EMPLOYMENT TRIBUNALS

Claimants: Mr M Jouhary, Mr M Wojsa, Mr D Wojdylo, Ms N Pinto

Respondent: London Mayfair Hotel Limited

Heard at: London Central **On:** 20 - 24 February 2017

Before: Employment Judge Grewal

Members: Mr J Noblemunn
Mr P Secher

Representation

Claimant: Ms G Rezaie, Counsel
Respondent: Ms A Chute, Counsel

JUDGMENT having been sent to the parties on 27 February 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1 In a claim form presented on 16 September 2016 the Claimants complained of unfair dismissal, wrongful dismissal and age discrimination.

2 At the conclusion of the evidence on 22 February 2017 the Respondent conceded that the Claimants had been unfairly and wrongfully dismissed and, therefore, the only complaint that we had to determine was the complaint of direct age discrimination.

The Law

3 Section 13(1) of the Equality Act 2010 provides,

> "*(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."*

Age is a protected characteristic. On a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case (section 23(1)).

4 Section 136(2) and (3) of the Equality Act 2010 provide that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the tribunal must hold that the contravention occurred unless A shows that A did not contravene the provision.

5 The following legal principles are to be derived from the authorities on proving direct discrimination –

(a) There can be unlawful discrimination where a prohibited ground contributes to an act or decision, even though it is not the sole or principal reason for the act or decision (**London Borough of Islington v Ladele [2009] IRLR EAT)**.

(b) The burden of proof does not shift to the employer on a claimant establishing a difference in status, in this case age, and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could decide" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (**Madarassy v Nomura plc Ltd [2007] IRLR 246)**.

(c) A tribunal should have regard to all the facts of the first stage to see what proper inferences can be drawn (**Laing v Manchester City Council [2006] IRLR 748)**.

The Evidence

6 The Claimants gave evidence in support of their claims.On behalf of the Respondent we heard evidence from Davinder Gujral (Group HR Director) and Fernanda Provin (HR Officer). Having considered all the oral and documentary evidence the Tribunal makes the following findings of fact.

Findings of Fact

7 The Respondent owns and operates the Mayfair Hotel, which is a subsidiary of the Edwardian Group Limited. The Group operates 14 hotels in the United Kingdom, most of which are in London, and employs approximately 2,200 full-time and part-time staff.

8 In February 2016 the Claimants were employed in the Restaurant and Bar of the Mayfair Hotel. Ms Pinto and Mr Wojsa were employed as Restaurant and Bar

Team Leaders and Mr Jouhary and Mr Wojdylo as Bar Service Assistants. Mr Wojdylo worked part-time and was contracted to work 24 hours a week. The other three Claimants worked full-time and worked 40 hours per week.

9 Mostafa Jouhary was born on 27 December 1965 and was 50 years old in April 2016. He commenced employment with the Respondent on 10 March 1997. He worked as a waiter in the restaurant on the late shift, which commenced at about 3pm and ended at about midnight. During that shift he served the tail end of lunch, afternoon tea and dinner and then reset the restaurant for breakfast the following morning.

10 Mateusz Wojsa was born on 5 January 1984 and was 32 years old in April 2016. He commenced employment with the Respondent on 29 November 2008. In 2014 he was promoted to Team Leader and worked as the head bartender in the restaurant bar. His shift normally began at about 4.30 in the afternoon and ended when the last of the guests left the bar, which was often after midnight.

11 Daniel Wojdylo was born on 2 July 1981 and was 34 in April 2016. He commenced employment with the respondent on 7 December 2009. He used to work full-time but reduced his hours in October 2015 when he embarked on a university course. He worked in the cigar room.

12 Noelma Pinto was born on 14 September 1975 and she was 40 in April 2016. She commenced employment with the Respondent on 13 October 2008. In 2012 she was promoted to Team Leader of the Breakfast team. Her shifts normally started at 6 or 7 in the morning and concluded at about 3pm or 4pm, although sometimes she worked until 6pm. She covered breakfasts and lunches.

13 During the time when the Claimants had worked for the Respondent, the restaurant had been refurbished and rebranded on a number of occasions, and the employees had been retrained in relation to any changes made to the food and drinks menus.

