RA

EMPLOYMENT TRIBUNALS

Claimant:	**Mr A H Shamim**
Respondent:	**Sahara Grill Whitechapel Ltd**
Heard at:	**East London Hearing Centre**
On:	**13 – 15 March and 19 March 2019**
Before:	**Employment Judge Lewis**
Members:	**Mr P Quinn** **Dr J Ukemenan**

Representation

Claimant:	Mr A Philpott (Counsel)
Respondent:	Mr T Muirhead (Counsel)

JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's claims for:
(i) unfair dismissal;
(ii) wrongful dismissal;
(iii) race discrimination;
(iv) failure to pay holiday pay;
(v) and unpaid wages
fail and are hereby dismissed.

REASONS

1. The Claimant brought claims of unfair dismissal, race discrimination, wrongful dismissal, failure to pay holiday pay and unpaid wages.

2. The List of Issues had been agreed between the parties in October 2019, following directions given at a Preliminary Hearing.

3. On the first day of the hearing the Respondent raised a new issue, namely whether the Claimant had two years qualifying service. The Respondent asserted that there was a break in the Claimant's continuous employment during the period from August 2016 to October 2016 when he went to Bangladesh. As this is an issue that goes to the Claimant's entitlement to bring a claim for unfair dismissal the tribunal accepted that it was an issue that it had to decide.

4. The Claimant also raised a new issue applying to amend the Claim Form to include a claim for automatic unfair dismissal for asserting a statutory right, namely, the right not to suffer unlawful deductions from wages under s13 of the Employment Rights Act 1996. That application to amend was granted by the Tribunal for the reasons given below.

5. The issues the Tribunal had to decide were as follows:

5.1. Unfair dismissal

5.1.1. Does the Claimant have two years qualifying service?

5.1.2. Was the Claimant dismissed?

5.1.3. If not, did the Claimant resign in circumstances where he was entitled to resign under s.95(1)(c) of the Employment Rights Act 1996?

5.1.4. If the Claimant was dismissed, was the dismissal fair or unfair in terms of s.98 of the Employment Rights Act 1996?

5.1.5. Was the Claimant dismissed for asserting the statutory right and therefore automatically unfairly dismissed under s.104 of the Employments Rights Act?

5.2. Race discrimination

5.2.1. Did the Respondent treat the Claimant less favourably than the Claimant's named comparator Samadur Rahman (a British National) on the grounds of the Claimant's Spanish nationality in respect of the following acts:

5.2.1.1. Paying the Claimant, the sum of £7.50 per hour between 31 March 2017 and 31 May 2017 and reducing this to £7.05 per hour from 30 June 2017;

5.2.1.2. On 16 June 17, 27 November 2017, 9 December 2017, and 2 February 2018; Mr Taj calling the Claimant "bloody European" and/or "stupid" on the telephone or in front of employees known as Omar, Shainur and Ashraful;

5.2.1.3. On various dates asking the Claimant to pay for his meal whilst at work.

5.3. Wrongful dismissal

5.3.1. If the Claimant was dismissed, is he entitled to damages of two weeks of pay in respect of wrongful dismissal?

5.4. Holiday Pay

5.4.1. Has the Claimant suffered unlawful deductions from wages in respect of holiday pay, contrary to s.13 of the Employment Rights Act 1996?

5.4.2. Are any such claims for holiday pay time barred?

5.4.3. If not, what is the value of the unlawful deductions?

5.5. Unpaid wages

5.5.1. Has the Claimant suffered unlawful deductions from wages contrary to s.13 of the Employment Rights Act 1996 in respect of an alleged reduction in wages from £7.50 per hour to £7.05 from 30 June 2017?

5.6. Compensation

5.6.1. If the claim succeeds, what compensation is the Claimant entitled to?

5.6.2. Should the compensation be reduced on account of Polkey, contributory fault or failure to mitigate?

5.6.3. What is the value of any injury to feelings award should the Claimant's for race discrimination succeed?

5.6.4. Should compensation be increased or reduced on account of any failure on the part of the Respondent or on the part of the Claimant to comply with the ACAS Codes of Practice?

Applications to amend

6. The Claimant applied to amend his claim to include a claim for automatically unfair dismissal for asserting a statutory right. Having heard from both parties the Tribunal considered the application and found that the matters relied upon in support of the application arose from the facts already pleaded by the Claimant, the evidence that was to be called by the Respondent already addressed the relevant evidence and that the balance of hardship fell in favour of the amendment being allowed.

