwright were provided in the bundle. On 4 September 2015 Mr Cartwright had a viral illness and was off work for a week. On 11 September 2015 he was off from 11-25 September in respect of "cirrhosis of liver NOS". This period of absence for the same condition was extended on 1 October to 1 November 2015. On 11 January 2016 he was to be off until 25 January 2016 as a result of cough, breathlessness. On 29 January 2016 he was off with a chest infection to 12 February 2016, and on 12 February for breathlessness, under investigation, he was to be off for four weeks, taking him to the anticipated 11 March 2016 date in Mr Smith's letter.

18. The meeting took place on 23 February 2016. Mr (RC) and Mrs (JC) Cartwright were both present and they were assisted by Mr A Robinson, a friend (AR). It was this Mr Robinson who represented the claimants before us at the hearing.

19. Mr and Mrs Cartwright recorded the meeting and their transcript of it, typed out by another friend, was in the bundle. According to Mrs Cartwright it was a complete transcript. Mr Smith (HS) did not accept that it was complete and/or some of the things that were in it, but from our perspective we have no reason to doubt that it represents what was said at the meeting. Had the parties wished to take issue with the content of the transcript then we take the view they would have done so prior to the hearing because Employment Judge Franey made provision for a copy of the recording to be provided.

20. When Mr Smith arrived Mr Cartwright got out of bed and joined the meeting. The discussion was as follows:

"HS: Well we're here to talk about your health so what do you want to do?"

- RC: Well yes, I want to get better, I want to get over this pneumonia and get support more.
- HS: Well we had a medical report from the Dr Pinder, what about this disease? You do have a disease don't you?
- RC: I have had chronic cirrhosis of the liver but I have carried on working with it and I have had very little time off unless they wanted to investigate the illness.
- HS: In their opinion it states that you are not fit to be in work doesn't it?
- RC: Yes, that is their opinion, however they are a specialist and none of the others said that. They specialise in liver disease.
- HS: Are you both on sick at the moment then?
- RC: Yes.
- HS: How long have you been here then?
- RC: In the pub 13 years.
- HS: You are both members of the pension scheme aren't you?
- JC: Yes we are.
- HS: I don't want to ask your ages but presumably you are both over the age of 56 aren't you?
- JC: I am 57 and Ronnie is 59.
- HS: Is it worth you looking into the pension scheme as it is an exceptionally generous pension scheme isn't it and you have both been here a long time? You will get a good lump sum and a good pension.
- RC: It's only £14,000.
- HS: Have you looked into that, have you
- JC: Yes.
- HS: And you chose not to take?
- JC: It is not my recommendation. They have recommended Ronnie finish on ill health but mine is just a temporary thing.
- HS: Well the doctors have advised this. The takings are down 10% last year and we have got the minimum wages rising so we will be losing £20,000 this year.
- RC: Even though I have been quite ill the takings have gone up.

- HS: Lost £3,000 in takings and you've spent £180 on maintenance and you only have to look at the building.
- RC: Your building, Mr Smith.
- HS: Maybe not but if we are losing £20,000 before we spend on maintenance we are going to lose more. I mean its all going out in your salaries and pensions. I am putting the best part of £10,000 into your pension scheme and your salaries, they are going to have to go up because of the minimum wage, it just isn't sustainable.
- RC: I'm too ill to do this.
- HS: Do you think all of our pubs are losing money? I mean how do we survive?
- AR: That's not the issue here today.
- HS: Apparently you don't want to retire so do I just have to wait until you are fit?
- RC: What about going down the disciplinary procedure?
- AR: If we are talking about them being finished is there a medical report?
- HS: Well I have got this medical report and I am told that I have to go with the findings of Dr Pinder's report.
- JC: He hasn't said he hasn't agreed, you have put there 'what can we help you with?'
- RC: What support would you give us?
- HS: As I understand with this report it says Mr Cartwright is not fit to be at work and no prospect of returning, would you agree with that?
- RC: I'm not a medical practitioner, all he has done is talk to us. My specialist says I have done very well dealing with it.
- AR: So what are the options here, Mr Smith? You obviously want to look at Ronnie retiring but then what about Joan because we will be looking at a single management?
- HS: Well I don't want to go down the disciplinary procedure but I can't afford to keep making these losses.
- AR: So how will you support Joan, you have already gone as far as your figures are concerned?
- HS: Well what can I give her? I can't have licensee without making the pub pay?

AR: Are you likely to make £20,000 per week profit?

HS: This pub makes a profit (Reference was made to another pub but in a Town Centre and then another one without passing trade).

AR: Can I ask you one question? Why are we here today, Mr Smith?

HS: Because of the medical report and I mean how long have you been off sick?

JS: September he had four weeks.”

21. The transcript continues for many pages with some matters being particularly relevant because they relate to particular items in the List of Issues.

