EMPLOYMENT TRIBUNALS

Claimant		***Respondent***
(1) Mr B Ghimire (2) Mr B Singh	**AND**	MW Eat Ltd

HELD AT: **London Central** **ON:** 3 & 4 June 2019

BEFORE: Employment Judge D A Pearl (Sitting alone)

Representation:

Claimants: Mr E Komeng (Lay representative)
Respondent: Ms D Sen Gupta, QC

JUDGMENT
on preliminary hearing

The claims of both Claimants under section 15 ERA 1996; in breach of contract; and for harassment are dismissed on the various grounds set out in these Reasons

REASONS

1. These are the Respondent's strike out/deposit applications. A short summary of the facts is as follows. The Respondent is an 'upscale' restaurant chain and both Claimants were employed as specialist chefs. Mr Ghimire began on 1 November 2014 and Mr Singh on 29 April 2011. Their respective dates of termination are 20 September and 31 December 2017. In each case they applied to the Home Office for indefinite leave to remain and the Respondent, in return for writing a letter about employment that supported the application, required each of them to enter into a fixed term contract and pay a

sum of money of 15% of the gross wage. This would be returnable if the employee stayed for 3 years. In each case, they left before the 3 year period had expired and they each claim, inter alia, return of their monetary deposit. The Respondent seeks to strike out claims made under ERA 1996, section 15; the claims of race harassment; and the contract claims.

2. I heard evidence from Mr Mathrani and the Claimants. Mr Ghimire came to the Respondent from another restaurant in London and the Respondent employed him on a 3 year renewable contract, with a mutual provision for 3 months notice on either side. He did not have to pay a 'joining deposit'. Mr Singh, who came to the Respondent from India, did have to do so and this was returned to him after 3 years' employment. He also was initially employed on a 3 year renewable contract. He had also to sign restrictive covenants.

3. The Respondent is a licensed sponsor for immigration purposes. I accept the evidence that if chefs wish to stay beyond the initial 3 years, the company applies for 3 year visa extensions and requires no deposit. It also pays for the extension and it did so in the case of Mr Singh. The position is different if an employee applies for indefinite leave to remain. For commercial reasons that Mr Mathrani sets out in his witness statement, after 2012 the Respondent would not write supporting letters to the Home Office unless satisfied that the employee would remain in long term employment. To this end, a new 3 year contract is required, a loyalty deposit has to be paid and a restrictive covenant is required if it has not been already signed. I was not shown any immigration rule dealing with what the employer is asked to state. Mr Ghimire says the letter must certify his employment status and "that my services were still required for the foreseeable future." Mr Singh says the same.

4. To illustrate the structure of the claims made by the ET1s, I take Mr Ghimire's claim. His deposit was paid on 21 July 2015 and it is said that this was because of undue influence. He then got into financial difficulty and discussed this with the company on 16 July 2016. He claims in contract as follows. The requirement for a deposit, the 3 year contract and the restrictive covenant are said to breaches of the implied term of trust and confidence. Alternatively, there was an implied term that the Respondent would assist the application for indefinite leave (presumably, with no further requirements of any kind.)

5. It is next said that the agreement the Claimant entered into was void as: there was no consideration; it "was illegal as it rendered the Claimant servile and/or amounted to unlawful discrimination"; was "the result of undue influence"; and followed an (unspecified) misrepresentation. Discrimination is alleged in the tripartite requirement (deposit; fixed term; covenant) and in a conversation of July 2016. It is also said that if any claims are out of time, time should be extended. I consider this is a tacit recognition of a possible time difficulty.

6. The discrimination claims (direct and indirect) have been withdrawn, but the harassment claim is still made by Mr Ghimire. Undue influence has not been pursued in argument and nor has economic duress, which has surfaced

in written submission. I also note that the ET1 reserves rights to sue in the civil courts.

7. The position changed with the further and better particulars but there is no need here to descend to further detail.

8. The Respondent's application was outlined orally by Ms Sen Gupta. When Mr Komeng replied, he drew attention to case law and a line of argument that the Respondent had not anticipated. On the second day of the hearing Ms Sen Gupta responded. What was evident in these submissions was that I have to make a decision about each of the 3 remaining legal claims: section 15; race harassment; and contract.

Section 15

9. Section 15 provides that: "(1) An employer shall not receive a payment from a worker … unless (a) the payment is required or authorised to be made by virtue of a … relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the payment."

10. The Respondent's initial response was that the matter was open and shut. Mr Ghimire was told about the deposit and the reasons it was being sought by letter of 3 July 2015 and on 16 July he said "… I got point and agree to pay deposit …" Mr Singh responded to a similar letter of 19 February 2016 and said he accepted the offer and wanted to go ahead with signing the contract.