7. During his evidence the Claimant also alleged that he had not been paid the correct amount for 3, 4, and 5 February 2018. However, this has not been identified in the Claim Form, nor in the List of Issues or in the Schedule of Loss which was provided as a result of the Orders of the Employment Tribunal. The Claimant's representative applied to amend the claim to reflect these days of unpaid wages. The Claimant's payslip for February reflects basic pay of nineteen hours. The Claimant claims that he was entitled to twenty-eight hours and eight minutes. The difference being nine hours and eight minutes for which he alleged he was owed pay.

8. The Respondent objected to this being pursued at this late stage. It was not prepared to meet this complaint and pointed to four separate occasions when this could have been and ought to have been identified and pursued when it was not, namely; in the amended Particulars of Claim, in the Schedule of Loss, before the Tribunal at the Preliminary Hearing and in the Claimant's statement

9. The Tribunal considered that the Respondent was prejudiced by this late

application. The Respondent was not in a position to meet the allegation, when it would have been able to if it had been raised earlier. The Claimant had numerous opportunities to identify this as part of his claim but had failed to do so. It may be that the fault for this omission lies with his representatives, it may not, he may have a remedy elsewhere; however, the tribunal found in this instance that the balance of prejudice and hardship did not fall in favour of the amendment being granted, and the application was refused.

The evidence

10. The Tribunal heard from Mr Rahman on behalf of the Claimant and the Claimant himself, and for the Respondent: Mr Mostafa Ali, Mr Jabran Taj, Mr Omar Chourdhury, Mr Najeebullah Maroufkhail, Mr Mohammed Miah, Mr Hamza Ali, and Mr Harun Patel.

11. The Respondent had also provided witness statements for Mr Zakir Begum, Mr Mohammed Udin, Mr Salah Siddique and Mr Umar Gulzar but did not call those witnesses to give evidence.

12. We were provided with a joint bundle of documents and further documents through the course of the hearing, including a supplemental bundle of documents from the Claimant, labelled [C1]; a copy of a bank statement relating to 28 September 27 October 2016 [C2]; a document from HM Revenue Customs dated 6 October 2016 setting out the Claimant's employment history [C3]; a copy of a letter from U.K Visas and Immigration in respect of the Claimant's wife and referring to documents submitting in support of an application for her visa [C4]; and copies of text messages from a WhatsApp group between the Claimant and Mr Taj, dated 12 August 2016 [R1]; a letter written by Mostafa Ali dated 10 August 2016 [R2].

Findings of fact

13. The Tribunal sets out below the key areas of dispute and its findings based on the evidence before it, as far as they are relevant to the issues it had to decide.

14. The Claimant was employed by the Respondent from 1 February 2006. In August 2016 he went to Bangladesh. He had informed Mr Taj and Mr Ali that he was intending to travel to Bangladesh where he was going to get married and that he would be away for some weeks.

15. The Respondent alleges that the Claimant did not have permission to be away for any period of time let alone the dates for which he was actually absent which were from August until October. Mr Taj's evidence was that he did not know the Claimant was intending to get married, nor how long the Claimant was going for. Mr Taj maintained that the Claimant had not requested any holiday in advance and that he was expecting the Claimant to come to work, he was on the Rota for the Friday and then the Claimant sent him a text message at 2.51am in the morning before his shift was due to start to say that he was not coming in. The Claimant denies that he was due to come in, he told the tribunal that he had informed both Mr Taj and Mr Ali that he was going to Bangladesh. Despite this Mr Taj had asked him at short notice to come in and cover a shift as he was short of staff, the Claimant had had to decline as

he was due to fly to Bangladesh that day and had texted Mr Taj to apologise for not being able to cover the shift.

16. A copy of a text message sent from Mr Shamim to Mr Taj at 2:51 am on 12 August 2016 was produced to the Tribunal [R1]. In the text the Claimant tells Mr Taj he is sorry to say he is not able to come on Friday night because he has flight at 9:30 am. He apologises for any inconvenience and asks Mr Taj to arrange someone else. He states that he did not want let Mr Taj down and signs off with "see you again in between four weeks". The response from Mr Taj was "Altaf you will be lucky if you have a job in Sahara Grill when you get back if you don't come in tomorrow. I am already short staffed".

17. The next text was from the Claimant on 3 October 2016, "sorry to say for delay due to some personal problem can't communicate with you. Is it still have a job with Sahara, could you confirm me please". Mr Taj's response was, "yes you do, when are you back".

18. The Claimant went back to work on 5 October and no disciplinary proceedings were taken against him for any alleged unauthorised absence.

