

**EMPLOYMENT APPEAL TRIBUNAL**  
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal  
On 27 October 2010  
Judgment handed down on 11 January 2011

**Before**

**HIS HONOUR JUDGE PETER CLARK**

**LADY DRAKE CBE**

**DR B V FITZGERALD MBE LLD FRSA**

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MR C LISBOA

APPELLANT

(1) REALPUBS LTD  
(2) MR N PRING  
(3) MR M HEAP

RESPONDENTS

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

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QC &  
MR BEN COOPER  
(of Counsel)  
Instructed by:  
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For the Respondents

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## **SUMMARY**

### **SEXUAL ORIENTATION DISCRIMINATION**

Whether Respondent's policy of encouraging a wider clientele at a formerly gay pub involved less favourable treatment of gay customers causing the Claimant to resign in circumstances amounting to discriminatory constructive (and wrongful) dismissal, applying principles in **Showboat**, approved in **Wethersfield v Sargent**.

Employment Tribunal fell into error in focussing on the (legitimate) commercial aims of the Respondent and not the potential discriminatory effect of the implementation of the policy.

Appeal allowed and finding of no discriminatory dismissal reversed. Remitted on remedy to fresh Employment Tribunal.

## **HIS HONOUR JUDGE PETER CLARK**

1. This is an appeal by the Claimant, Charles Lisboa, against the judgment of an Employment Tribunal sitting at London (Central) and chaired by Employment Judge Snelson, which dismissed part of his complaint brought under the **Employment Equality (Sexual Orientation) Regulations 2003** (the 2003 regs) and his claim of wrongful dismissal. That judgment was promulgated with Reasons on 9 February 2010. The relevant Respondents to this appeal are Realpubs Ltd (First Respondent below) and Mr Heap (Third Respondent), a director of Realpubs. We shall refer to those Respondents as Realpubs and Mr Heap, respectively.

### **The primary facts**

2. We take these from the findings of the Employment Tribunal. Over four decades the Coleherne Public House in Earls Court, London developed a national and international reputation as London's first 'gay pub'. Realpubs own and operate 'gastropubs'. Their business model is to buy failing pubs and reposition them as gastropubs, offering good food and drink to all sections of the community.

3. In September 2008 Realpubs acquired the Coleherne. It was then in decline. The windows were blacked out and drug dealers and male prostitutes plied their trades there. The premises underwent refurbishment and were re-launched as the Pembroke Arms, opening to the public on 5 December 2008.

4. The Claimant is an openly gay Brazilian man. His working life has been spent in the hospitality industry. Between 2003 and late 2008 he worked as General Manager of a gastropub in Ealing. In late November 2008 he was interviewed by Realpubs' Operational Manager, Mr Upton for a post in the Pembroke Arms. During that interview there was

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discussion about the character and reputation of the pub and Realpubs' strategy (with which the Claimant claimed to agree) to transform it from a 'gay pub' into a gastropub. Asked by the Claimant about existing gay customers Mr Upton replied that it would be madness to "say no to the pink pound". Following that interview the Claimant was offered and accepted a position as Assistant Manager at the Pembroke Arms. His employment commenced on 1 December 2008; it ended with his resignation on 11 January 2009.

5. Pausing there, at para 48 of their reasons the ET refer to Realpubs' unobjectionable 're-positioning' strategy, that is broadening the appeal of the pub, thus widening its clientele. They describe that as a 'lawful' strategy. On its face, we would agree with that assessment and Mr Andrew Hochhauser QC, with him Mr Ben Cooper, who appeared on behalf of the Claimant below, does not quarrel with that assessment so far as it goes. However the essence of his case on appeal is directed to the way in which Realpubs and in particular Mr Heap implemented that strategy. We would characterise the critical issue in this way: a policy of embracing diversity and welcoming inclusiveness is laudable; discriminating against gay customers and staff on grounds of their sexual orientation is not; it is unlawful.