14 In late 2015 senior management decided to rebrand and refurbish the restaurant in the hotel because the existing restaurant, which was a traditional restaurant and served more traditional fare, was performing poorly financially and in comparison with other restaurants in the area. They decided to change the image of the restaurant to make it more modern and trendy and to make it more visible and accessible from the street. That entailed adding a window and a door and changing the seating and the lighting. It also decided to change its menu to serve small Spanish and Italian plates in the style of tapas and different wines to accompany the various dishes. This was seen to be in keeping with the modern trends in dining and customer expectations.

15 On 16 February 2016 the Respondent's HR General Manager, Caroline Marais, wrote to all the staff working in the bar and restaurant. She advised them that there would be shortly changing their food and beverage concept at the restaurant and that the new concept would be centred around Spanish/Italian tapas. She said that the restaurant would be closed for four or five days to prepare for the change but this would not have any effect on their pay. She also informed them that two briefing sessions had been planned for 23 and 24

February to discuss the changes and that staff attendance at one of those sessions was mandatory.

16 Ms Pinto and Mr Wojsa were among the employees who attended those briefing sessions. The sessions were conducted by Caroline Marais and Amir Jati (Food and Beverage Director). Mr Jati informed the employees of the changes that would be made in the rebranding but assured them that no one would lose their jobs as a result.

17 At that time, there were about 45 employees working in the restaurant and the bar. It is not easy to be entirely clear about the numbers because we found that the details provided in the documents at pages 455 to 458 did not always tally. The 45 employees who worked in the restaurant worked as waiters and bar tenders, but they all had the title Restaurant and Bar Service Assistant or, in the case of the team leaders, Restaurant and Bar Team Leaders. They ranged in age from 19 to 68. The majority, about 26 employees, were under the age of 30. Nine of them were in their 30s, three were aged between 40 and 48 and seven of them were 49 or older. Five out of the seven in the oldest age group worked the early shift and were primarily responsible for serving breakfast and preparing for lunch and their shift ended at any time between 12.30 and 3.30 in the afternoon. It was not entirely clear to us whether Jonka Vladimorova worked the early or the late shift, but we do not think that it has any significant effect on the issues that we had to determine.

18 The employment of three of the employees in their 30s was terminated before 22 April 2016, one on 22 February and two on 17 April. We do not know anything of the circumstances of those terminations, whether those employees left or they were dismissed.

19 On 24 March, Manav Joshi, the Food and Beverage Manager, sent to Mr Jati and Caroline Marais a list of the roles in the rebranded restaurant. The titles in the rebranded restaurant were changed to reflect what the individuals actually did, i.e. they were called waiters, commis/support waiters and bartenders. Those comprised the majority of the roles. There were two additional new roles (host/hostess and expeditor) but those were only for a limited number of individuals. He sent them job descriptions for all the roles.

20 On 31 March Mr Joshi set out the numbers that would be required in each role in the rebranded restaurant. He said that altogether they required 57 employees, 10 of whom would be working part-time. They required 10 bartenders, including the head bartender and 35 waiters and commi/support waiters, including three head waiters. He said in that email that there were 27 current employees who could take on those roles and that they therefore needed to recruit 30 employees (25 full-time and 5 part-time). It was clear from that email that he contemplated that only 27 of the existing employees would be retained after the rebranding.

21 On 3 April he identified 11 existing employees who he said should be interviewed by 7 April for the roles post-refurbishment. It was not entirely clear to us whether those 11 were in addition to, or part of, the original 27 that he had identified.

22 Between 21 March and 4 April the Respondent recruited a Restaurant and Bar Manager (aged 37) and two Restaurant and Bar Assistants (aged 25 and 27).

23 Out of the 11 who were interviewed on 7 April, 8 were retained in the restaurant, 2 were redeployed elsewhere in the group and one was dismissed. The 2 who were redeployed were aged 26, the one who was dismissed was aged 25.

24 By about mid-April Mr Manaj had identified 12 existing employees who he did not wish to retain in the rebranded restaurant although there was still a need for more than 12 waiters and bartenders. Those 12 included the four Claimants. The ages of the 12 who were not to be kept on ranged from 19 to 50. Five of them were under 30, four were in their 30s, one was 40 and two were 50.

25 Although the Respondent asserted in the hearing before us that the twelve who were selected did not have the skill set required for the roles going forward, it did not adduce any evidence to support that. There was no evidence of how the waiting and the bartending skills needed to serve the food and drinks on the new menu were different from those that had been previously required. We accept that staff would have needed to be retrained on the new food and drinks being served but that could have been achieved relatively quickly and easily. The respondent did not disclose to the 12 employees or to the Tribunal the job descriptions or person specifications for the waiter and bartender roles in the rebranded restaurant. We had no evidence of the skills of the 12 being assessed against the skill set which the Respondent said was required after the rebranding, and the Respondent was not able to explain, either to the Claimants or to us, how their skills fell short of the standard required. As a result we do not know why the Respondent decided not to retain those 12 employees in the restaurant after the rebranding.

26 There was no evidence before us to suggest that there were any concerns about any of the Claimants' performances in their existing roles or about their conduct at that particular time.

27 Ultimately, 25 of the employees who were working in the restaurant and bar before 21 March were retained after the rebranding. Five of them were aged over 49. They all worked the early shift and were primarily, although not exclusively, on breakfasts. One was 41 - he was the Restaurant Manager. There were two employees in their 30s - a bartender who was 35 and a hostess who was 32. The remaining 17 employees were under the age of 30.

28 Between 18 April and 4 July 2016 the Respondent recruited 21 waiters and bartenders. Of these 3 were aged 30, the remaining 18 were under the age of 30.

29 Four of the twelve employees who had been identified as not being required had less than two years' service. Three of them were dismissed with notice and advised of their right of appeal.

30 On 21 April, Caroline Marais invited the remaining nine, including the four Claimants to individual meetings the following day. The letter inviting them to the meeting was brief and did not state the purpose of the meetings. They were told

that the meeting was to be chaired by Mr Gujral who was the Group HR Director and they were advised of their right to be accompanied by a work colleague.

31 At the meetings on 22 April there were discussions about settlement agreements which would be sent to them after the meetings. The settlement agreements provided that the date of termination would be 22 April 2016. It was conceded by the Respondents yesterday that the Claimants were unfairly dismissed on 22 April 2016 and, in those circumstances, it was not necessary for us to make findings of fact about what was said at those meetings. After the meetings, the four Claimants and, we suspect, all the other five employees as well, were asked to empty their lockers and to return their swipe cards and uniforms. The four Claimants did not sign the settlement agreements, the other five employees did.

32 On 4 May Mr Jouhary raised a grievance. He said he had been told at the meeting that there was no room for him and that he had been removed from the rota. He believed that that amounted to age discrimination. He said that he was good performer, had no attendance issues and had never been disciplined.

33 He was invited to a meeting which took place on 12 May 2016. His appeal was heard by Botho Stein, the Deputy General Manager. Mr Jouhary was asked why he thought it was age discrimination and he said because there had been no concerns about his performance and then suddenly, without any warning or explanation, he had been dismissed and that the staff who had been employed thereafter had been much younger. Mr Stein drew his attention to certain older employees who had been kept on, and Mr Jouhary said that their position was different because they worked on breakfasts and he was talking about the dinner team. Mr Jouhary also referred to a newspaper article that he had seen on the internet about the Respondent discriminating against another employee because of his age.

34 There was no proper investigation of Mr Jouhary's grievance. No one interviewed the managers who had made the decision to terminate his employment. No one looked at the ages of those who worked on the dinner shifts, Mr Jouhary having made it clear that he was comparing himself to them and no one looked at the ages of those who had been recruited to replace those whose employment had been terminated. Mr Stein looked at the article to which Mr Jouhary had referred and he relied on what he knew of the ages of the staff in the restaurant.

35 Mr Jouhary was given the outcome of his grievance on 24 May, He was told that the grievance was not upheld and the reasons where that the hotel and the company had a versatile workforce with staff from all over the world of different ethnic groups and comprising all age groups. Mr Stein felt that the restaurant was no exception to that. He had looked at the newspaper article; it related to something that happened a long time ago and the people involved in that no longer worked for the Respondent.

Conclusions

36 The Claimants case in essence is that they were not kept on and they were dismissed because of their age and, in particular, because they were not seen as

not fitting into the rebranded restaurant and bar because they were perceived as being too old. In the alternative, the second, third and fourth Claimants argued that they were dismissed because they were associated with the First Claimant who was 50 years old.

37 We considered the cases of each of the Claimant individually because, although some factors are common to all of them, their relevant circumstances were not all the same. We considered in each case firstly whether the Claimant in question had established a prima facie case of age discrimination, that is, whether he or she had established facts from which we could decide in the absence of any explanation that he or she had been discriminated against because of their age. I

Daniel Wojdylo

38 We considered the following facts to be material to his case. Mr Wojdylo was 34 at the relevant time. He was a part-time Restaurant and Bar Service Assistant. He worked afternoons and evenings. There were six waiters and bartenders in their thirties working for the Respondent on 22 April 2016. Four of them were invited to the meetings on 22 April and their employment was terminated on that date. Two, however, were retained. One was 35, i.e. older than Mr Wojdylo and the other was 32. Three of the waiters and bartenders who were recruited after Mr Wojdylo's dismissal were aged 30. There were, therefore, five waiters and bartenders working in the restaurant and bar after the rebranding who were aged between 30 and 35.

39 We note that staff older than 40 who were retained were either managers or those who worked the early shift. Their circumstances were different and not directly comparable to those of Mr Wojdylo. Therefore, we did not take those into account in determining and whether he had established a prima facie case.

40 Out the existing staff who were under the age of 30, one was dismissed after the interviews on 7 April and five were identified as staff that the Respondent did not want to retain and dismissed on 22 April in the same way as Mr Wojdylo had been.

41 We accept that the Respondent has not given any evidence about how or why the twelve were identified and that it has not disclosed any documents as to how or why they were selected. The absence of such documents demonstrates to us that either no proper process was undertaken to identify why they could not continue after the rebranding or that the Respondent has been selective in its disclosure. We have also taken into account the manner of the dismissal of the twelve. As the Respondent has conceded that the Claimants were unfairly dismissed, and we have been told that lessons have been learnt from that, we do not propose to say much more about that other than to state that it was a wholly unacceptable way for any employer, let alone a large employer and one that claims to be compassionate and a caring employer, to treat its long standing and loyal employees. However, whatever failings there were in respect of the dismissal process or in the selection of the employees who were not going to be retained, they apply in the case of all the twelve individuals who were selected, many of whom were under the age of 30. As those failures apply equally to

employees who were under 30 and younger than the Claimant in this case, we find that they do not assist us in making any inferences of age discrimination.

42 We also accept that the Respondent was attempting to create a new image and a new look for its restaurant. It would be pointless to go through a refurbishment and rebranding that cost one and a half million pounds if nothing was to change. We have found that the purpose of the exercise was to create a more modern and trendy restaurant and we asked ourselves whether that translated into employing waiting and bar staff who were under the age of 30. It clearly did not because post-rebranding there were five employees who were aged between 30 and 35. If the Respondent wanted a youthful look in its modern and trendy restaurant there was no evidence before us that the bar was set at 30.

43 Mr Wojdylo's case is that he was treated less favourably than those under 30 who were either retained or redeployed, and that age was an effective reason for that. We considered whether having regard to the facts which we have set out, we could, in the absence of any explanation by the Respondent, decide that the Respondent had dismissed him either because of his age or that of Mr Jouhary. We concluded that we could not. If Mr Wojdylo's case is that he was dismissed because he was 34, and he has not identified himself as belonging to any other age group, it must follow that nobody over the age of 34 would have been retained and anybody under that age would have been. The facts do not bear that out. A 35 year old was retained and some of the employees who were under the age of 34 were dismissed.

44 If one looks at the age groups, other employees in the same age group (ie in their 30s) were retained by the Respondent. One was older than Mr Wojdylo. Employees under the ages of 30 and, therefore, younger than Mr Wojdylo, were dismissed.

45 Having taking into account all the facts we concluded that Mr Wojdylo has not established a prima facie case that he was dismissed because he was 34. Equally there was no prima facie evidence from which we could conclude or infer that he was dismissed because of his association with Mr Jouhary or because of Mr Jouhary's age. We, therefore, concluded that the burden of proof did not shift in his case.

Mateusz Wojsa

46 Mr Wojsa was 32 at the time. The only difference between him and Mr Wojdylo was that he worked full-time and that he was a Team Leader. For the first time in closing submissions it was suggested that he was relying on the other two Team Leaders, who were younger than him, as comparators. We do not consider the fact that he was a Team Leader makes any material difference. We also noted that the managers who were in employment after the rebranding were older than the rest of the staff, one was 37 and one was 41.

47 In considering his case we took into account the same factors that we did in Mr Wojdylo's case because their material circumstances are by and large very similar. We noted in fact that he was even younger than Mr Wojdylo. In circumstances where the Respondent retained a 32 year old and 35 year old and recruited three 30 year olds and dismissed a number of people under 30, we

concluded that we could not on the basis of those facts decide that the Respondent had dismissed Mr Wojsa or treated him less favourably than younger team leaders, either because he was 32 of because he was close to Mr Jouhary, and again we concluded that the burden in his case did not shift.

Noelma Pinto

48 Ms Pinto was in a different position from those two Claimants. She was 40 years old and the Team Leader of the breakfast shift and she, therefore, worked the early shift and primarily on breakfasts and part of lunch. In her case, the retention of the older employees who also worked on the breakfast shift was a relevant factor. All of those who were retained were considerably older than her and it could not, therefore, be said that she was dismissed because she was too old or perceived as being too old. In her case we also took into account some of the factors that we had taken into account in relation to the other two Claimants. We took into account the ages of the other employees who were dismissed and what we have said about the lack of explanation for the treatment of the twelve, the absence of documents in relation to that, the manner of the dismissal and the changes to the image of the restaurant. As far as the changes to the image of the restaurant are concerned, it has been the case of the other Claimants that the change had no impact upon the breakfast team and the need to have a model and youthful look did not apply to staff on the breakfast team and hence that explained why many of the oldest staff were retained in the breakfast team. We concluded in her case that she had not established facts from which we could conclude that she had been dismissed because she was 40 or because she was close to Mr Jouhary, who was 50 years old, and, therefore, she had not established a prima facie case of age discrimination.

Mostafa Jouhary

49 Mr Jouhary was 50 years old and he worked as a waiter on the late shift from 3pm until about midnight. He was the oldest person who worked on that shift and he was dismissed prior to the restaurant opening after the rebranding. After the rebranding, the oldest person working on the late shift, excluding the two managers, was aged 35. The intention after the rebranding was to create a modern and trendy restaurant. Had those been the only facts before us we might well have concluded that we could decide, in the absence of any explanation, that he had been dismissed because of his age.

50 However, the evidence before us was that the process, which led to Mr Jouhary being dismissed, also led to a number of employees who were considerably younger than him, six of them under the age of 30 and four of them in their thirties, also being dismissed. The dismissal of ten employees who were considerably younger than Mr Jouhary indicated to us that age was not a factor in the decision about who the Respondent should let go. Although Mr Jouhary's case was stronger than that of his colleagues, we concluded that even in his case we could not on the facts established before us have decided that he had been dismissed because of his age and we, therefore, concluded that he had not established a prima facie case of age discrimination.

Remedy

51 We begin with issues that apply in the case of all the Claimants before we deal with each of the individual Claimants. First, both parties agreed that if we considered it just and equitable we could order that the overpayment that had been made in respect of accrued holiday pay, on the basis that the Respondent erroneously believes that the termination date was sometime in September 2016, should be deducted from the damages awarded for breach of contract for notice period. We think that in all the circumstances it would be just and equitable for that overpayment which was made on an erroneous basis to be deducted from the damages for breach of contract.

52 The second general point that we make is in relation to any compensation to be awarded for failure to give written reasons. We have had a look at Section 93 of the Employment Rights Act 1996, which provides that an individual can present a complaint to a Tribunal if he or she believes that the employer failed to provide a written statement under Section 92. It is not an issue that arises purely at a remedy stage; there has to be a claim made under Section 92 before we can make any award in respect of that. We have had a look at the Claimants' particulars of claims and we accept that in the narrative of those particulars there is a reference to the failure of the Respondent to provide written reasons and a right of appeal. However, when at the end of each of the particulars of claim, the Claimants set out the claims that they are making to this Tribunal, there is no suggestion there that they are making a claim under Section 92. If there had been any misunderstanding on their part and it needed to be corrected, there was a Preliminary Hearing which took place on 24 October. We have had a look at the note of that Preliminary Hearing and the identification of the issues by Employment Judge Tayler. He identified the complaints and the issues that have been made as being complaints of unfair dismissal, wrongful dismissal and age discrimination. At the outset of this hearing we clarified that the parties of those were the issues we are going to be considering and again it was not made clear to us that there was a live claim under Section 93 and, furthermore, as is obvious in our liability decision we did not deal with the matter because we did not consider there was a claim there before us. S there was no claim before us under Section 93 ERA 1996, we are not obliged to make any award in respect of that.

53 Even if we are wrong in respect of that and there had been a claim and could have made an award, we consider that in circumstances such as in this case where there was a dispute between the parties as to whether in fact there had been a dismissal, a dispute which to some extent was also contributed to by the Claimant's trade union representatives, who argued that they had not been dismissed, we would not in those circumstances have made an award.

54 Thirdly, there was a submission on behalf of the Claimants that the onus is on the Respondent to prove that there has been a failure to mitigate loss. We accept, of course, that the onus is on the Respondent to prove that failure. That, however, does not require the respondent in every case to provide evidence of the number of jobs that are available and the pay rate that were available for those jobs. In this case, in any event there was evidence in relation to the jobs that were available in the Edwardian Hotels Group. That certainly indicates the large number of jobs that are available in the Respondent's hotel group, and one

would imagine that that Group is not an exception but typical and reflective of the industry as a whole. In any case, as we have said, the respondent is not obliged to provide evidence of that kind, it can prove that the Claimants have failed to mitigate their losses by relying on the fact that the Claimants have not made sufficient efforts to look for alternative employment. The Employment Tribunal is also able to take into account its own industrial knowledge of the kind of jobs that are available in the industry in London.

55 The fourth point that we want to make (this does not apply in the case of Ms Pinto) is that we were in general astounded by the lack of the documentary evidence to show that the other three Claimants had attempted to mitigate their losses. They are represented, and have been for a very long time, by a good firm of solicitors and it must have been made clear to them that if they succeeded in these claims before the Tribunal, then when dealing with compensation the Tribunal would require some evidence to show that they had made efforts to mitigate their losses. We accept that those matters are not always recorded in documents and it is quite common now days for applications to be made on telephones or online, but there are nevertheless ways of preserving, securing and retrieving that information, so we were surprised by the very very limited, virtually non-existent, in some cases, evidence of mitigation. In general we find that the lack of that documentary evidence reflects the efforts, or rather the lack of the efforts, by the Claimants to seek alternative work. Those are things that apply generally to all the Claimants. We then deal specifically with each of the Claimants.

Mrs Pinto

56 The parties are agreed that we should make a basic award of £3,353 and we make an award of that amount. The parties are also agreed, subject to the figures being given to us being correct, that after deducting for the overpayment of the holiday pay, her damages for breach of contract for failure to give notice should be £2,294.35 and we make an award for that amount. We then considered the compensatory award, there is no dispute that she should be awarded £300 for loss of statutory rights.

57 We considered her attempts to mitigate her loss. It appears that she made no attempt to look for alternative employment between 22 April and July of 2016. We accept that she was no doubt distressed and upset by her termination, but what the Claimant says is she was not well enough to look for any work. There was no medical evidence to support that. She did produce some evidence in respect of counselling she had but the counselling she had was between 20 September and 25 October. That was a date after she had managed to look for, and had found, work. We, therefore, found that Ms Pinto could have made more efforts to find work prior to July. However, we were not satisfied that even if she had done so, she would have within that period secured alternative employment that paid her close to what she earned at the Respondent. It is not in dispute that from 1 August she did secure employment and that that employment pays her £396.43 net per week. We consider that it is reasonable for the Claimant, having found that secure employment, to have taken and stayed in that employment, rather than trying to pursue some other employment that would have paid her an extra £15 or £20 to make up the relatively small shortfall.

58 Her seven weeks' notice would have taken her to 10 June. From 10 June to today there is a period of 36 weeks. Had she remained with the Respondent during the 36 weeks, she would have earned £15,052.68 and we agreed her loss to date is £7,350.94. We add to that the £300 loss of statutory rights. The net difference of £21.90 per week between she gets from her current employment and what she had from the respondents that equates to a difference of £1,038.80 per annum. We accept that the bonus and the overtime that she received to date has been taken into account in the calculations done by the Claimant's solicitor.

59 Going forward, we think it is very likely that the overtime and the bonus that she will receive from that will cover the difference between her wages from her new employer and her wages from her old employer. We, thereofore find that there is no ongoing loss, in other words we are satisfied that she will be able to earn in the region of £1,038.00 from overtime and her bonus.