19. The Claimant produced a letter from the U.K Visa and Immigration Authority [C4] to his wife Shahida Begum, in support of his contention that the Respondent was aware all along that he was travelling to Bangladesh to get married and would be away for a number of weeks. The Respondent had provided a letter for him to take with him in support of his wife's visa application. The part of the UK Visa and Immigration Authority letter relied upon contained the following, "I have considered the documentation you have submitted in relation to your sponsor's claimed employment. You have submitted a letter headed Sahara Grill dated 10 August 2016, which states that your sponsor works there but gives no dates, job title or pay scale details but that he will still have a job with them on return from Bangladesh (again it doesn't state when that is) and it comments on your sponsor's impeccable character.". The production of this letter led in turn to the production overnight by the Respondent of the letter dated 10 August 2016 from Mr Ali [R2].

20. Mr Ali confirmed that he had written the letter of 10 August 2016 [R2] which included the following statement, "I write to confirm that Mr Altaf Shamim Howlader is a permanent employee at Sahara Grill, Whitechapel and we can also confirm that Altaf Shamim Howlader will still hold his employment with Sahara Grill on returning from Bangladesh".

21. Mr Mostafa Ali tried to explain away the content of this letter by saying that he had known at the time he wrote it that the Claimant had not had authorisation from Mr Taj for his absence. He told us that that the Claimant had come to him directly and he had written the letter without checking the position with My Taj and that the first time he knew that Mr Taj had not authorised the leave was on the first day of this Tribunal hearing. This is also his explanation for having written the letter at page 92 of the bundle, dated 24 October 2016, confirming that the Claimant was an employee, that he was of an impeccable character and integrity and regarded with great respect within the company; and the letter at page 93 dated 20 February 2017 which confirmed that the Claimant recently visited Bangladesh on 13 August 2016 and

returned back to work on the 5 October 2016.

22. Mr Ali told the tribunal that he was in the habit of writing such letters at the request of his employees to be helpful to them. He accepted that he knew on this occasion that his letter written on behalf of the Claimant might be presented to British High Commission. He told the tribunal that despite this he had not concerned himself to check the accuracy, or to confirm the contents were true, he was happy to sign whatever he was asked to. We do not find that this to be a credible explanation.

23. We are satisfied that the three letters indicate that the Claimant was away with the prior knowledge of the Respondent and that there had been an agreement prior to his leaving that his job would be available for him on his return. We find that there was such an agreement in place and that document R2 and page 93 of the bundle confirmed that.

The Claimant's rate of pay

24. The Claimant accepted that he was under 25 throughout the relevant period and that he was paid at least the applicable minimum wage for his age throughout his employment.

25. When the Claimant started his employment in 2016, he was paid at the rate of £6.70 an hour. According to his contract of employment his employment commenced on 2 January 2016 however, according to HMRC records his start date was 1 February 2016 and this is the date relied upon the by the Claimant. The Claimant's pay went up to £6.95 in October 2016 and then increased to £7.50 an hour in March 2017. His payslips show that he was paid at £7.50 per hour in March, April and May 2017 [pp. 137, 138 and 139]. In June 2017 his pay went down to £7.05 per hour and stayed at £7.05 per hour until he left in February 2018 [144].

26. We are satisfied that the Claimant did not make any complaint about his pay in June when his hourly rate went down. He does make a complaint about it in February 2018 when he sees Mr Samadur Rahman's payslip on the 5 February and sees that Mr Rahman is being paid £7.50 an hour, even though he has only recently started his employment.

27. The Claimant compared himself to Mr Rahman for the purposes of his race discrimination claim. He called Mr Rahman to give evidence on his behalf. Mr Rahman's told the tribunal that he was paid the minimum wage. When he started with the Respondent he was paid £7.20 and his pay went up to £7.50 when he was over the age of 25. This was not disputed by the Claimant. The Claimant told the tribunal that he had not realised that Mr Rahman was 25 and therefore entitled to a different minimum wage (the national minimum wage) until he checked with him last week shortly before he gave his evidence to the Tribunal.

