Case Numbers: 1600686/2016
1600687/2016

EMPLOYMENT TRIBUNALS

Claimants: **(1) Mr R Jeduss**
(2) Ms A Kudrjavceva

Respondent: **Mr T Hussain (trading as "Mighty Cod Pontypridd")**

Heard at: **Cardiff** **On: 19th February 2018**

Before: **Employment Judge M Whitcombe**
Members **Mrs LM Thomas**
Ms C Lovell

Representation:

Claimant: Mr G Pollitt (Counsel) and Mr N Vidini (Solicitor), both acting *pro bono*.

Respondent: No appearance or representation.

JUDGMENT dated 19th February 2018 having been sent to the parties on 21st March 2018, and reasons having subsequently been requested by the Respondent in accordance with rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal's reasons are set out below.

REASONS

Background

1. Oral reasons for our judgment on liability and remedy were given at the hearing. These written reasons are provided in response to a request by the Respondent Mr Hussain, who did not attend the hearing. Our findings and reasons are unanimous.

2. Mr Jeduss and Ms Kudrjavceva are in a relationship and now have a child together. They are citizens of Latvia (born in Belarus and Russia respectively) and both formerly worked in Mr Hussain's fish and chip

restaurant business in Pontypridd. In these Reasons we will refer to the parties as "the First Claimant", "the Second Claimant" and "the Respondent" respectively.

3. The claims arise from the period between about 2nd February 2016 and 15th May 2016 during which the Claimants allege that they were employed by the Respondent, both to decorate and refurbish the restaurant prior to its opening, and then subsequently to work in that restaurant as chefs and delivery drivers.

Claims and Issues

4. By a Claim Form (ET1) presented on 19th September 2016 the Claimants brought various claims of race and religious discrimination and also claims for "other payments" owed. Initially those claims were not clearly particularised. They were clarified at a Preliminary Hearing for case management conducted by REJ Clarke on 18th November 2016. Anyone wishing to understand the full background to that hearing, the Respondent's failure to attend it, or the Respondent's unsuccessful application to transfer the case to an Employment Tribunal sitting in Birmingham, should consult the Order of REJ Clarke dated 22nd November 2016.

5. In his Response (ET3) presented on 15th November 2016 the Respondent denied the claims, described them as "outrageous", "frivolous" and "vexatious", and queried why the Tribunal administration had accepted the claims at all. The Respondent alleged that the Tribunal had no jurisdiction to hear any of the claims because the Claimants had both been self-employed when working in his business. The Respondent also alleged that the Claimants had been paid for the painting they carried out before the shop started trading. More generally, the Respondent alleged that the claims were a sham, fabricated in collaboration with Mr Ali Saeed, a previous tenant of the same restaurant premises and with whom the Respondent was in dispute. Matters were pending both in the High Court and in Arbitration. The Response gave a good deal of information regarding the dispute between the Respondent and Mr Saeed, but it is not necessary to summarise it for present purposes.

6. By the time of the Preliminary Hearing on 18th November 2016, Newport CAB had assisted the Claimants to file amended riders to the ET1 and to make an application to amend as necessary. However, that correspondence was not drawn to REJ Clarke's attention until after the hearing. The Claimants were also assisted on the day by Mr Vidini, acting pro bono under the auspices of the ELIPS scheme. The Respondent did not attend, despite having been given an opportunity to attend by telephone if preferred.

7. REJ Clarke recorded the remaining claims and some of the issues arising as follows.

    a. Employment status was a central dispute between the parties. The Claimants argue that they were at all relevant times employees for the purposes of claims under the Employment Rights Act 1996. Alternatively, they argue that they were workers for the purposes of that Act. They also argue that their status satisfied the extended definition of employment in the Equality Act 2010. The Respondent contends that the Claimants were at all times self-employed and that they had no employment rights at all.

    b. There were claims for notice pay of one week each, either as a result of a direct dismissal without notice, or else as a result of a constructive dismissal which entitled the Claimants to resign without notice.

    c. Failure to provide a written statement of terms and conditions contrary to section 1 of the Employment Rights Act 1996, giving rise to an award under section 38(3) of the Employment Act 2002.

    d. Claims for arrears of wages. Although the Claimants contended that the agreed rate of pay was “a little over” the national minimum wage, the claims were limited to arrears of wages at national minimum wage rates. The Claimants claim that they were not paid at all while working excessive hours for the Respondent.

    e. Accrued but untaken holiday pay.

    f. Race discrimination in the form of harassment, put on the basis of colour and/or nationality. For that purpose the Claimants describe themselves as “white”. They are Latvian nationals.

    g. Religious discrimination in the form of harassment, put on the basis that the Claimants did not share the Respondent’s religion of Islam.

