EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
MR M TULI		MW EAT LTD

Heard at: London Central

On: 11 and 12 June, 2019

Before: Employment Judge O Segal QC
Members: Mrs M Pinfold, Ms S Boyce

Representations
For the Claimant: Ms D Keyms, Consultant
For the Respondent: Ms D Sen Gupta QC, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's claims are dismissed.

REASONS

1. The Claimant brings claims in relation to the retention by the Respondent of a "loyalty bonus"/"joining fee" of £6,750, which he was required to pay to the Respondent in 2016, on the termination of his employment when he resigned in 2018 (the issues were clarified and set out following a PH on 26 March 2019).

2. Those claims are of direct or indirect race discrimination and/or breach of contract. An original claim of unlawful deduction from wages was not pursued.

3. The tribunal wishes to express its gratitude (and admiration) for the way in which both representatives conducted the proceedings.

Evidence

4. We had an agreed bundle of 115 pages. We had witness statements and heard oral evidence from:

4.1. on the Claimant's behalf, himself;

4.2. for the Respondent, Ranjit Mathrani, Chairman and Chief Executive of the Respondent.

5. We comment at the outset that we consider that those witnesses were doing their best to assist the Tribunal.

6. The Claimant applied to introduce a supplementary witness statement on the first day of the hearing. We rejected that application on the basis that:

6.1. The contents were of only borderline relevance – and only in one respect – to the claims.

6.2. The statement raised new issues of fact that the Respondent had not been able to address by providing documentary or witness statement evidence.

6.3. There was no real explanation for why the evidence had not been included in the original witness statement.

6.4. It was therefore not in accordance with the overriding objective and not otherwise appropriate to allow the further statement to be introduced.

Facts

7. There were few if any disputed facts. In setting out the material facts below, we exclude those which we have decided are not relevant to the issues we have to determine.

8. The Respondent operates Indian restaurants, including Chutney Mary in St James', London, providing fine dining to its customers.

9. It recruits only chefs of Indian (or in one case Nepalese) ethnic origins, in the main if not exclusively from India or elsewhere outside of the UK. It takes some time and costs significant money to train those chefs further in the Respondent's UK restaurants so that they are able to adhere to UK statutory and cultural expectations. Mr Mathrani estimates such costs to total up to £20,000; that might be a little high, but the tribunal accepts that the costs would generally equate to at least £10,000.

10. The Respondent is a Tier 2 Sponsor Licence holder within the meaning of the relevant immigration legislation, meaning that it is entitled to:

    10.1. Support applications for a 3 year Tier 2 (General) visa on behalf of its intended/actual employees who are non-EU nationals, which visa entitles a person to work for that 3 year period (together with any extension) for the sponsor; and

    10.2. Support applications for such persons for Indefinite Leave to Remain (ILR) status, which in practice entitles the person to remain in the UK regardless of the identity of their employer.

11. The Home Office rules were such that:

    11.1. A person who obtained a Tier 2 visa <u>before</u> April 2011 might be entitled on application to indefinite 3 year extensions of that visa;

    11.2. A person who obtained a first Tier 2 visa <u>after</u> April 2011 was only entitled to a single extension of 3 years (thus a total residence entitlement of 6 years) and would then in practice have to apply for ILR or leave the UK.

12. In order to obtain ILR, an applicant had to satisfy various criteria, including 5 years residence as inter alia a Tier 2 (General) Migrant, earning above a threshold annual salary, and – materially in this case – have their sponsor employer certify in writing *"that he still requires the applicant for the employment in question for the foreseeable future"*.

13. The Claimant is of Indian ethnic origin and nationality.

14. The Respondent recruited the Claimant in July 2011 in Mauritius with a view to him becoming Head Chef at one of its restaurants. He was promoted to Head Chef at Chutney Mary in October 2012.

15. On joining the Claimant entered into a "3 year contract" terminable on 3 months' notice during that period and had to pay a "joining fee" of £3,000 against recruitment and training costs, which would be repayable (and was repaid) inter alia if he remained at the Respondent for at least 3 years.

16. The Claimant, with the Respondent as his sponsor, obtained a Tier 2 (General) visa in 2011 and a 3 year extension to that in 2014. He was not entitled to any further extension.

17. The Respondent had been willing until 2012 to write in support of their employees' (including chefs) applications for ILR. Between 2010 and 2011, a number of such successful applicants had left the Respondent's employment shortly after obtaining ILR.