28. The Claimant also compared himself to Mr Najeebullah Maroufkhail who was born on 5 March 1996 and who was 22 at the time he started working for the Respondent in 2017. Mr Maroufkhail also started on an hourly rate of £7.05. Mr Maroufkhail told the tribunal that his wage was increased to £7.50 when he took on the breakfast shift. He explained that he had taken on this responsibility when no one

else wanted to do it. He had to get up very early in the morning to travel in from Ilford to be at the restaurant for the breakfast shift. It was a busy shift starting at 7 am and he was on his own. There was a hotel above the restaurant and he had to serve the hotel guests, as well as people who were on their way to work. People were often in a rush and wanted their breakfast served quickly. He was also responsible for accepting deliveries. The regular delivery arrived at 10 am. It did not take him too long to unload but he then had to place the stock in the relevant place in the stores or on the shelves and that this would usually take him until 12 pm.

29. We found Mr Maroufkhail to be an entirely straightforward witness. His evidence was largely unchallenged. We accept his evidence that the additional pay was for the additional responsibility and that is what Mr Taj had explained to him at the time.

30. Mr Taj gave evidence that Najeeb (Mr Maroufkhail, referred to as Nazib by the Claimant) was paid £7.50 an hour to reflect the increase in responsibility of the breakfast shift. He worked on his own and that there were additional responsibilities for him as a result.

31. Mr Taj told the tribunal that there was a period of time when the Claimant was also paid £7.50 an hour and this was to reflect extra responsibility taken on by the Claimant. My Taj had asked the Claimant to take on bar work as well as waitering work, this involved preparing drinks and cleaning up and closing up the bar. The Claimant had initially been reluctant to do take this on but had been persuaded to do so and the £7.50 an hour was to reflect the extra responsibilities. Mr Taj also gave the Claimant other additional responsibilities such as being responsible for supervising other staff. However when Mr Shamim asked to reduce his hourly pay and the rate went down the additional responsibilities were also removed.

32. Mr Taj's told us that the Claimant approached him around the time his pay went down, which was June 2017, and asked him to reduce his pay but not his hours so that he was able to claim some benefits. He understood it to be Council Tax Reduction and Housing Benefit. The Claimant had sent him a screen shot of a letter that he had received explaining what he needed. Mr Taj agreed to reduce his pay, which he did from June. The Claimant made no complaint at the time. There was no complaint either verbally or in writing.

33. The Claimant was recalled to deal with page 97a of the bundle which was a screenshot of the letter about Council Tax Reduction that he had sent to Mr Taj on 9 June 2017 with a request for a reference letter confirming his details. The letter referred to assessing the Claimant's entitlement to Housing Benefit and Council Tax Reduction, informing him that he needed a letter setting out details of his employment, including his hours and payslips.

34. The Claimant was reluctant to answer questions about page 97a and was evasive in his answers. He told the tribunal that he had been a student and that as such he had been entitled to Council Tax Reduction and Housing Benefits. There was a gap in his studies between the time when he had finished his Business Studies Level 3 and before he started his degree in Information Technology at university. As a student he had been entitled to the benefits in question and the Benefits Agency

had accepted his certificate from the university. When he finished his course he was no longer covered by the certificate and needed the information about his income from his employer. When asked whether there was a threshold, or a level of income, above which he would not be entitled to the benefits he was again reluctant to answer. The question was put in a number of ways to ensure that the Claimant understood what was being asked and to try to elicit a clear answer. Eventually, he accepted that there was such a threshold and that, until he was able to provide another certificate confirming he was a student, he needed to show that his income fell below the threshold in order to qualify for those benefits.

35. Mr Taj told the tribunal that he did not respond to the request for a letter at page 97a because the Claimant subsequently told him that he did not need the letter any more. We are satisfied that this is consistent with the Claimant's evidence which was that he did not get a letter from the Respondent, however, he got a certificate from the university when he started his course by which time he no longer needed a letter from his employer.

36. We find on the balance of probabilities that the Claimant did ask for his rate of pay to go down to allow him to qualify for Council Tax Reduction and Housing Benefit. We are satisfied that this is also consistent with there not being any evidence of a complaint by him at the time in respect of the reduction in his hourly rate. We are satisfied that there was an agreement, at the Claimant's request, that his rate of pay be reduced to £7.05 per hour from June 2017.

5 February 2018.

37. According to the Claimant Mr Taj was in the habit of laying out everyone's payslips on the table and staff could see each other's pay. He included a photograph of a number of payslips in his supplemental bundle[7]. On 5 February (but not before) he saw Mr Maroufkhail's pay slip and realised that he as being paid less than him. Mr Maroufkhail was being paid at £7.50 an hour although he had only recently started whereas the Claimant was being paid £7.05 an hour.