8. Full details of the claims for unpaid wages and holiday pay, including calculations, are set out in paragraph 13 of REJ Clarke’s Order. They were put on the same basis at this hearing.

9. Full details of the allegations of discriminatory harassment contrary to section 26 of the Equality Act 2010 are set out in paragraph 15 of REJ Clarke’s Order. They are as follows.

a. That a few times every week the Respondent would refer to the First Claimant as "Gora", which the First Claimant understood to be the Punjabi word for a white man, and which was directed at him in a pejorative sense which he found derogatory. This is alleged to have been harassment related to race in the sense of colour (section 9(1)(a) of the Equality Act 2010).

b. That on three or four occasions the Respondent shouted at the Second Claimant (clarified at this hearing to relate to both Claimants) for cooking pork or non-halal food in the flat above the restaurant (clarified at this hearing to be the restaurant itself). This is alleged to have been harassment related to religion, specifically the fact that the Claimants did not share the Respondent's Muslim faith.

c. That on two occasions, on or about 3rd and 30th April 2016, the Respondent complained that Latvian citizens such as the Claimants were allowed to enter the UK to work whereas his own family members in Pakistan were not. This is alleged to have been harassment related to race in the sense of the Claimants' Latvian nationality (section 9(1)(b) Equality Act 2010).

d. That on two occasions, on or about 3rd and 30th April 2016, the Respondent put pressure on the Second Claimant to enter into a sham marriage with one of his relatives, so that the relative could take advantage of EU free movement rights. This is alleged to have been harassment of both Claimants related to race, in the sense of their Latvian nationality, or alternatively their EU citizenship (section 9(1)(b) Equality Act 2010).

10. It was accepted on behalf of the Claimants that the ET1 had raised other claims which the ET had no jurisdiction to determine, and also that the Claimants' alleged status as vulnerable migrant workers could not, on its own, amount to a protected characteristic for the purposes of the Equality Act 2010 (see paragraphs 10 and 15 of REJ Clarke's Order). The Claimants also made it clear that they did not claim unfair or discriminatory dismissal. Their discrimination claims were limited to incidents prior to the termination of the employment relationship.

Respondent's Failure to Attend

11. The Respondent did not attend this hearing ("the Final Hearing"), which had been listed for 3 days on 19th, 20th and 21st February 2018. The Respondent is certainly not obliged to attend, but his failure to attend without explanation gave rise to a number of questions and case management options. It is necessary to set out some of the background.

12. The dates for this Final Hearing were fixed at a Preliminary Hearing conducted by EJ Beard on 5th October 2017, which the Respondent also failed to attend. EJ Beard's Order and a Notice of Hearing were sent to the parties in the normal way.

13. In fact, the Respondent had not attended any of the previous hearings listed in this case, which can be summarised as follows:

    a. the first Preliminary Hearing for case management, conducted by REJ Clarke, on 18th November 2016;

    b. a further Preliminary Hearing for case management, conducted by EJ Beard, on 5th October 2017;

    c. a Preliminary Hearing to consider an application by the Claimants for an "unless order" against the Respondent, and a counter-application by the Respondent to strike out the Claims, heard by EJ Cadney on 6th February 2018.

14. During the evening prior to the Preliminary Hearing conducted by EJ Cadney on 6th February 2018 the Respondent emailed the Tribunal saying that he was unable to attend since his mother had suffered a heart attack. The Respondent sought a postponement and re-listing of that *Preliminary Hearing* (not this Final Hearing). EJ Cadney refused that application given the proximity of the Final Hearing and the urgent nature of the applications before him. EJ Cadney also made an "unless order" addressed to the Respondent, but that order was subsequently revoked on EJ Cadney's own initiative because administrative delays in promulgation had rendered it ineffective.

15. The position when the case came before us was that the Respondent had not made any application for a postponement of the Final Hearing. There was no unresolved application for a postponement of any sort on file. There was no message from the Respondent to explain his failure to attend. The Tribunal clerk's own enquiries did not shed any light on the matter.

16. We considered the requirements of rule 47 and the overriding objective in rule 2 of the ET Rules of Procedure 2013. We decided to proceed with the case in the Respondent's absence since there appeared to have been more than adequate notice of the hearing and there was nothing in the evidence before us to indicate that it would be unfair to proceed.

17. The process of hearing evidence and submissions took until the afternoon. At no point prior to giving judgment and oral reasons did any message

reach us explaining the Respondent's failure to attend or applying for a postponement, still less supplying evidence in support of any such application.

