**Case number: 2204607/2018**

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**EMPLOYMENT TRIBUNALS**

***Claimant*** ***Respondents***

Ms N Tumenaite **AND** (1) PS Coho Centre Administration Ltd
(2) DH Soho Ltd

**Heard at**: London Central **On**: 13 November 2018

**Before:** Employment Judge Palca
**Members**: Mr M Simon
Mr D Eggmore

**Representation**
**For the Claimant:** In Person
**For the Respondent:** Ms P Hall, Consultant

# REASONS

Parties

1. The Respondents are part of a group of companies which owns three bars/restaurants in Waldorf Street, Soho. The Claimant was employed to work as a waitress in one of those venues, Dirty Harry.

2. On 19 May 2018 the Claimant brought proceedings against Dirty Harry for unlawful deductions from wages and discrimination. At a case management conference/preliminary hearing held on 3 September 2018, the current parties were substituted as Respondents to the action. The ET3 was served on 16 October 2018.

Evidence

3. The Claimant and one of her former colleagues, Ms E Oikonomidou gave evidence for the Claimant. Mr Richard Walker and Mr Hamish Glenn, respectively the Operations Manager and Head of Operations of the Respondents, gave evidence on behalf of the Respondents. All witnesses had produced witness statements. There was an agreed bundle of documents.

Issues

4. The issues for the Tribunal to determine are: -

1. By whom was the Claimant employed
2. Was the Claimant directly discriminated against on the ground of religion or belief
3. Was the Claimant indirectly discriminated against on the ground of religion or belief
4. Was the Claimant's claim submitted within time
5. If appropriate, remedy

Facts

5. The Tribunal found that the material facts were as follows.

6. The Respondent operates three food and drink venues from one premises in Waldorf Street – Dirty Harry, Paper and After All. Dirty Harry is on the first floor. The other two are in the basement. Each venue apparently has a different character. However, they share one kitchen. They are connected via a group of companies, the structure of which those giving evidence before us clearly found quite hard to articulate. However, it seems that the venues share the same umbrella company, PC Admin Soho Limited, one company owns the relevant leases – PC Soho Limited, and each venue operation is owned by a subsidiary of the holding company – in the case of Dirty Harry, the Second Respondent. The First Respondent conducted the administration across all of the sites, apparently including employment of staff. Therefore, DH Soho Limited is the effective owner and operator of Dirty Harry, including managing its brand and taking some, but not all, of its receipts. Around Christmas 2017 the group employed some twenty-five staff but this number reduced to around fifteen in the New Year. One man, Malcom Farquharson owns the umbrella company, the Tribunal was told, and is director of all the companies. The companies' registered offices are the offices of their accountants, who also provide payroll services.

7. Dirty Harry is a bar which serves burgers, including cheese burgers and vegetarian haloumi burgers. Both retail for £7.50. Other burgers are sold at higher prices. A standard meal of cheese burger and chips would cost customers £11.50. The cost of ingredients of a cheese burger is £1.64, 49p cheaper than the cost of the ingredients of a haloumi burger. The Tribunal was told that a meat burger has a shelf life of three days, while a haloumi burger has a longer shelf life.

8. The Claimant has been vegetarian since 2012 for spiritual and ethical reasons. She does not consider herself a Hindu but follows basic Hindu spiritual teachings as well as those of Vaishnavism, which has evolved from Hinduism. These include meditation, yoga and a vegetarian diet, which are part of her daily life in pursuit of spiritual development. Over time she has also become increasingly aware of and sympathetic to the cause of animal rights, and thus holds vegetarianism as a philosophical belief and part of her person code of ethics. The Respondents did not contest that this was a philosophical belief, and the tribunal found that it was so.

9. The Claimant was employed as a waitress at Dirty Harry. The employment formally began on 11 November 2017 after a preliminary probation period.

10. The Claimant's employment contract was made with the First Respondent. There was also a staff handbook, thought this was not referred to in the contract of employment. The Claimant says she did not get a copy of the handbook until February 2018 and the Respondent's did not refute that. The policy includes the following statements

> "the aim of the policy is to ensure no job applicant, employee or worker is discriminated against either directly or indirectly on the grounds of … religion or belief …
>
> We will maintain a neutral working environment in which no employee or worker feels under threat or intimidated".