38. In his statement the Claimant's evidence is as follows, "I saw from the payslips that I was being paid less than other employees. I approached Mr Taj and asked him why. He replied "this is my business and I will do what I like. If you don't like it just leave and don't come tomorrow"." The Claimant alleges he told Mr Taj he was being rude and should not talk to him like that, at which point Mr Taj got angry and told him to leave work immediately, using the words "bloody European" and "stupid" to him.

39. Mr Maroufkhail told the tribunal that the Claimant asked him, "how much salary do you get paid?" and when he told him £7.50 the Claimant became enraged. He saw from the Claimant's face that he looked shocked and he could tell from his body language and his face that he was not happy.

40. The Claimant denied that he was upset or angry. He told the tribunal that he simply went to speak to Mr Taj. Mr Taj was sitting at table 25, there were other staff around who were witness to the conversation but he has not called them to give evidence because he does not wish to name their names. We note they are named in the List of Issues.

41. Mr Taj accepts that the Claimant came to him in the middle of the shift and asked him about the rate of pay. He told the Claimant that it was not appropriate to discuss the matter in front of everyone; that it was the middle of the shift; it was busy, and the Claimant should return to his duties. He did not tell the Claimant to go home and he did not say 'if you do not like it you can leave and do not come in tomorrow'.

42. We are satisfied that the Claimant was upset to discover that someone who had only recently started was being paid more than him when he had been there for two years. We prefer Mr Taj's account of what he said to the Claimant.

43. The Claimant did not go home in the middle of his shift. He worked the rest of his shift, finishing at 11 pm. He did not come in the next day although the Respondent was expecting him. The Claimant says he was unwell. The Respondent denies getting any fit note. A fit note was produced at page 99 of the bundle. The Respondent had no knowledge of that fit note which was dated the 25 January 2018 and related to the period of 25 January to 1 February. The fit note made reference to the Claimant reporting of a viral infection which 'would have affected his assignment'. It was suggested to the Claimant that this was in reference to his university studies and not in relation to work and had never been provided to the Respondent. In any event it did not relate to the relevant period in question. There is no evidence of any other fit note having been provided.

44. On 9 February the Claimant posted a message in the employee WhatsApp group. This is a shared group for all the staff of the restaurant, which includes about 20 employees. The relevant parts [page 100 in the bundle] refer to a conversation on 5 February at about 6.40:

> "we discuss about the wages between me and Nazib (£7.05 and £7.50). I ask you as a question and you said that don't come to me with the rubbish go away, if you want to leave, you can leave the job, you also said this is my business so I can do whatever I want, don't ask me this question. In this regard I accept your open notice to leave, so from 5 February 2018 my notice period starts as a two-week notice. Can you also confirm me please about my two years holiday payment when you can pay"
> The message concludes with;
> "and Jabran due to sickness I am not able to work until further notice thanks"

45. The Claimant was then removed from the WhatsApp group. He re-sent his message to Mr Taj in a private message on 13 February 2018 [C1 at page 4], with further allegations:

> "according to your statement you are sacked me as well as your WhatsApp activity. If your doubts about this please check CCTV records. Regardless of what I am, what nation I am, what colour I am, you can't speak like that to anyone.
>
> I am not telling you what right what wrong because you already mentioned that this is your business so do what you like. The government authority will be find out what has happened. The issues has been raise please cooperate with my

work coach".

46. Mr Taj replied, "I don't understand your message". His explanation for that response was not that he was belittling the Claimant's grasp of English but that he did not recognise the account given by the Claimant. It did not make any sense to him as it did not reflect what had actually happened.

47. There is no reference at page 100 or in the subsequent message to being told to leave immediately. Rather, the Claimant says that he has accepted the 'open notice to leave'. Quoting the words "if you want to leave you can".

48. We accept Mr Taj's evidence that he told the Claimant not to raise the matter in the middle of the shift and in public i.e. words to the effect that this was not the time or place. He may have been short with the Claimant but we do not find that he told him he should leave immediately, nor did he tell him not to come back.

49. We do not find that the 'open invitation' to "leave if you don't like it" or "you can leave" to be words of dismissal. Nor do we consider in the context of these particular circumstances that those words were sufficiently ambiguous so as to be capable of bearing that meaning. The Claimant's response was to give two weeks' notice.