Evidence

18. We heard evidence from both Claimants. They gave their evidence in the Latvian language with the assistance of an interpreter. They also adopted and relied on written witness statements. With our permission, the Claimants also relied on supplementary witness statements directed to the issue of injury to feelings caused by alleged acts of unlawful discrimination. We pre-read all of the witness statements and the contents of a concise bundle of documents.

19. While it was certainly not our function to adopt the role of advocate for the absent Respondent, we did seek clarification of certain matters and asked our own questions when we thought that was important in the interests of a fair hearing.

20. We found both of the Claimants to be honest and credible witnesses. They answered our questions helpfully, they appeared in almost all respects to have a good grasp of the relevant detail and their credibility was enhanced by a willingness to give answers that served to limit their claims or to reduce the potential compensation. That struck us as the behavior of honest witnesses, since a dishonest witness could easily have exaggerated claims or embellished evidence knowing that his or her evidence was essentially unopposed. The Claimants' evidence was consistent, corroborated and uncontradicted by the evidence of any other witness.

21. For obvious reasons, the Respondent did not give evidence himself or call any other witnesses. The Respondent had not submitted any documents or witness statements, so there was nothing of that sort which we could take into account in his absence. The Respondent did not make any written submissions, although we carefully read the points made in the Response (ET3).

22. For those reasons, when making findings of fact on the balance of probabilities, we generally accepted what we were told by the Claimants in their unchallenged and uncontradicted evidence.

Findings of Fact

23. We made the following findings of fact on the balance of probabilities. On most issues the Claimants have the burden of proof to that standard.

24. The First Claimant came to the UK in order to take up an offer of employment on a ship. When that job offer came to nothing the First Claimant found alternative work in Birmingham.

25. While working in Birmingham for one of the Respondent's business associates the First Claimant was offered a job at "Aladdin's", a chip shop owned by the Respondent. The First Claimant worked there as the manager and delivery driver.

26. When "Aladdin's" was sold the Respondent offered the First Claimant paid work and accommodation at another chip shop he owned in Pontypridd. That business became known as "Mighty Cod" and is the setting for the claims we have to determine. By then the First Claimant had met the Second Claimant. Both Claimants were offered paid work and accommodation at the Respondent's business in Pontypridd. The First Claimant was told that he would be the manager and would get slightly more than minimum wage. The Second Claimant was told that she would be needed 2 or 3 days a week and would be paid the minimum wage. However, both Claimants now limit their claims to national minimum wage rates.

27. The Claimants moved to Pontypridd and started work in the shop on 2nd February 2016.

28. On arrival, the Claimants found that the shop was not yet open and that it would require significant cleaning and renovation before it would be ready to open. The Claimants cleaned it and painted it. The electricity supply had been disconnected and the freezers contained defrosted, rancid food. On the Respondent's instructions the First Claimant took that food to a tip in Cardiff in his own car. The Respondent promised to pay the First Claimant petrol money. The First Claimant used his own savings to buy cleaning products for use in the shop, light bulbs, other electrical components and other miscellaneous business expenses. The Respondent was apologetic and told the First Claimant that it would not be possible to reimburse those expenses until the shop opened and it made money.

29. By the third week the First Claimant complained to the Respondent that he and the Second Claimant had no money for anything. The Respondent apologised and paid £100 the following week. However, the First Claimant then had to use £80 of that sum to arrange for the reconnection of the gas supply to the shop and to the flat above it where the Claimants lived. The balance of £20 was more than accounted for by cleaning materials the Claimant had purchased out of his own savings.

30. The renovation of the shop took about 5 weeks and it opened for business on 7th March 2016. Once the shop opened the First Claimant asked for some money for the work done up until that point and for reimbursement of expenses. The Respondent declined to make any payments, saying that he did not have any money. The Respondent had until then been living in another flat above the shop, but after that the Claimants hardly saw him. The Respondent lived mainly in Birmingham, returning at weekends to collect takings from the till. Every time the First Claimant saw the Respondent he asked when the Claimants would be paid. The Respondent always promised to pay during the following week, but never did. The Respondent did reimburse the First Claimant for food purchased from a cash and carry, but declined to pay the First Claimant's petrol expenses for the collection of that stock or for home deliveries.

31. From Monday to Thursday inclusive the shop was open from 11am until midnight. Additional cleaning and preparation meant that the Claimants would typically finish work around 1am. At weekends the shop stayed open until 2am and the Claimants would usually work until 3am. These very long hours are detailed in paragraph 18 of the First Claimant's statement and in paragraph 15 of the Second Claimant's statement. We will not set out the full table in these reasons.

32. The Respondent promised that the Claimants would receive a "contract of employment", but none was ever received. The First Claimant chased the Respondent for a written contract and was told that one would be provided. Again, none was ever received. At no time did the Respondent reply to requests for a "contract of employment" by saying that the Claimants were not employees at all.