6. In the course of the Claimant's short period of employment the ET found that the following incidents took place following the re-opening of the pub on 5 December 2008:

(i) On 7 December the General Manager, Jimmy Sydney, told the Claimant that he had been instructed by Mr Heap to display a board outside the pub saying 'this is not a gay pub'. The Claimant told the ET in evidence that he was shocked by the instruction and did not comply with it. Instead he wrote a notice along the lines "under new management... friendly staff". We note that in his evidence Mr Heap denied giving the instruction to Mr Sydney as relayed by the Claimant. The ET did not believe Mr Heap. They found that

he did ask that a sign be displayed saying that it was no longer a gay pub, but after discussion agreed that a message in that form was not appropriate and accepted the Claimant's formulation (Reasons, para 26).

- (ii) On 8 December Mr Heap replied to an e-mail from Mr Zimmerman, an advisor to an investment company with an interest in Realpubs (and formerly Fourth Respondent to this claim). In that reply Mr Heap said, among other things, "management are hitting the streets and making sure everyone knows about us and that we are no longer an exclusively GAY pub. We are barring 'over the top' old customers but this needs to be done right!!...." (para 28).
- (iii) The policy of Realpubs, circulated by Mr Heap and Mr Pring (a director and formerly Second Respondent to this claim), was to encourage staff to seat customers or groups of customers who did not appear to be gay in prominent places in such a way that they could be seen from outside the pub. The ET did not accept that there was a policy to conceal gay customers from view (para 36).
- (iv) Consistent with that policy, when Mr Heap visited the pub at lunchtime with his family on Sunday 14 December he deliberately positioned himself at a table within sight of the outside (para 30).
- (v) On 19 December two gay customers were engaging in a display of intimacy, the extent of which differed on the conflicting accounts in evidence of the Claimant and Mr Heap. The ET made no express finding on that dispute of fact, finding neither witness entirely satisfactory on the point, but they did accept the Claimant's evidence, disputed by Mr Heap, that the latter referred to the customers as "queens" (paras 31-32).

- (vi) On the same occasion, the Claimant stated in evidence, Mr Heap said “Charles is gay but another kind of gay.” Mr Heap denied making that remark but the ET accepted the Claimant’s evidence.
- (vii) After Realpubs took over the sex balance amongst staff members changed. It was Realpubs policy to have a more even balance between the sexes. At the re-launch on 5 December there were 9 male members of staff: 5 female and 3 male managers. By 5 January 2009 the numbers of male and female non-managerial staff were even at 6 each. 5 male members of staff had left during that month; 2 were dismissed on grounds of unsatisfactory performance (para 42).
- (viii) There was, in the Coleherne days, a male member of the bar staff called Ricky. He was not gay, but was much admired by many of the regular customers. Mr Heap was not comfortable with Ricky’s appearance and dress; he left the employment. There was an evidential dispute as to the reason for his leaving. The Claimant believed he was “got rid of” because of his attractiveness to the gay clientele; Mr Heap said that he left to play Australian Rules football in his native Australia. The ET felt unable to make a finding as to precisely what brought about his departure (para 43).
- (ix) On one occasion, contrary to Mr Heap’s denial, he said to the Claimant, apparently in jest, that his fellow Assistant Manager “walked too camp.”

We shall hereafter refer to those incidents by the same numbering.

7. The repositioning policy failed (para 48); the clientele both before and after the re-launch remained at 90 per cent gay (para 45).

8. Mr Sydney resigned on 30 December 2008. He said that the Realpubs bosses were not enabling him to do his job and were demoralising and demotivating both him and his staff (para 38). On the same day the Claimant told Mr Sydney that he too was going to resign (para 37).

9. Having learned of the Claimant's resignation Mr Heap spoke to him on 4 January and sought to persuade him to stay. He was conciliatory and apologetic, saying that if he was leaving because of the 'gay issue' he was sorry if he had not expressed himself properly on that subject. The Claimant's position was that he was out of sympathy with Realpubs and what they represented and felt unable to work for them. He also told Mr Pring that he would have nothing to do with the kind of business which Realpubs was seeking to build. The Claimant could not be persuaded to remain and left his employment on 11 January (paras 39-41).

### **The claims**

10. The Claimant had not completed one year's continuous service and therefore could not bring an 'ordinary' constructive unfair dismissal claim under s98 **Employment Rights Act 1996**. Instead he brought a common law constructive wrongful dismissal claim. The significance, of course, is that dismissal for the purposes of reg 6(2)(d) of the 2003 Regulations includes constructive dismissal (reg 6(5)(b)).