50. The Claimant also relies on his removal from the WhatsApp group in support of his contention that he was dismissed. It was not disputed that he was removed from the WhatsApp group following his posting of the message on 9 February. Mr Taj explained that he had reported the message to Mr Mostafa Ali who instructed him to remove the Claimant from the group immediately. We accept that he gave this instruction because he considered that it was not appropriate to use the group for such a message. A message sent to the group goes to all twenty employees and the Claimant sought to raise issues about pay and disclose details about other people's pay within that group. Mr Taj did remove him from the group. We do not find that was indicative of there having been a dismissal. Mr Taj sent the Claimant a private message asking him to come in and discuss things with him. The Claimant went to the head office to speak to Mr Ali and asked him to look into the matter.

51. The Claimant does not say anywhere in any of his texts that he had been called a "bloody European" or "stupid". Mr Taj denies using those words. None of the people who were called to give evidence to the Tribunal heard him use those words at any point on that evening and none of them had ever heard him using the word "bloody European". We find that it was not said.

52. The Claimant asserted that those remarks had been made on previous occasions: he referred to four dates on which he alleges he was called "bloody European" and/or "stupid", namely; 16 June 2017, 26 November 2017, 9 December 2017, and 2 February 2018. He alleges that the remarks were made in front of employees known as Omar, Shainur and Ashraful. Of the three-people named Omar told the tribunal that he did not hear any such comment; the other two witnesses were not called to give evidence but they have provided statements confirming that they had left the employment before the dates of any of the incidents relied upon by the Claimant.

53. During his evidence the Claimant was given he opportunity to elaborate on his allegation and specify how he had come up with the dates in particular and what he was saying about them, but he could not answer. We are satisfied that these remarks were not said by Mr Taj. There is no evidence upon which we can reliably find that they were.

Meals

54. The Claimant complains that he was treated less favourably because of his race by being asked to pay for his meals. The Respondent's case was that it had a staff meals policy that was applied to all staff and there was no less favourable treatment. The Claimant was asked to pay for his meals if he chose something outside of the two staff options. The Claimant did not dispute that there were two staff options available and that he did not have to pay for those. The staff meal was a choice between a burger with a side and a soft drink, or a quarter chicken with two sides and a soft drink.

55. The Respondent called Mr Omar Choudhury to give evidence. He had worked at Sahara Grill, Whitechapel from 1 December 2015. He was familiar with the staff meals policy. He described the staff meal as being a choice from two options; a quarter chicken with two sides and a soft drink or a beef burger with a side and a soft drink. The staff could choose to have something else but they would need to pay for this, although the company gives staff 50% off the menu cost. This policy was explained to him when he started at the company and his experience was that the policy was the same for all staff. Mr Choudhury also gave evidence that he had never heard Mr Taj calling the Claimant "bloody European" or "stupid" .

56. Mr Harun Patel told the tribunal that he understood the staff meals policy to be that set out in the handbook i.e. the two staff options. On some occasions, if he opted for a meal outside the free staff meal option, he has paid a discount rate of 50%.

57. Mr Mohammed Miah gave evidence in the same terms. He told the tribunal that the staff meal policy was standard practice in the company and applies to all members of staff.

58. The Claimant asserted that there were occasions where other staff had been provided with free meals, however when challenged the only evidence he could give to support this was that he had not seen them pay for their meal. There was no other evidence to suggest that any of the waiting staff were given free meals. Mr Taj explained that it would make no sense to allow staff to choose whatever they wanted from the menu as a free staff meal, some options were very expensive, for example the T-bone steak.

59. The Claimant produced copies of his bank statements which showed that he had on occasions paid the restaurant the sum of £2.74 . He explained this was for a meal. He would sometimes choose to have lamb chops but would not have a whole portion because it was too expensive, he would only have a few pieces. Mr Taj accepted that this payment most likely related to a portion of lamb chops; the full portion was on the menu at £10.95 and if staff had a partial portion then the cost was

halved then 50% discount would be applied. 50% of the cost of a half portion would come to £2.74.

60. The Claimant also pointed to payments in the sums of £1.64 and £3.00. We accept Mr Taj's evidence that this did not reflect the full price of any of the meals on the menu was uncontested. The Claimant also told the tribunal that sometimes he paid more for meals, for example when he had received a good tip when he paid in cash.

61. We accept Mr Taj's evidence as to the existence and application of the policy, which was supported by the evidence of Mr Omar Choudhury, Mr Harun Patel and Mr Mohammed Miah. We are satisfied on the evidence before us the staff meal policy as set out above was applied to all the waiters; as was the 50% discount policy for staff who chose meals outside the two staff meal options. We find that the Claimant was not treated any differently in this respect to any other member of waiting staff.

Holiday pay

62. The Claimant asked for his two years outstanding pay on leaving the Respondent's employment. On 28 February 2018 he was paid the sum of £917.28 in holiday pay in respect of 130 hours and 11 minutes.