33. The standard of accommodation provided was poor. For that, the Claimants paid rent of £50 per week inclusive of bills. They were entitled to free meals in the chip shop itself. It is not necessary to make detailed findings on the issue of quality of accommodation because the Respondent did not put forward any evidence to substantiate a claim to be able to offset the value of accommodation provided against the wages that would otherwise be due to the Claimants.

34. On Sunday 3rd April 2016 the First Claimant saw the Respondent paying wages to other staff who worked in the shop. When the First Claimant asked for his own wages the Respondent shouted at him in front of other staff saying that the First Claimant should "leave now" and "get out" if he "didn't like it". Later that night the First Claimant threatened to call the police if he was not paid. The Respondent laughed and replied that the police would not help the First Claimant because he was a foreigner. The Respondent also threatened to tell the police that the First Claimant had stolen from him, that the police would force the Claimants out of the flat

and that they would have nothing. The First Claimant felt that he could not take that risk.

35. On 15th April 2016 the Respondent suggested to the Claimants that an arrangement could be reached under which the Respondent would pay the Claimants "big money" if the Second Claimant entered into a sham marriage with the Respondent's cousin for immigration purposes. The Claimants were angry and refused. The Respondent later repeated his request to the Second Claimant at a time when the First Claimant was not around. Faced with repeated refusals the Respondent said to the First Claimant, "*It's not fair. You're an immigrant. I've lived here for years. Just because you're from Europe you are allowed to bring family. My family can't come over but yours can. It's unfair; you need to help me.*" The First Claimant refused.

36. The Claimants were extremely hurt and upset by these remarks, which they interpreted as showing that the Respondent thought that the Second Claimant was for sale, and that the Claimants' private lives and the relationship between them meant nothing. They found the approach insulting and oppressive. They felt that the Respondent was treating the Second Claimant like a prostitute. Both Claimants have cried as a result.

37. When the Claimants returned to work following leave on 26th or 27th April 2016 they found that the Respondent had changed the locks and had locked the door to the flat. The Respondent only permitted access once the Claimants promised that they would not take another day off. The Respondent said, "*If you don't agree you can leave now.*" The Claimants felt that they had no alternative but to agree. The Respondent promised to pay arrears of wages within a few days but did not do so. In the course of the discussion the Respondent said, "*you're immigrants, you're nothing [or nobody] here*" and that the Claimants should be grateful for food and somewhere to live.

38. At all times the Claimants worked under the direction and control of the Respondent. They did not work for anyone else while working for the Respondent. The Claimants' understanding was that they were employed by the Respondent. At no time did the Respondent describe the arrangement as "self-employment", nor did he refer to "worker" status as distinct from employment.

39. The Claimants were initially told that they would be working a maximum of 5 to 6 days a week in the First Claimant's case and 2-3 days a week in the Second Claimant's case. In fact they worked every single day between 2nd February 2016 and 15th May 2016 apart from 4 days. In total, the First Claimant worked for 1,498 hours, as set out in paragraph 18 of his

statement. The Second Claimant's hours were exactly the same, totaling 1,498, as set out in paragraph 15 of her statement.

40. Once the shop was open the Respondent would sometimes invite his friends to the shop to socialise. On those occasions the Respondent showed off by calling the First Claimant various names. Sometimes the First Claimant was simply addressed as, "*You!*" or a random western name like "*Peter*". The Respondent would then laugh and say to his friends in either Punjabi or Urdu, "*I don't care what his real name is.*" On some occasions the Respondent referred to the First Claimant as "*Gora"*, a name used to describe people with white skin. The Second Claimant was never referred to by her name and was ordered about in terse terms such as "*You! Get me tea.*" On one occasion the Respondent said of the Claimants, "*These two fools work for me for free… Stupid immigrants.*"

41. The First Claimant's knowledge of these remarks made in another language came about in the following way. The First Claimant has picked up some Punjabi through 9 years of working for people of Indian ethnicity. The Respondent was not aware that the First Claimant understood some Punjabi. Punjabi and Urdu are, to a degree, mutually intelligible, at least in spoken form. Whether the Respondent was speaking Punjabi or Urdu, the First Claimant was able to understand some of the words used. The First Claimant also relied on what he was told by an employee known as "Dave". Dave was a student who sometimes worked in the shop. He was fluent in both Punjabi and English. Dave specifically confirmed that the Respondent had said "*These two fools work for me for free… Stupid immigrants.*"

42. The Claimants found these remarks derogatory in the context in which they were used. They perceived that they were used to insult, mock and belittle them. The Respondent laughed with his friends while making the remarks. The Claimants felt that it showed the Respondent had no respect for them and that they were worth nothing in his eyes. The Claimants felt that the Respondent was demonstrating his power over them. The First Claimant asked the Respondent to show respect by using his correct name, but the Respondent repeatedly chose not to do so. For all of those reasons, the Claimants felt upset, angry and humiliated.