22. As to retirement Mr Smith asks if he has said to Mr Cartwright to medically retire with Mr Robinson saying no, that was what the medical report had suggested, and he thought the meeting was about their capability rather than other matters discussed at the meeting. Mr Robinson thought one was dealing with ill health the other was looking at capability. Mr Smith asked “What about Mr Cartwright retiring on ill health?” and he responded that his liver “was not the problem at the moment, it was the pneumonia. People could not always recover from pneumonia and he did not think he would ever recover from...” Mr Cartwright went on to say that he did not agree with Dr Pinder’s report. It was not cirrhosis of the liver keeping him off work it was the shadow on his lung which were two completely different things. Mr Cartwright then said that it was only the opinion of Dr Pinder after talking to him that there was no prospect of him being fit to run a pub or to be at work.

23. Mrs Cartwright made some comments as to Mr Cartwright’s health. They told him he had a chest infection, they told him he was not fit to work because of the coughing as it is not good for people waiting to be served. He had worked all Christmas and had to go on sick in January because he was worse than he was then.

24. Mr Robinson put it to Mr Smith that what he was saying was that he wanted both parties to retire due to ill health and Mr Smith said he could not continue like this and he had to do something about it as he had been losing money for years.

25. Mrs Cartwright said she had been to see the doctor and she was on medication and she had been asked to be off for four weeks. They were sleeping in separate rooms because they were keeping one another awake with coughing. They had never been off at the same time before. She ended up in hospital before Christmas.

26. Mr Smith said, “Then you will need to take early retirement as the pub has been losing money for years”. Mr Robinson put it to Mr Smith that what he was saying was that they were not trying hard enough to make money in the pub and Mr Smith said he just could not carry on losing money and he was paying into their pensions. The doctor had stated they were not fit to work and it was unsustainable. It was not sustainable for the brewery.

27. There was later another reference to age when Mr Smith says, "You are 59 and under the national rules you are pensionable age. I mean how much is the pension that you get on the variable scheme?". He said that their situation had to be sustainable. If Mrs Cartwright was to run the pub singlehandedly he would want to go through a procedure to ensure the pub did not make a loss. If she was employed as a single manager she would get paid the same wage. He would expect her to work for the required hours of work and to work 38 hours a week but there needed to be profit. If Mrs Cartwright came back to work he would continue with the capability route.

28. The discussion went on about how things might work with Mrs Cartwright being the sole manager and how the business might be improved with Mr Smith confirming that if she wanted to remain as a manager then she would go on performance related procedures. Mr Cartwright said he would see his doctor on 4 March and if the doctor advised him about retiring then maybe they could look at going down that road but he did not want to decide before he saw the specialist again. He and Mrs Cartwright would need to sit down and talk after seeing the specialist and perhaps they could get back in touch for a further meeting?

29. Mr Smith during the meeting made it clear that in his view the pub was unsustainable. If Mrs Cartwright became the single manager he would not allow her a grace period. He thought he was entitled to start a performance process right away as it was a long process. He did not think this would amount to constructive dismissal.

30. With further reference to the pension scheme Mr Smith is quoted as saying, "well I suggest that both of you retire as the fantastic pension scheme allows to do that, that's where I started off didn't I?"

31. After the meeting Mr Smith wrote to the claimants on 24 February 2016. In his letter he noted that Mr Cartwright was sick in bed upon his arrival but got up especially to attend the meeting. They had discussed Dr Pinder's health assessment. Mr Cartwright indicated he did not agree with the content and indicated he had pneumonia. Dr Pinder had reached the clear conclusion that he was not fit to be at work and there was no prospect of him regaining the fitness required to manage a pub. Mr Cartwright indicated that he would consider ill health retirement but only after his next GP appointment scheduled for the first week in March. Mr Smith confirmed he was happy to wait until after the appointment for them to decide how best to proceed and he would schedule a further meeting for the week commencing 7 March. If Mr Cartwright did not elect for ill health retirement then they would have to make a decision whether or not in the light of the doctor's report it was appropriate to terminate Mr Cartwright's contract of employment by reason of lack of capability, and if Mr Cartwright had decided not to retire he would have to hear from Mr Cartwright as to why his employment should be allowed properly to continue including consideration of any medical evidence he may wish to produce. A decision could then be made. There was a joint contract of employment and if Mr Cartwright's employment was to continue this would remain the position, but The White House was showing an annual loss of approximately £30,000 in a full year which was unsustainable and would need to be addressed, either in terms of their ongoing ability to manage The White House jointly or the feasibility of Mrs Cartwright

managing it herself. They would leave the situation to be addressed until after a decision was made in respect of Mr Cartwright.

32. Mr Smith wrote again on 2 March 2016 referring to their 23 February meeting and Dr Pinder's report and conclusions. At the meeting he wrote Mr Cartwright indicated that in the circumstances he would consider ill health retirement, but only after his next GP appointment scheduled for the first week in March. He invited them to a meeting on Wednesday 9 March at The White House to discuss the contents of Dr Pinder's report and any recommendations made by their GP. If Mr Cartwright had decided not to elect for ill health retirement they would have to make a decision whether or not in the light of Dr Pinder's report it was appropriate to terminate his contract of employment by reason of lack of capability.

33. The meeting duly took place on 9 March attended by the claimants, accompanied by Mr Robinson, and Mr Smith but neither side appears to have recorded it and neither side has produced any notes of what was said at the meeting.

34. In Mrs Cartwright's written statement to the Tribunal she refers to the 9 March meeting as being an update on the wellbeing and health of Mr Cartwright, but it had the same tone and content as the 23 February meeting with Mr Smith coming in, being on the telephone asking how much had they lost. Mr Robinson witnessed Mr Smith calling them "leeches, lazy and idle" and told Mr Smith he had never experienced behaviour like it by someone in his position. At the meeting Mr Smith dismissed them both on three months' notice. Mr Cartwright was dismissed "on ill health without reasonable evidence or not going out of sickness guidelines and myself as joint manager without even considering single management."

35. In his ET1 Mr Cartwright states that at the meeting of 9 March "no opportunity was given for any advice to be considered despite what was stated in the letter of 2 March. In the letter confirming the outcome of 9 March the respondents say that the claimant had seen his specialist and accepted that the medical reasons he had no option but to retire. This is wholly and completely untrue. In fact at the date of dismissal the claimant was fit to work. In the letter of 9 March the respondent made significant reference to the financial difficulties of The White House and in fact had been raising these issues with the claimant and his partner for some time before the dismissal. The claimant maintains that his health issues were being used as an excuse to dismiss and that no reasonable employer would have dismissed based upon the evidence available at the date of dismissal."

36. In his witness statement Mr Smith, referring to the 9 March meeting, had intended to record it but his recorder failed to work. They discussed Mr Cartwright's health assessment by Dr Pinder and the subsequent appointment with his GP:

"Mr Cartwright acknowledged that, for health reasons, he had no option but to stop work in the light of the medical opinion. He did, however, say that he would not wish to terminate his employment by resignation but wanted us to early retire him. I confirmed that I was happy to proceed on that basis and confirmed that I would give Mr Cartwright three months' notice. Mrs Cartwright suggested that she might be able to run The White House as a single

manager, if necessary for a trial period. The White House had in fact been running at a loss for each of the 11 years that Mr and Mrs Cartwright had jointly managed it. In order to make it sustainable it would required 50% increase in take which I concluded could not realistically be achieved under single management. That decision was based entirely on my assessment of Mrs Cartwright's ability to run the pub successfully on her own. I confirmed my decision by a letter dated 9 March 2016, namely that both Mr and Mrs Cartwright were given three months' notice of termination. I confirmed their right of appeal."

37. Mr Robinson asked Mr Smith some questions about the 9 March meeting. He did not think there was a great argument about what was said at the second meeting. It went over the same ground endlessly as the previous one. None of the figures produced by Mrs Cartwright showed break even. It showed a pay rise for her. The requirement must be for the pub to break even. With such a small take a 50% increase was not a lot of take. He would say 50% was too much in a busy pub. Previously they did increase it to break even. They discussed her proposals at the meeting but none of them showed the pub breaking even. They were not able to micromanage. It was up to the manager to do the job. It was not the Area Manager's job to micromanage the business of The White House.

38. The evidence of Mr Smith was that Mr Cartwright was dismissed because of the content of Dr Pinder's medical report. Mr Smith did not need to get a more detailed report because Dr Pinder was definite in his conclusion. Mr Smith was aware of the reference to liver trouble for over five years in Dr Pinder's report.

39. At this point Mr Robinson accepted that the liver complaint did not affect Mr Cartwright running the pub.

40. Mr Smith continued and said he was entirely governed by the report of Dr Pinder. As he recalled it, and his memory was not of the best, Mr Cartwright said he could not continue. He wanted a couple to run the premises rather than a single manager. A couple had come to The White House since the claimants had left and it was not yet in profit although it was getting better. He felt that the dismissal of the claimants was the right decision.

41. As to Mrs Cartwright working as a single manager he looked for figures. Her figures did not show it breaking even. She wanted money for herself. There was no suggestion as to how the pub could operate profitably.

42. Following the meeting Mr Smith sent the claimants a letter on 9 March 2016. It included:

"The meeting, which lasted for over 1½ hours, was to discuss Mr Cartwright's health assessment by Dr Pinder dated 2 February 2016 following Mr Cartwright seeking his own medical advice. Mr Cartwright had seen his specialist and accepted that for medical reasons he had no option but to retire. He did, however, not wish to tender his own resignation but required us to early retire him. This I hereby do giving Mr Cartwright three months' notice from the date of this letter.

Mrs Cartwright asked for a trial period running The White House as single manager, a possibility I have considered since our last meeting. As we discussed, and as the enclosed figures show, a loss has been made in The White House in every one of the 11 years that you have joint managed it. To make The White House sustainable would require a 50% increase in take from the present level which realistically cannot be achieved under single management, particularly given your record of managing The White House as a couple. No less than a total of £226,731 has been lost in the business of The White House during your period of joint managing the premises and a great deal of further investment needs making by the company in the building's fabric.

In the circumstances, and given that your contract is for joint management, I hereby give Mrs Cartwright too three months' notice from the date of this letter."

43. The right of appeal was given.

44. Before receiving that letter Mrs Cartwright had on 9 March sent by email a formal grievance to the respondent's HR department:

"We wish to raise a formal grievance against Mr HRW Smith based on the grounds of unreasonable behaviour in the sickness and absence meeting held at The White House today on the following grounds:-

- (1) At no point did Mr Smith enquire as to Mr Cartwright's health and prognosis as stated in the letter dated 24/2/2016.
- (2) At both meetings Mr Smith brought profit and loss sheets and discussed at the onset and at length that The White House has been losing money for the entirety of our management and compared our takings and salary with the Hark to Topper. Two entirely different locations, breaking confidentiality.
- (3) Mr Smith discussed at last meeting the option of me taking over as single management and asked me to provide proposals which I did and then today gave me three months' notice and stated that I should uptake by 50% which was unachievable in the current climate."

45. On 10 March Jane Lindsay in the respondent's HR Department acknowledged the email sent by Mrs Cartwright saying that she proposed the email be treated as an appeal. She wished to give them the opportunity to confirm that the email set out fully the grounds of the appeal now that they had received the letter from Mr Smith. Once this was confirmed she would let them know the arrangements for a hearing.

46. On Tuesday 15 March 2016 when in possession of the 9 March letter from Mr Smith Mrs Cartwright sent a further email. She said:

"I thought it would be prudent, following the letter we have received today, to give you an insight into the way both Ronnie and I are feeling. We have just returned to work after a bout of pneumonia, after 13 years of loyal service to,

what we thought was a company that valued our loyalty, cared and took their duty of care seriously enough to support us through difficult times in our lives.

Please do not think that we believe that all upper management within the company feel the same contempt for their employees as Mr Smith, as our dealings so far with yourself have shown us. As a result of the letter we received today, I would ask that the communication between Mr Smith and ourselves ceases until the process is concluded. We are under no illusions that Mr Smith feels nothing but contempt for us, and has demonstrated his dislike of us, at length, in both meetings he has had with us.

As you can imagine, to suffer a bout of such a serious illness as pneumonia, would leave even the strongest person with low mood issues and feel that any more letters itemising any apparent 'failures' could be of a negative nature, would do serious harm to our recovery, and could be deemed as bullying and harassment. I hope you can understand the predicament we are in and can empathise with us."

47. Jane Lindsay arranged for Sue Baker, the company's Financial Controller, to hear the appeal at which they would have the opportunity to put forward full grounds of appeal and the company would have the opportunity to respond. They were told of their right to be accompanied.

48. The appeal meeting took place on 7 April 2016 at The White House. Present were Mrs Baker who heard the appeal, Mr and Mrs Cartwright and Mr Robinson, their companion. Mrs Baker recorded the appeal hearing and a transcript was later produced. The meeting lasted one hour 20 minutes.

49. Mrs Baker confirmed that Mr Cartwright had been dismissed based on a health assessment carried out by Dr Pinder and because it was joint management Mr Smith had given them both three months' notice. They appealed initially because the meeting to discuss Mr Cartwright's health on 23 February was unreasonable; secondly there was no intention of allowing Mrs Cartwright to carry on as single manager; and third that they had requested a breakdown of the alleged losses which they had not had.

50. Mr Robinson raised the question of the second meeting on 9 March saying that he had put the proposals Mr Smith had asked for but he said he was not interested. They had leached off the company for long enough and he thought they both needed to retire. That was the opening gambit to the meeting.

51. Nowhere in the meeting notes do either Mr or Mrs Cartwright take issue with the statement in Mr Smith's 9 March letter to the effect that Mr Cartwright accepted that for medical reasons he had no option but to retire, he did not wish to resign but required the company to early retire him with three months' notice.

52. After the appeal meeting there was some delay. By 19 April 2016 Mrs Baker was still awaiting the transcript. By 29 April 2016 Mrs Cartwright was again pressing for a response to the meeting.