63. The holiday year set out at clause 9.4 in his contract; [page 43] states the holiday year is the calendar year from 1 January to 31 December. The clause also provides that, "you will not be permitted to carry over unused holiday entitlement into the following holiday year except with express written consent of the company.
You will not be entitled to payment for any unused holiday entitlement". Clause 9.6 of the contract provides for payment of outstanding holiday entitlement to be paid on the leaving employment.

64. Mr Ali invited the Claimant to attend the office to discuss his request for holiday pay. We were taken to emails at page 101, 102 103, 104 of the bundle confirming that he was available to meet with the Claimant. In his email of 24 February [106] Mr Ali confirms that "all employees are entitled to holiday pay. There seems to be clerical admin error which is why we need you to visit out head office for clarification. Please visit Irfan anytime Monday to Friday from 9:00 am to 6:00, many thanks Mostafa Ali. "

65. The Claimant responded by stating that the matter could be dealt with by email, he did not understand why he needed to attend the office. The Respondent replied on 28 February:

> "our records show that all due payments to yourself have been paid to you accordingly if it becomes evident that an error has been on our behalf we aim to rectify it as soon as possible. We requested for you to visit the head office similarly to your previous visit when you had an issue regarding your Housing Benefit claim. In the same manner we intend to facilitate a speedy resolution"

66. Mr Ali explained that it was not clear to the Respondent what it was the

Claimant was saying was outstanding in respect of the holiday pay.

67. The Claimant relied on his Schedule of Loss [page 328 of the bundle], in support of his holiday pay claim. His calculations were based on the payslips, which were in the bundle. He claimed holiday pay from 2016 to 2017, in the sum of £1563.75 and from February 2017 to January 2018, in the sum of £352,50 which was the 180 hours he says he was owed at £7.05 an hour, less the 130 hours he accepts he was paid.

68. No other assistance was provided to the Tribunal as to how the Claimant put that claim other than to say it was based on the payslips. We have seen the payslips and we can see from the final pay slip that the Respondent paid the Claimant in February 2018 for 113 hours and 11 minutes in respect of holiday pay. This is in spite of the clear provision for the contract that no holiday be carried over.

69. There was no evidence from the Claimant to show that he was prevented from taking his holiday or that he asked to take any annual leave and was refused . The Claimant made a general assertion that the Respondent said it did not pay holiday pay. However, this was not explored in the evidence and it is not consistent with the only evidence before us, which is that is that he was paid his holiday pay on termination.

70. The Claimant has failed to prove his claim in respect of any outstanding amount.

Law

71. Section 95 Employment Rights Act 1996:
Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2). . . , only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

…

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

72. Section 98 Employment Rights Act -1996:
General

(4) **[**Where**]** the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

73. Section 210 of the Employment Rights Act 2010:
Introductory

(1) References in any provision of this Act to a period of continuous employment are (unless provision is expressly made to the contrary) to a period computed in accordance with this Chapter.

(2) In any provision of this Act which refers to a period of continuous employment expressed in months or years—

(a) a month means a calendar month, and

(b) a year means a year of twelve calendar months.

(3) In computing an employee's period of continuous employment for the purposes of any provision of this Act, any question—

(a) whether the employee's employment is of a kind counting towards a period of continuous employment, or

(b) whether periods (consecutive or otherwise) are to be treated as forming a single period of continuous employment,

shall be determined week by week; but where it is necessary to compute the length of an employee's period of employment it shall be computed in months and years of twelve months in accordance with section 211.

(4) Subject to sections 215 to 217, a week which does not count in computing the length of a period of continuous employment breaks continuity of employment.

(5) A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous.

74. Section 212: Weeks counting in computing period

(1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.

…

(3) Subject to subsection (4), any week not within subsection (1) during the whole or part of which an employee is –

…

(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose,….

counts in computing the employee's period of employment.

75. Direct discrimination
Section 13 Of the Equality Act 2010

(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.

76. Mr Philpott, on behalf of the Claimant, introduced extracts from Harvey in respect of termination by the employer. Mr Philpott particularly drew our attention to the extract at page D1207 in Issue 220 at paragraph 229; in respect of the problem with ambiguous language; he sought to draw our attention to two possible solutions to the problem, to suggest that there should be a subjective approach to the language used, ignoring the third possible solution put forward by the authors of Harvey.