43. On one occasion when the Claimants were cooking pork in the restaurant the Respondent approached them and complained about the smell. The Respondent shouted at them and said that the Claimants could not cook pork or any other non-Halal food in his kitchen using his utensils. The Claimants therefore bought their own utensils which were kept separately from the other kitchen equipment. The Respondent continued to forbid them from cooking non-Halal food in his restaurant, even using their own utensils.

44. On 15th May 2016 an incident occurred which led to the end of the Claimants' involvement in the business. Earlier that evening the Respondent had taken money out of the till to pay British nationals working in the shop called "Phil" and "Kelly". After closing time at around 1am the First Claimant asked the Respondent for wages, as he had done every week since the shop had opened. The First Claimant pointed out that the Claimants had worked for 3 months without any pay.

45. The Respondent replied by shouting at the First Claimant, accusing him of stealing from the Respondent. The Respondent then began to search the Claimants' room above the shop. When confronted by the First Claimant the Respondent said that the Claimants had to leave the shop immediately, or else he would "*smash your face in*". The First Claimant told the Respondent that he was acting illegally. The Respondent laughed saying that the Claimants had no money and had no choice but to work for him. He also said that the UK government would not help the Claimants since they were immigrants. The First Claimant said that he would take the Respondent to court. The Respondent continued to laugh, saying that a court would not believe immigrants. The First Claimant wanted the treatment to stop, so he gave the Respondent the keys to the shop and flat and left with the Second Claimant.

46. The Respondent has since sold the business.

47. First Claimant accepted that the Respondent had paid him £140 and the Second Claimant accepted that the Respondent had paid her £150 in respect of wages. They accepted that they must give credit for those sums but maintained that their work had otherwise been entirely unpaid.

Applicable Law

48. Section 230 of the Employment Rights Act 1996 provides that an "employee" is someone who has entered into or who works under a contract of employment. A contract of employment means a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing.

49. The same section defines a "worker" as someone who has entered into or who works under a contract of employment (see above), or "*any other contract, whether express or implied, and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual*".

50. The following principles can be derived from a long line of cases including, for example, ***Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance*** [1968] 2 QB 497 at 514, ***Johnson Underwood Ltd v Montgomery*** [2001] EWCA Civ 318, ***Hall (Inspector of Taxes) v Lorimer*** [1994] ICR 218 and ***Market Investigations Ltd v Minister of Social Security*** [1969] 2 QB 173 at 185.

    a. There are three essential features of a contract of employment. If a contract imposes an obligation on a person to provide work *personally*, if there is "*mutuality of obligation*" between the parties and if the alleged employee expressly or impliedly agrees to be subject to the *control* of the person for whom he works *to a sufficient degree*, then there may be a contract of employment.

    b. Whether or not there is a contract of employment depends on an assessment of all of the other circumstances of the case. As long as all of the three essential features listed above are established, it is then necessary to consider the overall picture rather than to treat any one factor as conclusive.

51. Section 86(1)(a) of the Employment Rights Act 1996 gives employees who have been continuously employed for one month or more the right to a minimum of one week's notice.

52. Workers (including employees) are entitled to be paid in accordance with the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 2015, which means that they must be paid at a rate which is not less than the applicable national minimum wage rate at any particular time.

53. Workers (including employees) are entitled to paid annual leave under regulations 13 and 13A of the Working Time Regulations 1998, and to a payment in respect of accrued but untaken holiday upon the termination of their contract under regulation 14.

54. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee of his.

55. Harassment is defined in section 26 of the Equality Act 2010. It occurs when an employer engages in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating the employee's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

56. Section 26(4) of the Equality Act 2010 provides that when deciding whether conduct had those effects a Tribunal must take into account the

perception of the employee, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

57. ***Land Registry v Grant*** [2011] EWCA Civ 769 reminds Tribunals that they should not "cheapen the significance" of the statutory wording, which was an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The intention of the alleged harasser may also be a relevant consideration when determining whether conduct could reasonably be considered to violate an employee's dignity (***Richmond Pharmacology Limited v Dhaliwal*** [2009] IRLR 336, EAT).