11. In his submission, Mr Komeng raised Cleeve Link Ltd v Bryla UKEAT/0440/12 a decision of HHJ Hand QC. This makes clear that, in a claim about unauthorised deductions, the tribunal must, where relevant, ask if the sum in issue is an irrecoverable penalty. Mere agreement to the deduction in writing is not enough. Therefore, in this case, where the Claimant has paid a sum pursuant to a written agreement and has later sought to recover it, the first question is whether the law of penalties is applicable. I shall defer this because the answer to the claim is that is in any event time barred.

12. A complaint to a tribunal concerning a payment alleged to contravene section 15 must be presented before the end of the period of months "beginning with … the date when the payment was received": section 23(2). Subsection (4) contains the familiar 'escape clause' where it was not reasonably practicable to present the complaint in time.

13. Mr Ghimire paid the deposit of £4,612 on 21 July 2015. His claim was presented on 4 December 2017, over 2 years out of time. This defeats his claim unless it was not reasonably practicable, ie, reasonably feasible, to present the claim in time. In his statement, Mr Ghimire says that he borrowed money from his bank and credit card. This was both for the deposit and also the costs associated with his application to the Home Office, namely the application costs and his legal costs, as he employed a solicitor. It took about 11 months before his financial difficulties led him to write to his employer (17 June 2016) at page

94. The company declined to return the deposit to him at that time. He repeated his request and Ms Jeffs, HR Director, wrote and said an exception could not be be made but that she was happy to meet with him to see if anything could be done to find alternative loans.

14. Pausing there, the suggestion that within the limitation period of 3 months it had not been reasonably practicable to present a claim is unsustainable. The evidence shows with some clarity that the financial difficulties that, in a practical sense, led to the request for repayment and, ultimately, the claim had not become sufficiently acute. The Claimant asserts no alternative reason for saying that it was not reasonably practicable to present the claim.

15. Ms Jeffs made a note of the meeting of 5 July (page 101). She recorded that the Claimant's loan was for £10,000 which was more than double the deposit in question. He was told that a CAB may be able to assist him in his predicament. IVAs were seemingly discussed and he said he might take advice. The notes says: "We said that if he needed any help we could privately help him if required." They would speak to the Directors and revert to him. On 16 July he was offered additional hours so that his net weekly wage could increase by £155.35. He declined this. His email also says that the idea for an IVA came from the Respondent at the meeting. As far as I can understand the last paragraph of the email at page 105, the Claimant appeared to be saying that it was "my last option."

16. The Claimant's account of the pressures and stress on him are credible and a decision was taken to relocate his family to Birmingham, although he remained working in London. He eventually resigned on 1 July 2017. He sought legal advice and raised a grievance on 4 September 2017. The grievance signed by the Claimant, but on solicitors' headed paper, alleges that the payment of the deposit was direct or indirect race discrimination. The claim was filed in early December. As I have commented, there is no evidence presented to explain the long delay in claiming. Nor is there evidence directed to the second limb of section 23(4), whether the claim was presented within "such further period as the tribunal considers reasonable." All discrimination claims were subsequently withdrawn.

17. My view is that the section 15 claim is plainly out of time and that it was reasonably practicable to present the complaint within the initial 3 months, more especially as the Claimant maintains that he was reluctant to pay the deposit in the first place. Experiencing mounting financial difficulties over the ensuing month does not mean that it was not reasonably practicable to do so. Further, there is no evidence on which I could hold that the period that did elapse was within a further reasonable period. The Respondent's objection based on time cannot be met and there is no jurisdiction to entertain the section 15 claim. In so far as the payment of the deposit is challenged in law (see below) this does not preclude the Claimant from seeking a remedy in the civil courts.

18. In Mr Singh's case the period in question is from payment of £5,270 on 23 February 2016 to 30 April 2018 when the ET1 was presented. His statement gives no details about financial difficulties, but does refer to problems in one

sentence. He resigned on 10 August 2017 and withdrew this a week later. He also seems to have decided to move to Birmingham (paragraph 27) and resigned on 27 November 2017. His resignation letter cites the relocation to Birmingham as the sole reason. He has no basis in evidence for an extension of time and in that regard his case is identical to Mr Ghimire's. Both section 15 claims are struck out for want of jurisdiction.

The alternative argument – if no time bar

19. I should deal with this. Ms Sen Gupta submits that the section 15 claims (if allowed to proceed) would need to be struck out in any event, on the basis that the law of penalty clauses cannot be used by the Claimants in the section 15 claim. Her argument is a straightforward one: "it is not an agreed damages clause; it contains a conditional primary obligation." There is an alternative argument that, if the clause is reviewable in these proceedings, the Claimants (in effect) must lose. I do not agree. Were the clause reviewable, and there was no time bar, I would allow the claims to proceed, subject to consideration of a deposit. Her primary submission is based on the Cavendish Square authority in the Supreme Court, [2015] UKSC 67. (Referred to as Makdessi below.)