11. The principal claim lay under the 2003 Regulations and it was put in two ways, we see from Mr Cooper's written closing submissions below where he advanced two categories of unlawful direct discrimination:



- (1) Comments by the Respondent(s) specifically directed at the Claimant on grounds of his sexual orientation; what the ET referred to as the ‘conventional’ claim (para 52 and following) and,
- (2) A complaint about a course of conduct on behalf of the Respondent(s) by which the Claimant was put under pressure to work in and co-operate with a policy of making the pub less welcoming to gay customers than to ‘straight’ customers; what the ET referred to as the **Wethersfield v Sargent** claim (para 46 and following). See [1999] IRLR 94 (CA).

We shall also use the ET’s shorthand descriptions of the categories of claim.

### **The Employment Tribunal decision**

12. **The conventional claim.** At paras 52-58 the ET upheld the complaint of direct discrimination in relation to three remarks by Mr Heap, referred to at incidents (vi) ‘Charles is gay’; (v) ‘those queens’ and (ix) ‘walking too camp’. The ET regarded those remarks by Mr Heap as offensive to the Claimant as a gay man; he suffered detriment and that was on grounds of his sexual orientation. There is no cross appeal by the Respondents against those findings.

13. **The Wethersfield v Sargent claim.** In **Wethersfield** the employer, a vehicle hire operator, explained to the Claimant employee following her appointment as a receptionist their policy that if she received an enquiry from any coloured or Asians, judging by their voices, she was to tell them that there were no vehicles available. Upset by that policy she promptly resigned, complaining of constructive dismissal. An ET upheld her complaint brought under the **Race Relations Act 1976**. Appeals by the employer to the EAT and Court of Appeal were dismissed.

14. The expression ‘on grounds of’, in that case race (in the present case sexual orientation; reg 3(1)(a) 2003 Regs) should be given a broad meaning and includes requiring the employee to carry out a racially discriminatory trading policy; per Pill LJ, paras 15-16, approving the approach of Browne-Wilkinson P in Showboat Entertainment Centre Ltd v Owens [1984] IRLR 7.

15. It is we think common ground in the present case and if it were not we would hold, that a policy of discrimination against customers on grounds of sexual orientation is rendered unlawful by regulations 3 and 4 of the **Equality Act (Sexual Orientation) Regulations 2007**.

16. Having summarised Mr Cooper’s submissions on this aspect of the case (paras 46-47) the ET rejected that part of the claim for the reasons expressed at paras 48-51. We should set out that reasoning in full:

“48. Attractive and persuasive as they were, we are unable to accept Mr Cooper’s submissions on this part of the case. We do not doubt that the Claimant perceived anti-gay prejudice on the part of the organisation and in particular the individuals about whom he complains. In the case of Mr Heap, he had understandable reasons for that perception. But the law does not legislate against prejudice: it offers a remedy only where adverse *treatment* on a proscribed ground is made out. We find that nothing was done to make the pub unwelcoming to gay customers or less welcoming to gay customers than other patrons. Nor was any instruction given to that effect. Realpubs are a hard-headed commercial enterprise. The last thing in the minds of its directors was to alienate their established customers. Their objective was to broaden the appeal of the pub, increase the numbers coming in and widen its clientele. If that aim had been achieved (as apparently it has not), the inevitable consequence would have been a ‘watering down’ of the gay element within the client base. But a reduction in the percentage of gay customers would not have amounted to an exclusion of gay people or less favourable treatment of them, even if some established customers might have disapproved. Rather it would have been the natural fulfilment of the unobjectionable ‘re-positioning’ strategy. And once it is accepted that the strategy was lawful, it seems to us that measures such as redressing the gender imbalance among bar staff (whether or not that entailed sex discrimination) and ‘showcasing’ families or mixed-sex groups by seating them prominently in the pub are not properly seen as instances of discrimination against gay customers but rather as manifestations of the legitimate policy of seeking to ‘sell’ the pub to a wider public. (Of course matters would have been different had there even evidence of, for example, an instruction to reserve the more comfortable or attractive tables or seating areas for non-gay customers or to enforce any form of segregation by reference to sexual orientation. But that is not what happened.)