58. We have applied the burden of proof provisions in section 136 of the Equality Act 2010, and the "revised ***Barton*** guidance" (see for example ***Barton v Investec Crosthwaite Securities Ltd*** [2003] ICR 1205 at 1218F, ***Wong v Igen Ltd*** [2005] EWCA Civ 142, ***Madarassy v Nomura International plc*** [2007] EWCA Civ 33 and ***Hewage v Grampian Health Board*** [2012] UKSC 37). However, this was of little practical relevance given that the Respondent did not give any evidence at all.

Reasoning and Conclusions

Employment status

59. We find that both Claimants were, in law, employees for the whole of the time for which they worked in the Respondent's business, and that they therefore benefit from the rights conferred by statute on "employees", a category which includes "workers". They satisfy the definition of "employee" in section 230 of the Employment Rights Act 1996 and section 83(2)(a) of the Equality Act 2010. Our reasons are set out in the following paragraphs.

60. First, we find that there was an agreement between the Claimants and the Respondent that the Claimants would work in the Respondent's business and that they would be paid for that work. It was an express oral agreement and was never reduced to writing, despite the Respondent's promise to do so and his legal obligation to provide a written statement of terms. The agreement was effectively acknowledged by the Respondent when he repeatedly promised to pay arrears of wages, even though he never fulfilled that promise.

61. There was sufficient "mutuality of obligation" to found a contract of employment in that the Claimants agreed to work for the Respondent and the Respondent agreed both to provide work and also to pay the Claimants for that work. The Claimants were certainly not free to accept or to refuse work as they saw fit, as the Respondent's actions on 26th or 27th April demonstrated.

62. There is no suggestion that either Claimant could have sent a substitute of their choosing to carry out work for the Respondent. The Claimants were obliged to perform their contractual obligations personally.

63. The Claimants were subject to the Respondent's direction and control and exercised little or no autonomy in the making of business decisions. The Respondent controlled the finances and the way in which revenue was spent. The Respondent decided whether or not repairs to the premises would be authorised. The Respondent decided both *when* staff would be paid and also *which* staff would be paid. The Respondent accepted responsibility for issuing a written contract, although he never did so. The Respondent exerted strict control over the Claimants in other ways too, such as by instructing the Claimants not to take any more time off (coupled with a threat to withhold access to the accommodation provided along with the job).

64. For those reasons we find that the three essential elements of a contract of employment were all present:

    a. an obligation to provide work personally;
    b. mutuality of obligation;
    c. agreement on the part of the Claimants to be subject to the Respondent's control to a sufficient degree.

65. Next, we turn to the other characteristics of the relationship. We find that the other features of the relationship were far more consistent with employment than with self-employment or worker status and that those features suggest strongly that the relationship was one of employment.

66. Other than the prospect of remuneration at an hourly rate, the Claimants had no direct stake in the profitability of the business. They did not share in its profits and they were not responsible for its losses. There was no suggestion, still less any agreement, that the Claimants would be responsible for payments of tax and national insurance on their earnings. The Claimants did not issue invoices to the Respondent, nor was there any suggestion that they should.

67. The Respondent supplied the premises and equipment with which the business was conducted. While the Claimants used their own savings to buy cleaning products during the refurbishment, that was in the expectation of reimbursement by the Respondent. The Claimants were fully integrated into the Respondent's business and were central to its operation. They devoted the whole of their working time to that business. They were in no sense whatsoever in business on their own account. They did not accept work from any other source and it is difficult to see

how they could have done given the long hours they committed to the Respondent's business. The evidence suggests a very significant degree of subordination and submission to the Respondent's control.

68. While the label applied by the parties is far from conclusive, and although no statement of terms and conditions was ever supplied, in discussions about it the Claimants and the Respondent each referred to a contract of *employment*. In contrast, there is no evidence that the parties ever asserted that the relationship was of a different character, such as worker status or self-employment.

69. Those are the reasons why we find the Claimants to have been employees of the Respondent at all relevant times. As employees, the Claimants were entitled to a written statement of particulars of employment, to wages at no less than national minimum wage rates, to paid annual leave under the Working Time Regulations 1998 and to statutory notice pay. They were also employees for the purposes of harassment claims under the Equality Act 2010.

Deductions from Wages

70. We accept on the balance of probabilities that the Claimants worked the hours claimed and that they received only £140 (First Claimant) and £150 (Second Claimant) in respect of that work. Full details of the hours worked on particular dates are set out in the Claimants' witness statements.

71. We do not accept that the Respondent was lawfully entitled to make any deductions from wages. No evidence has been put forward to substantiate any entitlement to do so, whether in respect of the value of accommodation or for any other reason.

72. On that basis we find the following sums owed as unlawful deductions from wages.

    a. First Claimant: a total of £10,645.60 (1,498 hours at £7.20 per hour less £140 received in respect of wages).

    b. Second Claimant: a total of £8,163.90 (1,498 hours at £5.55 per hour having regard to her age at the time, less £150 received in respect of wages).