53. Mrs Baker wrote to Mr and Mrs Cartwright on 10 May sending them a copy of the transcript and a breakdown of the £226,000 cumulative losses. She noted the reason for the giving of notice was based on the medical report by Dr Pinder, whose opinion was that Mr Cartwright was not fit to work and there was no prospect of him regaining the fitness required to manage a pub. She referred to them explaining to her in the meeting that Mr Cartwright was subsequently diagnosed with pneumonia and had returned to work. Under the circumstances she believed it would be sensible for Dr Pinder to meet with Mr Cartwright again to discuss the current situation regarding his health and the future prognosis and it would be helpful if he could have access to Mr Cartwright's medical records.

54. Mrs Cartwright responded noting that the initial consultation with Dr Pinder was not a comprehensive examination as set out in the terms and conditions. Had the respondent come to the conclusion that the decision to give notice of termination was a breach of contract as the decision was based on an unreasonable assumption by Dr Pinder not a comprehensive examination as required by the contract?

55. Mrs Baker replied on 16 May 2016 saying she had not yet reached a decision on the issues raised. She had asked for a further appointment with Dr Pinder and consent for the medical records to be looked at. Once a further report from Dr Pinder was received she would be in a position to make a decision on the appeal.

56. Mrs Baker wrote again on 27 May 2016 explaining a decision had not yet been made. She referred to the February report of Dr Pinder and that she had been told Mr Cartwright was not fit to work. The concern about Mr Cartwright's health was aggravated by the fact that they understood from Mrs Cartwright he had spent some nights in hospital the previous week and might need a transplant. If they did not consent to giving Dr Pinder access to the medical records and attend another medical appointment they would have to rely upon the existing report "which is by far the most compelling evidence that we have and I will accordingly have to reject your appeal against the decision to terminate your employment". She would like to investigate his health to understand if he was fit to work but needed the consent form to access the medical records.

57. Mr Cartwright signed a consent form under the Access to Medical Records Act 1988 and then Mrs Baker wrote to Mr and Mrs Cartwright explaining that they would extend the contractual notice period on a week by week basis pending her receiving a report from Dr Pinder and reaching a conclusion.

58. Dr Pinder prepared a report on 2 August 2016 described as an "updated report after receipt of GP report". He did not see Mr Cartwright for the purposes of preparing this report. He confirmed that Mr Cartwright had been suffering from liver disease for over five years which has been confirmed by medical certificates. He has been coping fairly well until September 2015 when he started with increasing breathlessness and weakness. Tests had been inconclusive but confirmed the previous diagnosis. He is on multiple medication but is not improving. He has recently been in hospital for treatment relating to his liver problem. He has been referred to Leeds for assessment for liver transplant. The GP confirms the diagnosis and gave other information about the referral for liver transplant. The GP states that he is clearly unfit to work in the role described at the current time. It is unclear when

he will be fit again to resume work. The opinion of Dr Pinder remained unchanged and was confirmed by Mr Cartwright's GP. He was unfit for work and the GP could give no timescale for a return. Dr Pinder was of the opinion that Mr Cartwright would never be fit to return to work in the future in the role of a pub manager.

59. Having received this report Mrs Baker wrote to Mr and Mrs Cartwright on 5 August 2016 giving her response to their appeal.

60. As to the first point, she had received a transcript of the 23 February meeting but nothing in respect of the 9 March meeting. With regard to the 9 March meeting Mr Smith's letter stated Mr Cartwright after seeing his specialist accepted that for medical reasons he had no option but to retire. She could only conclude that this was discussed at the meeting on 9 March 2016. Dr Pinder had confirmed that when he visited Mr Cartwright he was able to draw his conclusions based on discussions with him about his condition. He had obtained the opinion of Mr Cartwright's GP before producing the second report where he was of the same opinion.

61. It is not necessary for the tribunal to deal with the allegation of breaching confidentiality when discussing the performance of other pubs, but as to the intention to allow Mrs Cartwright to continue as a single manager Mrs Baker understood that Mrs Cartwright requested a trial period as single manager but Mr Smith, after consideration, rejected it based on past performance and a requirement for a 50% increase in takings. Mr Smith did not believe it would be achievable by Mrs Cartwright as a single manager. Her plans were not seen as sufficient to turn around the loss making position of The White House. As to alleged losses she had provided the claimants with the breakdown. She concluded by upholding the decision to dismiss and the final extension to the notice period expired on 6 August 2016.

62. In cross examination Mrs Baker said the process took the length of time it took. There had been explanatory letters as to what was going on. She thought it was reasonable to allow time for the process to be followed through. In her view it would have been unfair to make a decision without gathering all of the evidence. She was comfortable with the opinion of Dr Pinder and that the GP was of the same opinion. She was able to confirm that following the termination of his employment Mr Cartwright applied to the pension scheme to take benefits and that his application was granted. She did not consider relocating Mrs Cartwright to another pub.

63. Looking at the cross examination of Mrs Cartwright, she had always been a joint manager in the premises with Mr Cartwright. It was a demanding role both in time and effort. As joint managers they had the ability to split the time on duty between themselves. She confirmed that there had been an improvement in performance after the management action taken in 2006 and 2010.