Mr Jouhary

60 The only evidence of mitigation produced by Mr Jouhary was that between July and December of last year, he made six applications for work, none of which was for a job as a waiter. The one that came closest to it was a job in Origana Pizza or Pizza Hut which was a kitchen assistant's job. We accept his oral evidence that he applied to hotels by handing in his CV, but even if he did that, we find that that is a wholly inadequate effort to find waiting jobs. In light of the fact that Mr Jouhary had 19 years' experience as a waiter, we are absolutely astounded that he made no serious attempt to find any jobs as a waiter. Any reasonable person in his position would have registered with a large number of agencies that exist in London that provide jobs in the hotel and hospitality industry. If he had made serious efforts to find jobs in the area in which his experience lay, we accept that he might initially, because of his age, have had some difficulty in securing a job and it would have taken him longer to find work than it would have a younger person. However, we accept the evidence that was provided by the Respondent, and appeared to be relied upon by the Claimants when they wanted to argue that they did not accept the Respondent's case that they had no alternative jobs to offer the Claimants. Jobs in this particular industry are transitory, there is a high turn over of staff and there are at any given time a large number of vacancies available. Doing the best that we can and to a large extent this is a speculative exercise of looking forward, we concluded that if Mr Jouhary had made reasonable efforts to mitigate his loss and looked for the kind of jobs where his experience lay, he would within 6 months from the date of his dismissal have secured a job that paid at least half of what he was paid with the Respondent and that within a year he would have secured something that paid the same as what he was paid with the Respondent.

61 Turning then to his Schedule of Loss, it is agreed between the parties that he should be awarded a basic award of £11,256.50 and we make and award of that amount. It is equally agreed that his damages for breach of contract less the deduction for the overpayment of the holiday pay should be £4,236.27 and we make an award in respect of that sum. His notice period of twelve weeks would have expired on 15 July. We have found that within 26 weeks, i.e. by 21 October, he should have found a job that paid half of what he was earning at the

respondent and that is a period of 14 weeks. So therefore for 14 weeks he has a loss of £407.62 x 14 which we think comes to £5,706.68. We then calculated that for another period of 26 weeks he has a loss of half of his earnings, which is the £407.62 ÷ 2 x 26 which comes to £5,299.06. If you add those two figures and the £300 for loss of statutory rights, that comes to £11,305.74. So just to recap the awards made to Mr Jouhary basic award £11,256.50, breach of contract £4,236.27 and compensatory award of £11,305.74.

Mr Wojsa

62 It is agreed between the parties that there should be a basic award of £2,874.00 and we make an award to that effect. The Claimant's figure was corrected on the basis the correct start date. It is agreed that his damages for breach of contract, less the holiday pay, should be £2,099.08 and we make an award for that. Dealing with his compensation, it was clear from his own evidence that he made very limited attempts to find any employment other than the role that he had at Wembley Stadium. we did not find his evidence that he could not find any other work that did not clash with his commitments at Wembley Stadium to be credible. There is no documentary evidence at all of any effort that he made to find any alternative employment, Mr Wojsa is a young man and he would not have faced the same handicaps that Mr Jouhary would have in the job market. We also acknowledge that he was earning at a high level with the Respondent; with service and tips and overtime his gross pay was £620.00 per week and we accept that it would take some time for him to find work that would pay at that level.

63 We concluded that if he had made reasonable efforts to find work, that he could have found either something instead of the job that he had at Wembley or he could have found additional work to supplement the income that he was making from his job at Wembley and that he could have done that within a period of 9 months and so our conclusion that had he made proper efforts he could have found a job that paid around about £620 a week by 21 January this year. Leaving out the notice period, we calculate that to be a loss for a period of 32 weeks at the net figure of £483.78 per week, that comes to a total of £15,480.96, plus £300 loss of statutory rights. What we have not been able to do is deduct from that the amount that he had earned until 21 January from his alternative employment because we do not know that figure. Somebody is going to need to calculate what he earned until 21 January and that figure needs to be deducted from his compensatory loss. So what we award is a basic award of £2,874.00, £2,099.08 for breach of contract and the compensatory award the figure needs to be agreed between the parties.

Mr Wojdylo

64 The parties agreed that Mateusz Wojdylo had earned £5,333.92 from his alternative employment up until the date of 21 January. Therefore, his total compensatory loss is £10,747.04.

Employment Judge Grewal
30 August 2017