73. There is no claim for the cost of, for example, cleaning products bought with the Claimants' own money and we therefore award nothing in respect of expenses.

74. We reject the Claimants' additional argument that they should be entitled to interest, or alternatively to bank charges, under section 24(2) of the Employment Rights Act 1996.

75. We are unable to construe that subsection as conferring a general right to interest, as seemed at one point to be argued on behalf of the Claimants. There was in any event no cogent evidence before us either of overdraft interest incurred or of lost interest on savings. We were not shown bank statements, which might easily have substantiated claims of that sort. We find that it has not been proved on the balance of probabilities.

76. The claim was alternatively presented as one for bank charges. Again, we find that the Claimants have failed to establish the claimed losses on the balance of probabilities. The Claimants' evidence on this point was (unlike the rest of their evidence) vague and lacking in detail. A useful starting point for proof of the existence and causation of bank charges would have been the Claimants' bank statements, which ought easily to have been obtainable. None were produced. In the absence of bank statements we do not find this claim proved on the balance of probabilities.

Failure to provide a statement of particulars of employment

77. This claim is established on the evidence, as is the fact that the First Claimant chased the issue on behalf of both Claimants and was promised that statements would be issued. We find a blameworthy failure to issue the statement required by section 1 of the Employment Rights Act 1996, aggravated by the Respondent's failure to respond to the First Claimant's specific request. In our judgment the appropriate award under section 38(3) of the Employment Act 2002 is therefore the "higher amount" of 4 weeks' pay to each Claimant, rather than the alternative of 2 weeks' pay (the "minimum amount"). That amounts to £1,956.00 for each Claimant, based on the capped weekly rate of £489 per week.

78. If anyone reading these reasons wonders how employees who claim at minimum wage rates can also be subject to the capped maximum rate for a week's pay, the answer is the very long hours worked by the Claimants each week. We accept the calculations in the Claimants' Schedules of Loss, supported by their witness evidence. Each Claimant's hours were such that the "week's pay" calculated in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 reached the statutory cap.

79. Since giving oral reasons, and in the course of preparing these written reasons, the Employment Judge has noticed that the capped rate used in the Schedules of Loss and also in the Tribunal's own calculations, may well have been wrong. Compensation was claimed and awarded at a capped weekly rate of £489, whereas it now appears to the Judge that it

should have been £479 having regard to the effective date of termination. Separate correspondence will be sent to the parties regarding a possible reconsideration of this point, and the substitution of awards of £1,916 for each Claimant.

Notice pay

80. Each Claimant was entitled to one week's notice of termination. We find that they were dismissed without notice on 15th May 2016. That dismissal was either direct (by being told by the Respondent to leave the shop immediately) or alternatively constructive (because the threats made by the Respondent were the culmination of a long course of conduct which destroyed the relationship of trust and confidence without reasonable cause).

81. On that basis the First Claimant is entitled to £720 and the Second Claimant is entitled to £555 as damages for breach of contract. Ordinarily compensation of this sort would be awarded on a net basis, but in the absence of net figures the award is made gross, and the Claimants will be responsible for deductions of tax and national insurance unless those payments are made by the Respondent.

Holiday pay

82. As workers (and employees) the Claimants accrued the right to paid annual leave during their employment. The Claimants had accrued 15/52 of their annual entitlement to 5.6 weeks' paid leave and had taken 4/7 of a week's leave. That leaves an untaken balance of 1.044 weeks' paid leave. We therefore award £751.59 for the First Claimant and £579.35 for the Second Claimant. Those sums are awarded gross as deductions from wages.

Harassment related to religion and race

83. To the extent that the evidence at this hearing went beyond the allegations summarised by REJ Clarke we have been careful to remember that we are assessing only the pleaded allegations, although other material is potentially relevant as background evidence. For example, it may have a bearing on whether the conduct complained of in a pleaded allegation was "related to" a protected characteristic.

84. We reject the allegation of harassment arising from the Respondent's complaints about the Claimants cooking pork. We are not satisfied that in this regard the Respondent had the *purpose* of violating the Claimants' dignity or of creating an environment which met the definition of harassment. We do not think it would be reasonable for the Respondent's

conduct to have the prohibited effects either and we find that it did not have those effects. It was a relatively minor matter, falling short of the statutory language.