49. There certainly was evidence of a policy to exclude *some* gay customers. Mr Heap made it clear in his evidence that Realpubs would not tolerate offensive behaviour and would take steps to ensure that miscreants did not return. But that was a policy aimed at managing

misconduct, not disadvantaging individuals because of their sexuality. We are quite satisfied that the reference in Mr Heap's email of 8 December 2008 to barring 'over the top' old customers alluded to those who, by illegal, outrageous or otherwise unacceptable behaviour, had contributed to the 'fallen' image of the pub. We reject Mr Cooper's suggestion that 'over the top' merely meant 'camp'.

50. The instruction by Mr Heap to the Claimant to warn the amorous gay couple would have constituted an instruction to discriminate had we found that a corresponding instruction would not have been given in the case of a heterosexual couple but we are unable to make such a finding. Indeed we are confident that, in such circumstances, Mr Heap's reaction would have been the same. In this context we have noted the unchallenged testimony of Ms Christian that Realpubs operate an 'anti-petting policy' across their entire chain of pubs.

51. For all of these reasons, we find that the Wethersfield v Sargent claim, sincere as it is, is unfounded."

17. Constructive dismissal. The ET found that the Claimant had not been constructively dismissed for the reasons given at para 59:

"59. The complaint of constructive dismissal (as a claim under the contract jurisdiction as well as an element of the unlawful discrimination claim) fails. We are in no doubt that the detrimental treatment which we have identified constituted a repudiation of the Claimant's contract of employment. Had he resigned in response to it, his complaint of constructive dismissal would have succeeded. We find, however, that the true reason for his resignation was not the offensive treatment by Mr Heap but the Claimant's mistaken perception that Realpubs were a homophobic organisation in pursuit of a homophobic policy to disadvantage the Coleherne's gay clientele. Since he did not resign in response to the repudiation, he fails to establish a constructive dismissal."

## The appeal

### Wethersfield v Sargent

18. On the facts of that case it was entirely clear that the employer adopted a policy of discrimination against non-white potential hirers. The present case is less obvious. As the ET observed (para 48) a strategy aimed at re-positioning the pub as one that appealed to all sections of the public rather than being known as an essentially 'gay pub' is, without more, unexceptionable. The question on this part of the case, as the ET recognised, is whether the Respondents, particularly through Mr Heap, went too far in embracing a policy of putting pressure on gay customers and/or in taking negative steps which made the venue less welcoming to gay customers.

19. In order to answer that question, Mr Hochhauser submits, it is necessary to look at the picture presented by the overall factual matrix as found, drawing on the valuable guidance of Mummery P in **Qureshi v Victoria University of Manchester** [2001] ICR 863 (note), approved by the Court of Appeal in **Anya v University of Oxford** [2001] ICR 847. Here, he argues, the ET applied a wrong approach. Instead of looking at the overall effect of the Respondents' implementation of their re-positioning policy on the customers and as a result on the Claimant, as a gay employee, the ET at para 48 limited themselves to the commercial aim of Realpubs, to broaden the appeal of the Pembroke Arms to a wider clientele than that which frequented the old Coleherne Arms, which they considered to be lawful and having accepted that that strategy was lawful, then characterised matters such as gender imbalance among bar staff (which they thought may have led to possible sex discrimination against the male members of staff who left between 5 December and 5 January), and 'showcasing' families or mixed-sex groups by seating them prominently in the pub were not as instances of discrimination against gay customers but simply manifestations of selling the pub to a wider public.

20. Mr Hochhauser submits that the correct question for the ET is to ask itself whether gay customers would or might reasonably take the view that, as a result of the measures adopted, they were disadvantaged compared with straight customers. Putting his case at its highest Mr Hochhauser poses the question in this way; what would have been the cumulative effect for an established gay customer if all the measures proposed, particularly by Mr Heap, had been implemented? Such a customer would be aware of an aggressive marketing campaign on the streets making sure everyone knows that it is not exclusively a gay pub; confirmed by a sign saying 'this is not a gay pub'; with windows crammed with overtly straight customers, leaving him to find a table at the back; with the bar staff culled of those male employees known to attract the established clientele and with a director making homophobic remarks to the manager (and his assistant, the Claimant, a gay man) about customers and staff within the pub. The