77. We are satisfied that, in the circumstances of this case, a reasonable listener would not have understood the words uttered to be words of dismissal. In any event, we are satisfied that the Claimant did not consider himself to be dismissed at the time the words were spoken. He did not leave his employment forthwith. He wrote a couple of days later informing the Respondent that he was accepting the open invitation to leave and gave his resignation.

78. This is in contrast to a previous occasion we were told in evidence, where the Claimant had sworn at Mr Taj, Mr Taj told him leave, which he did and then the Claimant returned to work having texted Mr Taj to apologise and Mr Taj accepted his apology. This had taken place when Mr Taj had challenged him about his taking a break without clocking out and instead of informing Mr Taj he had worked over the requisite number of hours the Claimant simply lost his temper and told Mr Taj to "fuck off".

79. We accept Mr Taj's evidence that had the Claimant come to him subsequently and explained his concern about his rate of pay they could have had a discussion about his wage rate. Whatever the outcome would have been, Mr Taj's evidence to the Tribunal was that if Mr Shamim had wanted to reinstate his £7.50 hourly rate he would have been happy to do so. The 45p an hour difference was not going bankrupt the restaurant and Mr Shamim had been, up to that point, a good worker and he would have want to keep him.

Conclusions:

80. We are satisfied that the Claimant has two years qualifying service. There being a presumption of continuity in s.210 of the Employment Rights Act 1996.

81. At that point at which the Claimant raised the issue about his pay, he was not entitled to be paid the rate of £7.50 an hour. He had agreed to a reduction of £7.05 an hour for his own reasons. He was asserting that he was being paid less than another employee but there is no right under the statute simply to be paid the same as another employee. There is a right to be paid what was lawfully due, namely the Claimant's agreed contractual pay. There was no assertion of a relevant statutory right. Simply an assertion of unfairness.

82. In respect of the disputed reason for leaving, we have found that the Claimant resigned There was no dismissal, whether wrongful or otherwise. We do not find that the Claimant was entitled to rely on Mr Taj's response as a fundamental breach of contract.

Race discrimination

83. The Claimant withdraw his complaint of direct discrimination in respect of pay in comparison to Mr Rahman. We have found that there was a material difference in the circumstances of Mr Maroufkhail in that he had taken on additional responsibilities, we are satisfied that this was the reason for the difference in pay.

84. In respect of the meals we are satisfied that the same meal policy was applied to all of the waiters. There was no less favourable treatment.

Inferences

85. We looked for prima facie evidence from which we could draw an inference of discrimination. We could not find any credible evidence upon which we could base any finding of less favourable treatment. The Claimant's own witness, Mr Rahman, gave evidence that he did not hear the words "bloody European" or "stupid" used. We do not accept that the Claimant's account of that having been said There is no credible evidence before us from which we are satisfied we could conclude that those words had been said. We do not find that the words "bloody European" were said to the Claimant or that he was called "stupid".

86. The claims of race discrimination are not made out on the evidence.

Holiday pay

87. We find that the Claimant was paid his outstanding holiday entitlement both under the Working Time Regulations and under his contract, on termination. We find that there is no outstanding amount.

Deduction from pay

88. There was no unlawful deduction, the Claimant had agreed with the Respondent to reduce his hourly rate to £7.05. There is no payment due.

Credibility

89. We did not find either of the parties to be completely credible on any of the issues. We did the best we can to assess the credibility under each relevant issue, looking to the evidence provided and the documentary evidence surrounding the events.

90. The Claimant's evidence was unsatisfactory in many respects. He avoided answering a number of questions, particularly in respect of his claim for benefits and any income threshold. When he was recalled to deal with that point his evidence was evasive.

91. A text message that was placed in evidence by him [C1, at page 5], was not the original version of a text. When the original version was produced by the Respondent [R1] it was evident that the Claimant had removed a laughing emoji and the final

comment “hahahaha” from the text put before the Tribunal. We are satisfied that their removal gave, and was intended to give the text a different interpretation to that which it bore at the time. We accept Mr Taj’s evidence that the laughing emoji and the words “hahahaha” were clear evidence that the Claimant knew that he was joking. We find that the Claimant’s account of his interactions with Mr Taj has been a retrospectively coloured by his claims.

92. Neither did we find the Respondent’s evidence to be satisfactory in many respects. Particularly unsatisfactory was Mr Mostafa Ali’s evidence in respect of the letter written on behalf of the Claimant knowing that it would be potentially be presented to the British High Commission.

93. The Claimant’s claims were not made out on the evidence. The claims are therefore dismissed.

Employment Judge Lewis

Date: 2 May 2019