85. Further, we are not satisfied that the Respondent's treatment of the Claimants on that occasion was related to the protected characteristic of religion. The Respondent was unhappy that pork was being cooked in his shop, and would surely have treated anyone who cooked pork in his shop in the same way, whether they professed to be Muslims, people of another faith, or people of no faith at all. We are not prepared to infer that the treatment was "related to" the Claimants' protected characteristic of religion (in the sense of being non-Muslims). It is not even established that the Respondent acted as he did because of the protected characteristic of his *own* religion. We note the Claimants' evidence that the Respondent was prepared to buy non-Halal food for the restaurant, and in our judgment it is not established that his objection to pork was related to religion at all, whether his own, or the Claimants'.

86. In every other respect we consider that the Claimants' claims of racial harassment are well founded. We repeat and refer to our findings at paragraphs 34-37, 40-42 and 45 above. Those findings deal with the allegations summarised at paragraphs 15.1, 15.3 and 15.4 of REJ Clarke's Order.

87. We approach the structured test in section 26 of the Equality Act 2010 in the following way.

    a. We accept that the Respondent's treatment of the Claimants was *unwanted*.
    b. We find that the Respondent's *purpose* was to violate the dignity of both Claimants, that his treatment of the Claimants also had that *effect*, and that the test in section 26(1)(b)(i) was satisfied on either basis. The words used by the Respondent and the context in which he used them were such as to emphasise the Claimants' vulnerability and lack of power, to make them uncomfortable, to mock them, to hurt their feelings, to undermine their dignity and to diminish their status.
    c. Alternatively, we find that the Respondent's *purpose* and the *effect* of his actions certainly satisfied the definitions in section 26(1)(b)(ii) of the Equality Act 2010. It was intimidating, it was hostile, it was degrading, humiliating and offensive. That was the Claimants' perception, and we find that it was reasonable for the conduct to have that effect. We reach that conclusion well aware of the reminder in ***Land Registry v Grant*** (above) not to "cheapen the significance" of the statutory language by finding too readily that the test has been satisfied.

88. We will deal with the question whether the Respondent's conduct "related to" race last. Since there were clear and repeated references to the Claimants' status as "immigrants" or "foreigners", and therefore by implication their nationality, we find that the Respondent's conduct was indeed related to the protected characteristic of race. The suggestion that the Second Claimant should enter into a sham marriage for immigration purposes was clearly related to her Latvian nationality and to the EU Free Movement rights derived from that nationality. The use of the word "Gora" was clearly related to race in the sense of colour (section 9(1)(a) of the Equality Act 2010), since it refers to the colour of a white man's skin. With the exception of the allegation relating to cooking pork, we are quite satisfied that the Respondent's unwanted conduct related to race, either in the sense of colour or in the sense of nationality.

89. We therefore turn to compensation. The harassment claims lead only to a claim for injury to feelings. There is no claim for financial loss resulting from unlawful harassment. The award is intended to compensate the Claimants for the injury suffered by each of them. The objective of the award is not to penalise the Respondent for behaviour which the Tribunal has found to be unlawful, although that may be an indirect consequence. The true focus should be on the extent of the injury to each Claimant rather than on the unlawful conduct itself. We have been careful to award sums based on the injury caused by the successful allegations of harassment summarised in REJ Clarke's order, and not for every item of objectionable treatment referred to in evidence.

90. We have considered the joint Presidential Guidance relating to injury to feelings awards, which takes into account well known cases such as ***Vento*** [2002] EWCA Civ 1871, ***Da'Bell*** [2010] IRLR 19 and ***Simmons v Castle*** [2012] EWCA Civ 1039. The version issued on 5th September 2017 was in force at the time of our decision. That guidance stated that claims presented before 11th September 2017 should be assessed by reference to bands updated in accordance with paragraph 11 of the Guidance. In this case that updates the divide between lower and middle ***Vento*** bands to £8,162.

91. We readily accept that the Respondent's unlawful harassment caused significant injury to feelings in both cases. We find that it caused greater upset to the Second Claimant and that the compensation due to her is accordingly greater. The suggestion regarding the sham marriage greatly upset both Claimants but we find that it was even more offensive to the Second Claimant than to the First. We also bear in mind that the harassment in this case occurred over a relatively short period, and that its effect must be seen in that context, however unpleasant the incidents themselves. We also bear in mind that the Claimants' victory and award of

compensation in this Tribunal will serve to provide some sort of closure. We do not think that there will be a long term adverse impact on either Claimant's feelings. It was however extremely upsetting at the time.

92. Against that background we award £3,500 plus interest to the First Claimant and £5,000 plus interest to the Second Claimant. We do not make a separate award of aggravated damages and we think that the Claimants are properly compensated by those sums. Interest at 8% under regulation 4 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 comes to £571.80 and £739.72 respectively

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Employment Judge M Whitcombe
Dated: 9 April 2018

REASONS SENT TO THE PARTIES ON

10 April 2018

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS