

SUMMARY

2011/23 Rebranding of pub discriminated against gay employee (UK)

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Facts

For over four decades, the Coleherne Pub in London developed a national and international reputation as London's first "gay pub". It was purchased in 2008 by Realpubs Ltd ("Realpubs"), an owner and operator of "gastropubs" throughout the UK. By that time, the Coleherne was in decline: it had blacked-out windows and was frequented by drug dealers and male prostitutes. Realpubs' business model was to buy failing pubs and reposition them as gastropubs. In line with this policy, they re-opened the Coleherne as the Pembroke Arms in December 2008.

Mr Lisboa, an openly gay man, was interviewed for an assistant manager post. During the interview, there was discussion about the character and reputation of the pub and the strategy

of transforming it into a gastropub. However, assurances were made to Mr Lisboa that Realpubs wanted to retain the existing gay clientele. Mr Lisboa was offered and accepted the position but resigned after only six weeks.

During Mr Lisboa's employment, a number of measures were taken to implement the objective of broadening the pub's appeal. These included encouraging the staff to seat customers who did not appear gay in areas where they could be seen from outside the pub. There was also a reorganisation of staff, in line with Realpubs' policy to have a more even balance between the sexes, which resulted in the termination of two male employees on capability grounds and the resignation of an employee who was admired by the existing gay clientele. Finally, one of the directors of the pub (Mr Heap) wanted to post a notice outside stating "this is not a gay pub" – an act which Mr Lisboa successfully resisted as being inappropriate.

Mr Lisboa objected to these various measures on the basis that they made the pub less welcoming to gay people generally. He felt pressured into implementing a policy that made him uncomfortable and as a result he decided to resign. He brought claims of direct discrimination on the grounds of sexual orientation and unfair constructive dismissal in an Employment Tribunal (ET).

The discrimination claim had two aspects:

- First, Mr Lisboa complained that he had been subjected to certain homophobic comments that Mr Heap had made directly to him.

- Second, he alleged that he had been put under pressure to work towards and co-operate with a policy intended to make the pub less welcoming to gay customers than to "straight" customers. He relied on the case of *Weathersfield Ltd – v – Sargent* [1999] ICR 425, which established that requiring an employee to carry out a discriminatory instruction in itself amounts to unlawful discrimination.

With regard to the constructive dismissal claim, Mr Lisboa contended that his employer's requirement that he implement a discriminatory policy constituted a repudiatory breach of contract, entitling him to resign and treat himself as dismissed.

The Employment Tribunal's Decision

The ET found that three comments made by Mr Heap to Mr Lisboa were personally offensive to him as a gay man and resulted in him suffering detriment on the grounds of his sexual

orientation. Accordingly, the ET awarded Mr Lisboa £4,500 compensation for injury to his feelings in respect of the remarks made by Mr Heap. However, in relation to the Weathersfield claim, the ET concluded that, since Realpubs' aim of rebranding the pub was lawful, it must follow that the steps taken in pursuance of that aim were also lawful. The ET also rejected Mr Lisboa's constructive dismissal claim, finding that his resignation was not mainly in response to the remarks made to him, but rather his mistaken perception that Realpubs was a "homophobic organisation".

The Employment Appeal Tribunal's Decision

Before the Employment Appeal Tribunal (EAT), Mr Lisboa argued that the ET had adopted the wrong approach by failing to take into account the overall effect of the employer's implementation of its rebranding policy on gay employees.

The EAT noted that the instant case was more nuanced than *Weathersfield – v – Sargent*, where the employer's policy of not renting vehicles to black or Asian people was unambiguously discriminatory. However, the ET had failed to address the key issue: whether, in the process of widening the pub's appeal, the employer had implemented its rebranding policy in a way that meant the gay clientele would be treated less favourably on grounds of their sexual orientation than straight customers were.

The EAT noted that advancing a policy intended to broaden appeal, without more, was not controversial. However, the measures proposed by Realpubs would have the cumulative effect of making the gay clientele feel less welcome in the Pembroke Arms than straight customers. Since those gay customers were plainly treated less favourably by reason of their sexual orientation, Mr Lisboa's claim based on *Weathersfield – v – Sargent* should succeed.

Finally, the EAT reversed the ET's finding that Mr Lisboa was not constructively dismissed. His resignation was prompted by unlawful discrimination that clearly amounted to a repudiatory breach. Moreover, even if the *Weathersfield* claim had failed, the EAT commented that it would have allowed the constructive dismissal claim in any event. The homophobic remarks made by Mr Heap that gave rise to the "conventional" direct discrimination claim were a contributory factor in Mr Lisboa's decision to resign. That was sufficient to found a claim of constructive dismissal.

As a result, the EAT set aside the ET's award in respect of Mr Lisboa's injury to feelings and directed that compensation should be reassessed by a different Employment Tribunal (presumably leading to a higher award).

Commentary

This case was decided under the Employment Equality (Sexual Orientation) Regulations 2003, which have since been repealed and replaced by provisions dealing with sexual orientation in the wide-ranging Equality Act 2010. The Act, like the Regulations, is sufficiently broadly worded to allow a discrimination claim where an employee is dismissed or subjected to detrimental treatment, not by reason of his or her own sexual orientation, but for disobeying an instruction to discriminate against someone else. The same approach applies to other protected characteristics such as race (as in *Weathersfield v Sargent*), sex, age, disability and religion or belief.

Indeed, the Equality Act (unlike the 2003 Regulations) now contains a provision which expressly outlaws the giving of an instruction to discriminate on the ground of sexual orientation or other protected characteristics.

This case provides a good illustration of how employers' marketing and branding strategies can land them in hot water if they are based on stereotypical and discriminatory assumptions. In particular, Realpubs' approach of seating customers who did not appear to be gay in prominent places not only discriminated against gay customers but was based on the questionable assumption that the "straight" and family clientele they were seeking to attract would find the pub less desirable if they saw it was frequented by gay people.

An interesting parallel can be drawn with the recent *O'Reilly – v – BBC* case reported elsewhere in this edition of EELC.

Comments from other jurisdictions

Germany (Paul Schreiner): The basic difference in German law is that there is no statutory claim for redundancy pay or for any form of severance except where a social plan, concluded by the employer and the works council, is involved. However, a German court would likely have found that Realpubs discriminated against Mr Lisboa since there appears to have been discriminatory behaviour by Mr Heap. Further, one would have to examine whether or not a hostile environment was created by Realpubs in taking measures to avoid homosexual customers. Both situations would have led to a claim for immaterial damages for Mr Lisboa.

The Netherlands (Peter Vas Nunes):

1. Realpubs' policy to have a more even balance between the sexes resulted in the termination of two male employees "on capability grounds". I imagine that these two employees might also have had a claim for direct discrimination.

2. Mr Lisboa relied on a doctrine developed by the courts in the Weathersfield case, but he could also have based his claim on (a purposive interpretation of the UK law transposing) Directive 2000/78, Article 2(4) of which provides that an instruction to discriminate against persons on the grounds of, inter alia, sexual orientation shall be deemed to be discrimination.

Subject: Sexual orientation discrimination

Parties: Lisboa D v D (1) Realpubs Ltd; (2) Pring; (3) Heap

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