answer, proffers Mr Hochhauser, is that the customer would plainly feel less welcome than straight customers. In response Mr Spencer Keen rightly reminds us that it is not for us to retry the facts of the case. As to the question posed by Mr Hochhauser he makes the following factual points, based on the ET's findings. First, the sign proposed by Mr Heap was not in fact put up; the Claimant's anodyne version was accepted. Secondly, he raises an issue as to whether the Claimant in fact saw Mr Heap's e-mail to Mr Zimmerman. In short, he submits that the ET was entitled to conclude that nothing in the Respondents' conduct in re-launching the pub made gay customers less welcome and there was no evidence that they either were or felt less welcome than straight customers. As to the staff changes there was no evidence on which the ET could or did find that male members of staff, including Ricky, were dismissed as part of a policy to make the pub less attractive to gay customers.

21. In resolving the competing arguments on this aspect of the appeal we first return to **Wethersfield** and to **Showboat**. In both cases, on their facts, the policy of the employer was unambiguously discriminatory; Wethersfield's policy was not to hire their vehicles to black and Asian customers; Showboat's was a blanket exclusion of black customers from their premises.

22. The present case is far more nuanced. The ET was required to make a judgment as to whether the factual matrix as a whole, as they found it to be, showed that Realpubs and in particular their director, Mr Heap, in advancing a legitimate policy of widening the appeal of the pub following its re-launch, implemented it in such a way that the old gay clientele was less favourably treated than the desired straight/family customer base on grounds of their sexual orientation.

23. Mr Hochhauser has persuaded us that the ET failed to ask itself that critical question at para 48 of their Reasons. Their error lay in stopping their enquiry at the point where they found  
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that the re-positioning strategy was lawful. As they say, in terms, once it is accepted that such strategy was 'lawful' measures such as altering the staff gender balance and showcasing families at the front of the pub may be regarded as manifestations of that legitimate policy.

24. We agree with Mr Hochhauser that the question is broadly as he posed it, subject to the factual caveats raised by Mr Keen.

25. On the ET's findings (paras 52-58), contrary to Mr Heap's denials, he did on three separate occasions use disparaging language about gay customers and staff. His e-mail to Mr Zimmerman made it abundantly clear that he wished to make it absolutely plain that the Pembroke Arms was no longer an exclusively gay pub. The sign which he wished to put up would have reinforced the point. The predominantly male bar staff, particularly Ricky, had to and did change within a month. When he visited the pub at lunchtime he deliberately sat with his family at a table within sight of people passing by outside.

26. Based on that factual picture it is, we think, plainly and unarguably the case that gay customers were treated less favourably on the grounds of their sexual orientation. Consequently, on the principles of **Showboat** and **Wethersfield** the Claimant was treated less favourably on grounds of sexual orientation. This part of the appeal succeeds and we shall reverse the ET's finding under the **Wethersfield** head of claim.

### **Constructive dismissal**

27. Having found, contrary to the ET's conclusion, that the Claimant's perception that Realpubs was implementing its re-positioning policy in a way which discriminated against gay customers was not mistaken, it follows that, on the ET's findings (para 59), the Claimant's reason for resigning was prompted by unlawful discrimination against customers and that was a  
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repudiatory breach which the Claimant accepted by resigning. On that basis alone the constructive dismissal case is made out.

28. However, even had we upheld the ET's conclusion on the **Wethersfield** head of claim we should still have reversed the finding of no constructive dismissal on this basis. At the very least the 'conventional' discrimination against the Claimant found by the ET in the form of the three remarks made by Mr Heap, was a contributory factor in his decision to resign. That is sufficient; see **Notts CC v Meikle** [2004] IRLR 702 (Court of Appeal) para 33, per Keene LJ and **Abbycars (West Horndon) Ltd v Ford** (UKEAT/0472/07/DA) 23 May 2008 (EAT), paras 33-36, per Elias P.

### **Disposal**

29. It follows that this appeal is allowed and the ET decision reversed insofar as it dismissed the **Wethersfield v Sargent** and wrongful dismissal claims. Consequentially the ET's award of £4,500 for injury to feelings is set aside; that head of loss will require reconsideration in the light of our conclusions. In addition, the Claimant's loss following from his dismissal, both for wrongful dismissal and unlawful sexual orientation discrimination must be assessed. Remedy will be reconsidered by a fresh ET.