64. The first they knew about any meeting with Dr Pinder was a phone call asking them to go to Tadcaster and then the meeting was later arranged to take place at The White House.

65. When Mr Cartwright was recorded as saying he was "too ill to do this" she believed he was referring to attending the meeting not carrying out the job of joint manager at The White House. She accepted that the reference in the 24 February

letter from Mr Smith to pneumonia was broadly correct. As to the pension scheme, she accepted that the respondent was trying to find a mutually acceptable way out of the problems. Her working as a single manager was discussed. Mr Smith thought a joint manager was more appropriate and they discussed how it would work if she was a single manager. She accepted that what he said was in the transcript.

66. The 9 March meeting lasted an hour and an half. There were no notes. With reference in the letter to Mr Cartwright saying he had no option but to retire, this was not what was said. She agreed it was an important point as set out in the letter and it would stick out if it was wrong.

67. She accepted that when she sent the first grievance letter she had not seen the letter from Mr Smith, but when she wrote on 15 March 2016 the 9 March letter was in her possession. She agreed that nothing was stated by her which disagreed with what Mr Smith had put in the letter.

68. In her application to the Tribunal she had not raised the point about Mr Cartwright saying he had no choice but to retire, but it was in Mr Cartwright's claim form. She probably did not think it relevant to say anything about this.

69. Mr Smith was not interested in her proposals. He pushed them across the table. She agreed it would have been unfair for Mrs Baker to have come to a decision without all the evidence. It was generally right that she had been kept informed as to the delays in the appeal process and the reasons for them.

70. As to comments concerning age, it was not the question he had come to discuss. Mrs Cartwright did not think it should have been discussed at the meeting. She thought Mr Smith knew they could claim pension over that age and he knew their ages before the meeting. He asked because he wanted them to leave. On 9 March 2016 there were derogatory things said about age but she accepted that there was no mention of age in the grievance. She did not think at the time to mention it. She was too upset as was Mr Cartwright.

71. As to the appeal meeting she agreed she could say what she wanted to and that she had spoken at length during the meeting. There was no reference to derogatory comments being made about age, although she thought she had mentioned them. It did happen. She just did not put it in.

The Relevant Law

72. Section 98 of the Employment Rights Act 1996 deals with unfair dismissal and provides as follows:-

- “(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
 - (b) 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.

- (2) A reason falls within this subsection if it –
- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
 - (b) relates to the conduct of the employee,
 - (c) is that the employee was redundant, or
 - (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
- (3) In subsection (2)(a) –
- (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
 - (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
- (4) Where the employer has fulfilled the requirements of subsection (1), 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."

73. The allegations of discrimination are provided for by the Equality Act 2010.

74. Section 4 deals with protected characteristics which include age and disability.

75. Section 5, age, provides that:

“(1) In relation to the protected characteristic of age –

- (a) A reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;
 - (b) A reference to persons who share a protected characteristic is a reference to persons of the same age group.
 - (2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.”
76. Section 6 deals with disability and provides that:-
- “(1) A person (P) has a disability if –
- (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.”
77. Section 13 deals with direct discrimination and provides that:-
- “(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
- (2) ...
- (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.”
78. Section 15 deals with discrimination arising from disability 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.”
79. Section 26 deals with harassment and provides that:-
- “(1) A person (A) harasses another (B) if –
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and

- (b) the conduct has the purpose or effect of –
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) ..
- (3) ..
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are –
age...”

Discussion and Conclusions

80. When reaching the conclusions that follow we have taken into account the oral submissions made by Mr Robinson on behalf of the claimants and the written and oral submissions made by Mr Gilbert on behalf of the respondent.

81. We shall deal first of all with the matters concerning the late Mr Cartwright starting with unfair dismissal. Can the respondent show a potentially fair reason for dismissal, namely a reason relating to the claimant's capability?

82. Based on the report of Dr Pinder and the letter from Mr Smith dated 9 March 2016 we find that the dismissal of Mr Cartwright was for a reason relating to his capability which is a potentially fair reason under section 98(2) of the Employment Rights Act 1996.

83. Was the dismissal fair? The Tribunal is faced with a question of fact. Did Mr Cartwright accept at the meeting on 9 March 2016 that for medical reasons he had no option but to retire and whilst not wishing to tender his own resignation required the company to retire him?

84. Neither party has produced any notes of the meeting. Neither party appears to have recorded it. The respondent's summary of the meeting is to be found in Mr Smith's letter of 9 March where the statement concerning retirement is to be found. Mrs Cartwright in her email sent on that date does not refer to any statement of Mr Cartwright concerning retirement or to notice of termination being given to Mr Cartwright and when in possession of the letter from Mr Smith which confirmed both dismissals she did not make any reference to it in her 15 March email.