11. On a regular basis the Claimant received pay slips for the previous financial period from the First Respondent although the payments were paid in to her bank account by the Second Respondent. She worked a sixteen-hour week and was paid at the hourly rate of £9. Her employment contract provided that she was also entitled to a benefit:

> "Your position has the benefit if a service charge bonus, details of which are shown separately".

The Tribunal understands the meaning of this clause to be the natural meaning that the detail of the service charge policy would be written down elsewhere and conveyed to the Claimant. The Respondents witnesses said it meant that the service charge would be separately described on the pay slip. Since there was no mention of a pay slip in the clause, the Tribunal favoured the more natural meaning. Be that as it may, it is clear that the policy was never written down.

12. The Respondents charge a service charge of 12.5% of the bill to most customers. The Respondents claim that the Claimant would have been told that the service charge policy was discretionary. The Claimant denies that she was told this. Given that the Respondents have no direct evidence of this, and that its witnesses were not themselves informed that such a conversation took place, the Tribunal preferred the Claimant's evidence. It seems clear that the service charge paid to employees was a function of the hours they worked, and receipts. While not in the witness statements, which refer to easily measurable statistics on which to base the service charge, one witness referred in evidence to there being also a performance criterion, but no further evidence was given on this point and the Claimant had not been informed of it. We were told that all the service charges for the month were added up, 20% was taken by the employer to pay for uniforms etc, and the balance was paid to staff. It is reasonable to suppose that the policy was applied on a consistent and rational basis.

13. The Claimant was also paid directly any tips donated by a credit card on top of the service charge on tables she had served. The staff handbook refers to this as follows:

> "Tips are distributed via a tronc system. Details in this regard are provided separately".

However, the policy was not in the bundle of papers put before the Employment Tribunal and the Respondents did not produce it subsequently. There is no evidence that the Claimant ever saw the policy. The Respondents claim that the Claimant would have been told that in order to claim tips she would have had to have signed and taken a photograph of the relevant receipt and handed it in to her manager. The Claimant says that no such instructions were given until February 2018. For the reasons given above relating to service charge payments, the Tribunal preferred the Claimant's evidence on this point. In addition, the Claimant's witness, who was a former colleague, supported the Claimant's evidence.

14. The Claimant was paid one tip payment for £2.50 in December 2017. Her evidence was that she did not provide a photograph of the receipt before being paid the tip. The Claimant's pay slip dated 10 January 2018 showed that she had been paid, on top of salary, a service charge of £300 for December 2017. In fact, the service charge was never paid, and the reference to it was reversed in a pay slip received by the Claimant after her employment had terminated.

15. In January 2018 the group held an office party. Prior to the party the Claimant told people, including her managers, via a WhatsApp group that she was vegetarian/vegan. She did not however directly link this to any religion or belief. The Tribunal found that there was no reason why the Respondents should understand that the Claimant had a particular religion or belief linked to vegetarianism.

16. On 26 December 2017 a group of people visited Dirty Harry. There was a party in the basement of the Waldorf Street building. They ran up a large bar bill for which they paid by credit cards, and it subsequently emerged that the credit cards had been stolen. The extent of the fraud emerged over time. Initially it seemed containable but by early February it was apparent that it was quite substantial, as banks started to enter charge backs into the Group's bank accounts. Some of the payments were withdrawn from the First Respondents account and some from the Second Respondents account. This must have been because some of the initial payments for the Dirty Harry drinks were paid to the First Respondent and some to the Second Respondent. We were told that the Second Respondent had a credit card machine and that the machines moved around the venues. The party was held at Dirty Harry, several of the bills were from Dirty Harry, and given that the Second Respondent was only responsible for Dirty Harry, the Tribunal cannot conceive to what use a credit card machine in its name would have been put save for receiving payments for bills from Dirty Harry.

17. The fraud prompted the Respondents not to pay any service charge payments to its staff, including those already in pay slips, and to make late payments of salary. The Claimant received no further service charge or tip payments. This prompted the Claimant to complain. She seems to have adopted the role of staff representative, leading colleagues. She sought a meeting with staff, to which management agreed subject to agreeing how the meeting would be represented. Among the topics discussed was credit card tips and an action point was agreed that interested staff should go through receipts at the office and take pictures as proof. Shortly after the meeting the Claimant reviewed the credit card slips and found many lost receipts. The Claimant sent a WhatsApp with colleagues to advise them to do the same. Her evidence was that she found around £80 of tips due to her, that she took photographs

of the relevant receipts and provided these to her manager, but that she later deleted them from her phone on the basis that she had by that point handed them in. On 5 March shortly after this, the Claimant wrote to the Respondent seeking the payment of the £80 of tips she had identified. The Respondent argued that the fact that the Claimant had not kept photographs indicated that in fact she not due any tips at all. However, the Tribunal accepted the Claimant's evidence on the point. She had written an email about a fortnight later referring to the tips which she had identified as being due, which backs up her account with a near-contemporary document, and it seemed plausible to the Tribunal that, having handed in copies of the photographs of the receipts, she would then have deleted the photographs from her phone.

18. Meanwhile, at about this time, possibly on 9 February, the Claimant asked for a vegetarian burger. All Dirty Harry staff were entitled to reduced fee employee food during working hours. They were all told of this and there was a tab for "employee food" on the till. The policy was that the only employee food that would be served would be a cheese burger (including meat) and chips. These were provided to staff for £5. The Claimant asked her duty manager, Ms Daniviciute, if she could have the vegetarian version of staff food – ie a haloumi burger instead of a beef burger. Ms Daniviciute agreed and the Claimant went to the kitchen to warn the chef not to include meat in the haloumi burger. The head of operations was in the kitchen and he told the Claimant that if she wanted a haloumi burger she would have to pay full customer price. The Claimant was too intimidated by the head of operations to make the request again. She resigned on 20 February, worked out two weeks' notice, and left on 6 March.

19. In addition to her salary, the Claimant received the following supplemental payments while she was employed by the Respondents:

1. November service charge £33.60
2. December gratuity £2.50

20. Dirty Harry's turnover for the months of December 2017, January 2018 and February 2018 was £258,303, £90,180 and £127,518 respectively.

21. The First Respondent, as a result of the fraud, was not paying its debts. On 27 February 2018 Meantime Brewing Company Limited presented a winding up petition to the Court and the winding up order was made on 18 April 2018. The company initially did not know of the order. Once it found out its assets and employees were transferred to a new company within the group, PS Soho Limited.

Law

22. S.13 of the Employment Rights Act provides that employees have the right not to have unlawful deductions made from their wages. Service charges, bonuses and tips would be included within the definition of wages.

23. The Equality Act 2010 contains the following clauses:

13 Direct Discrimination

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 A protected characteristic includes religion or belief. Belief means "any religious or philosophical belief and a reference to belief includes a reference to a lack of belief".

3. Direct discrimination occurs when A treats B in a particular way "because of a protected characteristic". It is therefore axiomatic that the Respondent must appreciate that (a) has the relevant characteristic. Without this, any claim for direct discrimination fails".

24. The Act defines indirect discrimination in s.19 as follows:

1. "A person (A) discriminates against another (B) if A applies to B a provision criterion or practice which is discriminatory in relation to a relevant protected characteristic of B.
2. For the purposes of sub section (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B if:
(a) A applies, or would apply, it to persons with whom B does not share the characteristic
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Religion or belief is one of the relevant protected characteristics

25. S.123 of the Equality Act provides that Claimants must bring claims for direct or indirect discrimination within the period of three months starting with the date of the act to which the complaint relates or within such other period as the Employment Tribunal thinks just and equitable.

<u>Submissions</u>

26. The Respondents argued that the Claimant was employed by the First Respondent, that it had no obligation to pay the Claimant service charge payments because these were at all times discretionary and could be withdrawn, and that as a matter of fact the Claimant had not been paid any tips over and above the £2.50 which she had been paid in December. As far as discrimination was concerned, the Respondents argued that they had not known that the Claimant had any particular religion or belief and therefore could not have directly discriminated against her. In so far as indirect discrimination was concerned, the Respondents claimed that the Claimant was out of time for bringing the claim and that the decision only to allocate discounted meat burgers to staff was a proportionate means of achieving a legitimate aim, both for financial reasons and because meat burgers had a shorter shelf life than haloumi burgers.

27. The Claimant argued that as a matter of practice all companies within the Claimant groups seemed to operate as one and that therefore she was in reality employed by the Second Respondent. She believed she had a contractual entitlement both to tips and to service charges, which had not been paid. She argued that she had been

indirectly discriminated against, meeting the criterion in s.19 of the Equality Act 2010 because of the provision criterion or practice that staff could only receive discounted food of cheese burgers, and chips, and not any other vegetarian form of burger.

Conclusions

28. The first issue for the Tribunal to consider is by whom the Claimant was employed. The Claimant's employment contract was with the First Respondent and her pay slips were issued by the First Respondent although payment was actually made by the Second Respondent. This arrangement was described by the Respondents as pursuant to intercompany loan and there was no evidence to the contrary. The First Respondent is now in liquidation having been wound up on 18 April 2018. When the group found this out it appears that the First Respondent's assets were transferred to PS Soho Limited. The employees of the First Respondent were TUPE transferred across to this company. The winding up order and the transfer both occurred after the Claimant had left Dirty Harry, and therefore do not affect the identity of her employer.

29. Even though the various different companies within the group were patently interlinked and had similar managers and owners, the Tribunal concluded that the First Respondent was the Claimant's employer.

30. Turning now to the issue of service charges, the Tribunal concluded that the Claimant was contractually entitled to service charges. This is on the basis of the terms in her contract of employment. There was no evidence that the Claimant had been informed that service charges were discretionary. The service charge due to the Claimant for the first full month of work was £300. Since service charges were clearly related to takings the Employment Tribunal determined that a method of establishing the service charge to which the Claimant was entitled for January and February 2018 was to assess them in the same proportion to turnover as her December service charge was to the December takings, namely 0.12%. This would entitle the Claimant to £108.22 service charge for January and £153.02 for February, making a total service charge due, including the December payment, of £561.24.

31. So far as tips were concerned, as set out in the facts, the Tribunal accepted the evidence that the Claimant was due £80 in tips. That is a contractual entitlement also.

32. The Tribunal therefore orders the First Respondent to pay the Claimant the sum of £641.24.

Discrimination on Ground of Religion or Belief

33. Direct discrimination requires the Respondent to know that the Claimant had a particular protected characteristic. The Tribunal accepted that the Respondents did not as a matter of fact know that the Claimant had the philosophical belief which she possesses. The Tribunal therefore found that the Respondents did not directly discriminate against the Claimant.

34. So far as indirect discrimination is concerned, it is not necessary for the Respondents to know of the Claimant's protected characteristic for the case to be made out. The Employment Tribunal finds that the Second Respondent, which owned Dirty Harry, operated a provision criterion or practice ("PCP") of giving staff a discount on cheese burgers and chips only. The Claimant's philosophical belief prevented her from eating meat. This meant that she was not able to obtain substantial discounted food, but only the side order of chips. The PCP meant also that those who shared or might have shared the Claimant's philosophical belief would also not have been able to take full advantage of the discounted meals. The Claimant herself was put at that disadvantage because she was told that if she wanted a halloumi burger instead of having the cheese burger she would have had to have paid the full price, of £11.50 including chips, as against £5. This meant that she was not able to benefit from the provision without paying more. Therefore, all the provisions of s.19 are satisfied.

35. The final issue for the Tribunal to consider was whether the PCP was a proportionate means of achieving a legitimate aim.

36. The Respondents relied on two factors in support of their claim for the rule was a proportionate means, namely that a halloumi burger cost more to produce than a cheese burger, and that a halloumi burger had a longer shelf life than meat burgers.

37. The evidence before the Tribunal was that by February there were about fifteen employees, many of whom chose not to take advantage of the discounted meals but would buy meals more cheaply elsewhere and eat them on the premises.

38. While using up outdated stock might potentially be a legitimate aim, the Employment Tribunal was not convinced that there was a real need on the part of the employer to do this in practice. They did not believe that the chosen method, namely imposing the PCP, was a proportionate method of achieving the aim. In terms of price, the Claimant was told she would have to pay the full customer price not one discounted to take in to account the slightly higher cost of ingredients of a halloumi burger. The difference in price, given the broad scale of the employer's operation and takings, was minimal even taking in to account its financial constraints from the Boxing Day party.

39. Second in relation to shelf life, there was no evidence before Employment Tribunal that the Respondents frequently had to throw away stock. Again the solution, namely requiring employees if they wanted a discounted burger to have the cheese burger rather than any other burger or a vegetarian burger, did not seem a significant method of achieving the aim of making sure that all stock was used. Therefore, the Employment Tribunal did not believe that there was a real need for the Respondent to deal with the stock outside its sell by date in general, and there was no evidence before it that the PCP was an appropriate method of achieving the objective given the small numbers of staff who took up the option rather than eating elsewhere. The PCP was also not necessary to achieve this purpose, again given that the Respondent seemed able to assess approximate and anticipated turnover on a monthly basis and therefore could buy in stock accordingly and the very small percentage difference that the PCP would make was of minute proportions to the overall principle.

40. The Tribunal therefore found that the Second Respondent discriminated against the Claimant in relation to her protected characteristic of her philosophical belief.

Jurisdiction

41. The Respondents argued that the Employment Tribunal had no jurisdiction to hear the discriminatory complaints made against them because they were presented out of time.

42. It is unclear as to exactly when the Claimant sought an halloumi burger from the Respondent and the request was rejected. The Claimant thought that it was in mid February. She thought that her supervisor had left about two weeks after the event. The Respondent thought that the event took place on 9 February.

43. The Claimant's employment ended on 6 March. She applied to ACAS for early conciliation on 9 April 2018. ACAS issued its certificate on 24 April 2018, sixteen days later.

44. According to s.123 of the Equality Act 2010, a complaint of race discrimination should be brought within three months of the date to which the complaint relates – ie by 8 May 2018. However, any period during which ACAS was being asked to conciliate should be ignored for the purposes of assessing the three month period. This means that sixteen days during that period should be ignored, with the consequence that the Claimant had until 22 May 2018 within which to lodge her claim. She in fact lodged it on 19 May and was therefore within time.

Remedy

45 The First Respondent made unlawful deductions from the Claimant's wages. It is ordered to pay the Claimant £641.24.

46 The Second Respondent has been found to have indirectly discriminated against the Claimant in relation to her protected characteristic of her philosophical belief.

47 The Tribunal declares that the Claimant was unlawfully indirectly discriminated against by the Second Respondent in relation to her philosophical beliefs.

48 The case ***of Vento v Chief Constable of West Yorkshire Police (No 2***) [2003] ICR 318 CA gives guidelines for awards for injury to feelings. and sets out a series of broad bands depending on the degree of hurt, distress and humiliation caused by the discriminatory acts. The three bands are for the most serious cases, serious cases that do not merit an award in the highest band, and a lower band which is appropriate for less serious cases. The current, inflation-adjusted range of awards for the lower band is between £900 and £8,600.

49 The tribunal considered that the present circumstances fall within the lower band. The event occurred once. It was however not trivial, and the circumstances were such that the claimant was intimidated from making a request for a discounted haloumi burger again. The tribunal determine that the appropriate level for the award is £2,000, and the Second Respondent is ordered to pay this sum to the Claimant forthwith.

50 The Tribunal recommends that proportionately discounted vegetarian meals are available to vegetarian staff at Dirty Harry's. This is generally good practice to motivate employees and maintain their loyalty.

Employment Judge Palca

Dated: 26 March 2019

Judgment and Reasons sent to the parties on:

27 Mar. 19

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For the Tribunal Office