18. In 2012 the Respondent therefore introduced what Mr Mathrani rightly referred to as a "policy", that any employee applying for ILR would be required to pay to the Respondent a "loyalty bonus" or "joining fee" (initially a fixed amount of £3,000) before the Respondent would write the necessary supportive letter to the Home Office; which money (henceforward referred to as the "Fee") would be returned to the employee (in full) only if he remained in the Respondent's employment for a further 3 years and thereafter did not take up employment with a competitor within a defined geographical area.

19. The Respondent's reasons for introducing that policy were twofold:-

    19.1. It was concerned at losing skilled employees, to replace whom cost it time and money.

    19.2. It <u>wrongly</u> believed (though did believe) that, without some commitment from the employee to remain in their employment for a significant period, it would be misleading the Home Office to state that *"[it] still requires the*

applicant for the employment in question for the foreseeable future" and/or that it would be supporting an application presented by an employee on a false basis.

20. In 2016 the Claimant, partly because he then wanted to obtain a mortgage which he had not been able to do whilst holding temporary visa status, wanted to apply for ILR. He knew of the said policy – which had been then amended so that the sum payable by the employee was to be 15% of their gross wage (£6,750 in the Claimant's case) – and wrote to the Respondent on 17/3/16 asking for it to support his ILR application and to let him know *"the amount I will have to pay as a Loyalty deposit"*.

21. The Respondent replied on 22 March, referring to the said policy, introduced because of employees obtaining ILR who had *"then promptly left the Company in an unethical and unscrupulous manner [sic]"*. It set out the terms which would apply (signing a new 3 year contract and payment of the Fee). The letter commented (wrongly, but we do not find dishonestly) that *"If you do not apply for an ILR, the Company will apply for an extension to your visa, and we do not anticipate any problems with this application"*.

22. As to that last statement, the Respondent had not known of or had not checked on the application of the relevant change in Home Office rules referred to above (as stated, the Claimant would not have been entitled to a further extension to his visa); however, in around 2014 the Respondent had supported a successful application from another chef of Indian ethnicity for a second 3 year extension, allowable because he had obtained his first visa in 2008 (before April 2011).

23. The parties signed a 'Revised Contract of Employment' dated 28 June 2016, which referred to *"amendments to both the Period of Contract and Joining Fee … All other areas of your existing contract remain unchanged"*. It referred to a *"New 3 year Contract"* and stipulated for a *"Joining Fee: £6,750. If you leave the company, this is returnable with interest after 4 years from receipt of ILR, provided the 3 year contract is completed, due notice is given if you depart during the fourth year, and the terms of the restraint agreement are complied with …"*.

24. The Claimant paid the Fee, borrowing from his parents in order to do so.

25. At some point subsequently, the Policy was amended so that an employee thereafter obtaining ILR would be entitled to 16.67% of the Fee after 1 year of continued employment and a further 16.67% after a second year.

26. On 1 April 2018 the Claimant resigned in order to take up employment with a competitor restaurant in London. He was put on gardening leave and reminded of his post-termination restrictions, although the Respondent did not in the event attempt to enforce the non-competition restriction.

27. When the Claimant resigned, he sought repayment of the Fee. Despite the Respondent initially saying it would look into that, and despite several written chasers, the Respondent had not substantively replied to the demand for repayment by 20 July 2018.

28. The Claimant presented this claim on 4 October 2018.

The Law

Direct race discrimination

29. Section 13 EqA 2010 provides that

"A" discriminates directly against "B" if B establishes the detrimental action relied upon (e.g. dismissal), and A treated B less favourably that A treated or would treat others (an actual or hypothetical comparator) whose circumstances are not materially different to B's and the less favourable treatment is because of a protected characteristic.

30. We are also mindful of ss. 23 (as regards comparators, there must be no material difference between the circumstances of the two cases); 39 (discrimination might be constituted by subjecting an employee to a detriment).

31. Discrimination because of a person's immigration status does not amount to direct discrimination unless the material immigration status is in effect coterminous with their race/nationality: **Omu v Akwiwu [2016] WLR 2653**.

Indirect race discrimination

32. Section 19 provides:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice [PCP] which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a PCP is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) It puts, or would put B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

...

33. Again, we are mindful of ss. 23 (as regards comparators, there must be no material difference between the circumstances of the two cases); 39 (discrimination might be constituted by subjecting an employee to a detriment).

34. The Respondent relied on **Omu** for the proposition that a PCP must be a requirement applied by an employer to *all* of its employees. Although that is stated to be the general position at [32] when considering *obiter* the availability in that case of an indirect claim which had not been brought, that is not a requirement of the statute and often does not apply in practice in sound indirect discrimination claims – as the Respondent conceded, in respect of the hypothetical example of a 'glass ceiling' case where only those applying for certain very senior positions might be subject to a requirement (for instance) to commit to working during the school holidays; which would be fairly clearly indirectly discriminatory in relation to sex subject to justification.

35. The Respondent relied on **Rutherford v SS for Trade and Industry [2006] 4 All ER 577** (a case involving a challenge to the restriction of employment rights for those over 65) for the proposition that when selecting the comparative pool, a claimant cannot bring within it people who have no interest in the relevant advantage/disadvantage. We accept that. We do not, however, believe it is relevant in this case.

36. As to the justification defence, it was common ground that:

    36.1. The employer has the burden of proof;

    36.2. There must be a real need for the PCP; it is appropriate and reasonably necessary;

    36.3. A tribunal must weigh the employer's reasonable needs and the provision's discriminatory effect to establish whether there is an objectively proportionate balance between them.

Burden of proof

37. Section 136 provides:

> *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred … [unless] A shows that A did not contravene the provision.*

38. There is an initial burden of proof on the Claimant and the Tribunal must look at the entirety of the evidence to establish if the first stage of s136 is reached (***Ayodele v Citylink Ltd and anor*** [2017] EWCA Civ 1913).

39. The tribunal bore in mind the guidance in the ***Igen***, ***Madarassy***, and ***Hewage*** cases in relation to what is now s. 136. We acknowledge that something more than simply unfavourable or less favourable treatment is needed in order to "shift the burden of proof", though that does not need to be a great deal: ***Deman v CEHR*** [2010] EWCA 1279.

40. Finally in this context, we bear in mind the observation of the EAT in ***Chief Constable of Kent v Bowler*** EAT 0214/16, that *"Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic."*.

Penalty

41. A penalty clause in a contract is a provision which imposes, in respect of one party, on breach of a primary obligation on him, *"a secondary obligation which imposes a detriment … out of all proportion to any legitimate interest of [the other party] in the enforcement of the primary obligation"*: **Cavendish Square Holding BV v Makdessi [2016] AC 1172 at [32]**.

42. If the detriment is imposed not for breach of a primary obligation, but for the failure to meet a condition precedent, then it cannot be reviewed as a potential penalty clause: **Cavendish at [13-14, 241]; Imam-Sadeque v Bluebay Asset Management (Services) Ltd [2013] IRLR 344 at [207-209]**.

43. An obligation (as here) to forfeit a right suffices as a detriment: **Cavendish at [170, 226-228]**.

44. If a clause is reviewable as a potential penalty clause, the issue is whether the innocent party has a legitimate interest in avoiding loss/deterring breach and the detriment imposed is not extravagant or unconscionable by reference to that interest.

Time limits

45. S. 123 EqA provides for a primary time limit of 3 months *"or such other period as the employment tribunal thinks just and equitable"*; and provides that *"conduct extending over a period is to be treated as done at the end of the period; failure to do something is to be treated as occurring when the person in question decided on it"*.

The parties' submissions

46. Given the complexity of some of the issues, we refer to the parties' submissions as appropriately during the discussion of the claims below.

Discussion

Preliminary observations

47. All three members of the tribunal were troubled to some extent by the conduct complained of in this case.

48. There is no question that, in essence, the Claimant was forced to pay a significant sum of money to his employer for the privilege of remaining working for them (or anyone else) in the UK, which would only be repayable if he provided at least a further 3 years' service to the Respondent – in return for which the Respondent had only to write a short pro forma, truthful letter to the Home Office.

49. This was not a traditional "golden handcuff", whereby the employer provides *additional benefit* to an employee who remains for a set period of time. It was a "handcuff" of considerably baser metal whereby the employee only stood to lose, and had no effective choice in the matter given the implicit threat of not supporting his ILR application (and thus dooming it to failure) if he did not pay the Fee.

50. We recognise that the Respondent had both a legitimate commercial interest in seeking to retain the Claimant in its employment and (albeit wrongly) also believed that by requiring payment of the Fee it was more faithfully honouring commitments made to the Home Office as part of the application process.

51. However, in our unanimous view, that does not go far enough to justify the policy. As the Respondent conceded during submissions, it would be impossible, for example, to justify why an employee who had to resign on grounds of ill health just before he had completed a further 3 years of employment should be required to forfeit the full Fee.

52. All of which being said, we must apply the law: unfavourable treatment is not the same as less favourable treatment; less favourable treatment is not unlawful unless

because of a protected characteristic; the detrimental application of a PCP is not unlawful unless there are other employees to whom it is or could be applied, who would not suffer the same disadvantage as the claimant; and an unfair contractual clause cannot be impugned as a penalty clause unless it meets the particular conditions required for such a challenge.

Time limits

53. We were unpersuaded that any of the claims brought were out of time.

54. The Respondent accepted that those claims were in time unless we found that the only relevant act was the requirement in 2016 for the Claimant to pay the Fee. However, we find that the refusal to repay any or all of the Fee in 2018 constituted the relevant detriment (within the meaning of s. 39 EqA) or breach of contract (if the material clause in the 2016 contract were a penalty clause).

Direct discrimination

55. On the basis of the facts we have found, we conclude that the treatment complained of was not *"because of"* the Claimant's race, but rather because of his wishing to apply for ILR with the effect that if successful he would be able to work for other employers.

56. That factual circumstance would apply equally to any non-EU national wishing to apply for ILR. The Claimant was treated *"less favourably"* only than the Respondent treated employees – including those of Indian ethnic origins – who did not apply for ILR (as the treatment of the actual comparator referred to at paragraph 22 above evidences).

57. In material respects, this claim is indeed analogous to the claim of direct discrimination rejected in the **Omu** case.

58. This claim must fail.

Indirect discrimination

59. We make no secret of the fact that we did not find it easy to determine this claim – although we have eventually resolved it with confidence.

60. The aim at the time of acting faithfully as regards the Home Office was, as the Respondent accepted, misconceived. The only legitimate aim was employee retention in circumstances where replacing the Claimant would be costly.

61. We find that, had the other conditions been met, the Respondent did not show that the treatment complained of was a proportionate means of achieving that legitimate aim, for much the reasons set out at paras 48-51 above.

62. Whether we would have reached a different view had the repayment provisions been to the effect: 1/3 repayable after 1 year, 2/3 after 2 years and the balance after 3 years is a moot point. Certainly, the requirement to surrender 15% of gross salary for a full additional 3 years of service in order to obtain an employer's assistance in confirming basic facts to the Home Office is not proportionate to the material aim.

63. The Respondent did, or would have applied the PCP to persons not of Indian ethnic origin (though in fact, it seems no such occasion arose) and the application of the PCP to the Claimant certainly put him at a disadvantage.

64. The remaining criterion of s. 19(2) is that the PCP *"puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it"*. There must be other actual or potential employees, to whom the PCP is (might be) applied, who – by reason of not sharing the protected characteristic of Indian ethnic origin – would not suffer the disadvantage suffered by the Claimant (e.g. men with no childcare responsibilities in the example given at para 34 above).

65. That is not the case here. Any employee (of whatever race) to whom the relevant PCP was, or might be, applied would suffer the same disadvantage as the Claimant.

66. This claim must therefore also fail.

67. As noted in **Omu at [34]**, that is not necessarily because the Claimant does not deserve a remedy (in generalised terms).

Breach of contract

68. The Respondent rightly, in our view, submitted that this claim must fail at the first hurdle because the Claimant's forfeiture of the Fee was not by reason of his breach of contract; he had no contractual obligation to continue to work for the Respondent for 3 years; indeed he was expressly contractually entitled to resign on 3 months' notice (as his resignation letter stated).

69. Thus the requirement to serve a further 3 years was a condition precedent for the Respondent to be obliged to repay the Fee. It cannot be a penalty clause.

70. This claim must also fail.

71. Had we been required to determine, if the clause was reviewable as penalty clause (because the Claimant had been under a primary obligation to serve a minimum 3 year period), whether its terms were extravagant or unconscionable, we would probably have determined that they were not. The test is a high one and from the Respondent's perspective the amount of the "handcuff" was not out of proportion to the costs of replacing the Claimant if he had left during that hypothetical fixed 3 year term. However, we reached no final position on that issue after discussion and in the circumstances, the point is academic.

Other matters

72. The Claimant sought to amend his claim during the hearing to add a claim for unpaid holiday pay. The Respondent was not able to agree all of the factual premises on which that claim was made. It was made considerably out of time. The tribunal declined the application to amend.

73. However, it seemed as though there might be some merit to the claim (if not in its entirety) and the parties were encouraged to discuss the issue. The Respondent fairly undertook to investigate the issue more fully in the coming days and to pay the Claimant any outstanding sum without his having to make a further claim for that money.

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Employment Judge Segal

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Date 13 June 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

13 June 2019

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FOR THE TRIBUNAL OFFICE