85. There is no evidence before the tribunal that Mr Cartwright ever sent any communication on this subject to the respondent. The only words on behalf of Mr Cartwright are those in his ET1. He says that the statement was wholly and completely untrue.

86. Sadly Mr Cartwright had passed away and was not able to come to Tribunal with a witness statement and then to be cross examined.

87. Taking the letter from Mr Smith, the medical report from Dr Pinder and the lack of any contemporaneous objection to the statement in the letter from Mr Smith, we conclude that it is more likely than not that Mr Cartwright did make the statement that he accepted he had no option but to retire and asked to be retired from the company. This led to the termination of his employment on notice. In the circumstances, and without yet considering the appeal, at this stage the decision appears to be a fair one to dismiss on grounds of capability with the respondent doing what the first claimant asked and then allowing him to take his pension.

88. What about the appeal? The point concerning the statement in the letter was not raised by way of appeal, but Mrs Baker did note the apparent contradiction between the report of Dr Pinder and the fact that Mr Cartwright had returned to work. She, in our view sensibly, decided that it would be appropriate to have a further medical opinion and this involved Dr Pinder seeking information from the first claimant's GP but without meeting the claimant again. The second report of Dr Pinder confirmed the opinion he had expressed in February and was reinforced by information from the claimant's GP.

89. Looking at all of the circumstances surrounding Mr Cartwright's dismissal we find that his dismissal was fair. The dismissal followed his request and the appeal officer considered further medical evidence before reaching her conclusion to turn down the appeal.

90. For the purposes of section 13 of the Equality Act 2010, direct disability discrimination, in dismissing the claimant did the respondent treat him less favourably because of his disability than the respondent treated or would have treated another person?

91. In his submissions Mr Gilbert reminds us that the disability relied upon by the first claimant and admitted by the respondent is that the claimant is a disabled person by virtue of his suffering from a liver disease which has a significant impact on his day-to-day activities but not to the extent that he could not fulfil his contractual duties. The claimant does not place reliance upon pneumonia or chest problems as a disability.

92. The claimants have not established an appropriate comparator, whether actual or hypothetical, beyond the concept of someone who is not disabled. In any event the disability related to the liver was not the illness which formed the focus of the action taken by the respondent and as we have set out above, Mr Robinson confirmed that the cirrhosis did not affect the way in which Mr Cartwright carried out his duties when jointly managing The White House. He pointed out that Mr Smith gave evidence that he was unaware of any reference to cirrhosis of the liver, and

although the first report of Dr Pinder says that Mr Cartwright had been suffering from liver disease, Dr Pinder does not use the word “cirrhosis” and does not refer to it as being a disability. His emphasis is on increasing breathlessness and weakness with appointments at the chest clinic.

93. Mr Gilbert points out that in the notes of the meeting Mr Cartwright confirms his liver was not the problem it was the pneumonia at that time. He was off with a shadow on his lung and not cirrhosis of the liver.

94. When making submissions on behalf of the claimant Mr Robinson made some comments upon the submissions made by Mr Gilbert but he did not state that he disagreed with the points made as set out above.

95. On the basis of the evidence that we have seen and/or heard, we are satisfied that the respondent dismissed the first claimant for the reasons set out above as confirmed in his letter of 9 March 2016 without any specific reference to the claimant's disability, cirrhosis of the liver, in respect of which we heard no evidence that it affected his ability to carry out normal day-to-day activities and no evidence that it prevented him from attending to the running of The White House. We do not find that the dismissal of the first claimant amounted to direct disability discrimination.

96. For the purposes of section 15 of the Equality Act 2010, discrimination arising from disability, was the dismissal of the first claimant unfavourable treatment because the respondent was looking for the opportunity to dismiss the first claimant for financial reasons to replace joint managers with a single manager?

97. The evidence of Mr Smith was not to the effect that he was looking to dismiss the claimant with a view to replacing joint managers with a single manager. He made it clear to the Tribunal that his policy was to have the premises managed by joint managers rather than one. He told us that joint managers had been appointed at The White House following the departure of the claimants after an interim period where there might have been a single manager on a temporary basis. We accept this evidence.

98. The claim of Mr Cartwright in respect of discrimination arising from disability is dismissed because it is not supported by the facts as found.

99. Turning now to Mrs Cartwright and unfair dismissal, can the respondent show a potentially fair reason for dismissing her, being some other substantial reason in that following the dismissal of Mr Cartwright the claimant could not continue as a manager when joint managers were needed?

100. We remind ourselves of the contents of the 9 March letter in relation to Mrs Cartwright. She had asked for a trial period running The White House as single manager. Mr Smith had considered it but rejected it. A loss had been made in each of the 11 years that they had jointly managed. A 50% increase in take in his view could not realistically be achieved under single management, particularly given that as a couple losses had been incurred. Given that the contract was for joint management she too was given three months' notice.

101. Section 98(1)(b) of the Employment Rights Act 1996 refers to some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

102. Mrs Cartwright's agreement with the respondent had as parties the respondent of the first part, Ronald Cartwright (Manager) of the second part and Joan Cartwright (Manageress) of the third part (the Manager and the Manageress being together called "the Manager(s)").

103. In the submission of Mr Gilbert provided that the respondent's reason is not whimsical or capricious it is capable of being substantial and, if, on the face of it, the reason could justify the dismissal then it will pass as a substantial reason. See **Kent County Council v Gilham [1985] IRLR 18, CA.**

104. In his submission there was a substantial reason why Mrs Cartwright could not continue as a single manager. Firstly the company view was that the premises should be run by a couple. Secondly in the meeting on 23 February Mr Smith said that it was couples and when a single manager took over he immediately set targets, he did not really like single management, the contract was for a couple. Mrs Cartwright had run the pub jointly with Mr Cartwright and there had been losses for each year. Single management in his view would be unlikely to change matters.

105. Before coming to the conclusion Mr Smith would appear to have looked at the figures put forward by Mrs Cartwright albeit in a cursory fashion only to satisfy himself that the figures did not produce the increase in income that he expected and noting that she had provided for an increased income for herself.

106. For all of the reasons given by Mr Gilbert in his submissions, we accept that Mr Smith had a reason for dismissal that was not whimsical or capricious. He did not want a single manager. If he had wanted a single manager than he would not have wanted Mrs Cartwright based on her previous record when managing the premises jointly with Mr Cartwright. We accept that in the circumstances he did have a substantial reason of a kind such as to justify the dismissal of Mrs Cartwright holding the position of one of two joint managers of The White House following the dismissal of the other joint manager.

107. Were the decision and the process reasonable? In his 24 February letter Mr Smith referred to the unsustainable position of The White House which would need to be addressed either in terms of the ongoing ability to manage The White House jointly or the feasibility of Mrs Cartwright managing it herself. That situation would be addressed after a decision was made in respect of Mr Cartwright. Mrs Cartwright was aware that the question concerning her continued employment had been raised by Mr Smith and her situation was discussed both on 23 February and 9 March before Mr Smith reached his decision.

108. In the particular circumstances of this case we conclude that the decision made by Mr Smith to terminate Mrs Cartwright's employment was just within the band of reasonable responses to the factual situation under consideration as was the process that he followed.

109. This was touched upon in the appeal. Mrs Cartwright's plans were not seen as sufficient to turn around the loss making position of The White House. Mr Smith did not believe she would be able to achieve his desired increase in takings. Mrs Baker did not take a different view. We find that Mrs Baker's response to the situation was reasonable in all of the circumstances and that the dismissal of Mrs Cartwright was fair.

110. In dismissing the claimant did the respondent treat her less favourably because of Mr Cartwright's disability than it treated or would have treated another person? This is an allegation of direct disability discrimination by reason of the claimant's association with Mr Cartwright.

111. We have found that the respondent did not directly discriminate against Mr Cartwright because the dismissal was not for a reason that related to his disability.

112. The reason for the treatment of the second claimant was because following the dismissal of the first claimant, in circumstances that we did not find amounted to direct disability discrimination against him, Mr Smith did not believe that Mrs Cartwright would be an appropriate single manager at The White House. We do not find that the reason for the second claimant's dismissal was in any way because of the first claimant's disability in the form of liver disease.

113. The final issue for consideration in respect of the second claimant is an allegation of harassment related to age under section 26 of the Equality Act 2010. This requires unwanted conduct in relation to a protected characteristic which has the purpose or effect of violating the recipient's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. In deciding whether conduct has the effect referred to we must take into account her perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

114. We remind ourselves that the alleged unwanted treatment was that Mr Smith on 23 February and 9 March made comments to the effect that the second claimant was old enough to have her pension, was over 50 and too old to run a pub, and that a younger person would be a better approach.

115. We have set out above at paragraph 20 an extract from the transcript of the 23 February meeting. Mr Smith presumes that both claimants are over 56 and Mrs Cartwright does not simply confirm that they are, she gives their actual ages. Mr Smith then tells them that it is worth them considering the company pension scheme. There are no notes of the 9 March meeting.

116. In her grievances raised after the second meeting Mrs Cartwright does not raise any allegation concerning comments related to her age. When the pension question is referred to in the appeal meeting transcript Mrs Cartwright does not mention the matters set out at paragraph 114 above.

117. We do not find as a fact that Mr Smith's remarks to Mrs Cartwright on the question of pensions went beyond the transcript. In our judgment Mr Smith did not make the alleged comments and so did not harass Mrs Cartwright.

118. The second claimant's claims are therefore dismissed.

Employment Judge Sherratt

21 February 2017

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 February 2017

FOR THE TRIBUNAL OFFICE

[AF]