20. She further contends that the penalty rule is only engaged if the event triggering the detriment is a breach of contract or duty owed to the other party. This point surfaced in Nosworthy v Instinctif UKEAT/0100/18, a decision published 4 months ago. Neither party referred to this, but I cite it as an illustration only. The relevant claim was for an unauthorised deduction.

> 67. Mr Harris referred to paragraph 80 of the Judgment of the ET. The Respondent did not assert or rely on any breach of contract by the Claimant. The forfeiture of the Loan Notes and transfer of the Claimant's Shareholding were consequences of being a Bad Leaver. The definition of "Bad Leaver" in Article 15.9.2(a) does not depend on a breach of contract. Its effect is not the consequence of a breach of a primary obligation. Mr Harris referred to Makdessi in which Lord Neuberger held at paragraph 13:
> "… There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men's bargains either at law or in equity. The penalty rule regulates only the remedies available for breach of a party's obligations, not the primary obligations themselves. …"
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> 68. Mr Harris summarised his contention on the effect of Makdessi in paragraph 21 of his skeleton argument:
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> "21. The fact that performance of the contract by a party in a particular way may result in a less advantageous outcome for that party than performance of the contract in a different way, does not mean that a sanction is being applied or that the party is being treated as effectively having breached the contract. To apply such an approach would run counter to the reasoning of the Supreme Court in Makdessi."
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> 69. The ET held at paragraph 81 that the answer to the allegation that the imposition of the Bad Leaver provisions amounted to a penalty was that these did not follow any breach of contract by the Claimant. The ET did not err in concluding that the Respondent was not seeking to rely on Clause 7.23 of the Principal Agreement.

> They did not seek to assert that the Claimant was in breach of contract. The Respondent was simply applying the provisions of Articles 15.6 and 15.7 as a consequence of the Claimant giving notice to terminate her contract of employment.

21. In my view, we have a similar situation here, in that the retention of the deposits does not depend on or result from a breach of contract. Each employee was free in contract to leave before the fixed term expired and there was a notice provision in the agreement. Further, the retention of monies was nothing to do with the giving of notice. It was because the condition for return set out in the agreement had not been met. It is, therefore, my decision that this is not a case of a reviewable penalty clause and the claims under section 15 must fail.

The contract claim

22. This is another way the claim is put, but it must fail, in my view, because there was no contractual claim that arose or was outstanding on termination. The argument is made that there was an implied term that the Respondent would provide the letters to the Home Office without seeking a deposit, but there is no warrant for implying a term on that basis. It is a mischaracterisation of the facts to say that the refusal to repay the deposit is a breach of contract by the employer or can be attributed to a breach of the implied term of trust and confidence.

23. There may be some potential redress available to the Claimants in equity, but this is a matter for the civil courts. We have no such jurisdiction.

The harassment claim

24. This applies to Mr Ghimire's case. It is based on the conversation alleged for 5 July 2016. I conclude that this is a case that is bound to fail and is certainly within the scope of 'no reasonable prospect of success' for strike out purposes. The conversation on which it is based is set out shortly at paragraph 12 of the ET1: on 16 July 2016 he was advised "that he should send his family back to Nepal and declare himself bankrupt." In the witness statement the date is put at 5 July and the conversation is differently set out: "he was advised to send his family home to save money "and consider bankruptcy." The documents I refer to at paragraph 15 above tell a different story. The Respondent's note of the conversation records him as saying "he had heard of [IVAs]. He might need advice. "We said that if he needed any help we could privately help him if required." The Claimant's 29 July email at page 105 says that the IVA suggestion was a "last option." I accept that the idea of an IVA may have originated from the employer, but to characterise this is as actionable harassment is unsustainable. The evidence is clear that any suggestion was made to assist him and it could never on this evidence be found, or realistically suggested, that the effect was to create a hostile environment for the Claimant within the terms of section 26. This is a claim that is so slight and improbable it should be struck out. The test of no reasonable prospects is comfortably met.

25. The alternative argument, for both Claimants, that requiring the deposit

is itself an act of harassment fails on the same ground. Both Claimants paid it and it is impossible to contend that any hostile, degrading or offensive environment was created. Again, strike out on the same basis is apt.

Conclusion

26. For the various reasons set out above, these claims are both struck out.

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EMPLOYMENT JUDGE PEARL

12th July___2019 London Central_
Date and Place of Order

15th July 2019

Date Sent to the Parties

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For the Tribunal Office