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# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Hasan  
**Respondent:** Dishoom Limited  
**Heard at:** East London Hearing Centre  
**On:** 30 & 31 May 2019  
**Before:** Employment Judge Allen  
**Members:** Mr T Burrows  
Mrs A Berry

## Representation

**Claimant:** Ms E Godwins (Legal Representative)  
**Respondent:** Mr D S Bansal (Solicitor)

# JUDGMENT

**The judgment of the Tribunal is that the Claimant's claims of wrongful dismissal and direct race discrimination fail and are dismissed.**

# REASONS

1 By ET1 claim form received on 8 October 2018, the Claimant presented claims for wrongful dismissal and direct race discrimination.

## Issues

2 The issues were set out in the record of the preliminary hearing which took place on 4 February 2019 and were revisited during the hearing. The issues remained the same save that the Claimant confirmed that he was relying on a hypothetical comparator only and that he was not relying on Hemraj as a comparator as had been suggested in the list of issues identified at the Preliminary Hearing.

*Wrongful Dismissal*

3 Did the Claimant breach his contract of employment by slapping a colleague on his face in the kitchen (which the Claimant denies), entitling the Respondent to summarily dismiss the Claimant without notice?

*Direct Race Discrimination*

4 Was the Claimant subjected to a detriment by the Respondent in being unreasonably subjected to more work pressure than colleagues?

5 If so did (a) that work pressure; and / or (b) the Claimant's dismissal - amount to less favourable treatment?

6 If so was that less favourable treatment because of race?

7 The protected characteristic relied upon is the Claimant's Bengali origin. The Claimant relies upon a hypothetical comparator.

*Remedy*

8 If the Claimant is successful in his discrimination claim, the Respondent wishes to argue that any compensation awarded is reduced because of the Claimant's conduct.

**The Evidence**

9 The Tribunal had a bundle of documents running to 93 pages. This was an agreed bundle, save that at page 44a there was a list of examples of behaviour amounting to gross misconduct which was said by the Claimant not to have been disclosed prior to the hearing. We heard from the Claimant, a commis chef; and for the Respondent from Mr S Rathore, head chef and Ms T Wilderspin, assistant general manager.

10 The Claimant has limited English and gave evidence with the assistance of a Bengali interpreter throughout the hearing.

**Facts**

11 The Respondent, Dishoom Limited, is a restaurant chain operating seven restaurants in the UK with approximately 900 staff in total, 120 of whom worked at the Shoreditch restaurant. There were 29 people in the Shoreditch kitchen, where the Claimant worked on the curry section from 2 October 2017 until his summary dismissal for gross misconduct on 22 July 2018.

12 The Respondent kitchens were ethnically diverse. There were members of staff from Bangladesh, Tunisia, India, Lithuania, Poland, Pakistan, Britain, Nepal and Portugal.

13 The Claimant agreed in oral evidence that it was an environment in which, from time to time, angry words were exchanged between employees and also in which there were sometimes more serious incidents between workers.

14 The Respondent produced a document entitled Dishoom Community Standards. It stated “*we want Dishoom to always be a big hearted, slightly barmy, sepia tinted, charmed kind of place. Everyone should be welcomed with warmth and you should always feel amongst friends*”. That is not an accurate description of the working environment as presented to the Tribunal in this case. In addition, the Respondent produced an Equal Opportunities and Diversity Policy. The Claimant’s evidence was that he was unaware of the Community Standard. He was aware of the existence of an Equal Opportunities Policy but he said that he had not seen it.

15 The Claimant’s contract of employment stated at paragraphs 9 and 10 as follows

“9. Hours of work

*Your working week will comprise of 48 hours. These hours will be organised according to a rota which the company will notify to you in advance.*

10. Break Entitlement

*If you work a full day, you are entitled to a 60 minute unpaid break.”*

At paragraphs 15, 16 and 17 the following is stated

“15. Notice

*Following the successful completion of your probationary period, you are required to give one week’s notice in writing to terminate your employment with the company until you have been continuously employed for two complete years and then you are required to give one additional weeks’ notice for each completed year of continuous employment thereafter, up to a maximum of 12 weeks’ notice. You are entitled to receive the following written notice of termination of employment from the company:*

*Length of service - less than one-month: notice period - no notice*

*Length of service - at least one month but less than two years continuous service: notice period one week*

*Length of service - two years or more continuous service: notice period one week per completed year of service up to a maximum of twelve weeks*

*The company may exclude these notice provisions in the event of dismissal for gross misconduct. The company reserves the right to make a payment in lieu of notice for all or any part of your notice period upon the termination of your employment, regardless of whether notice to terminate the contract is given by you or the company.*

16. Disciplinary Procedure

*The company's disciplinary procedure, code of conduct and standards are set out in the employee handbook. You are strongly advised to familiarise yourself with them. The company reserves the right to discipline or dismiss you without following the disciplinary procedure if you have less than a certain minimum period of continuous service as set out in the employee handbook.*

17. Disciplinary and Dismissal Appeals

*If you are dissatisfied with any disciplinary or dismissal decision taken in respect of you, you may appeal to the operations manager. Further details on disciplinary and dismissal appeals are set out in the employee handbook."*

16 The Tribunal were presented with the Disciplinary Policy and Procedure, which states under the heading 'Your Entitlements and Responsibilities' that "*the company aims to deal with disciplinary matters promptly and fairly. You have a right to appeal against a decision the company makes at a disciplinary meeting. In these cases, the company will make every effort for the appeal to be dealt with by a different manager to the person who dealt with the matter initially*". Under the heading of 'Disciplinary Sanctions' and the sub heading 'Dismissal' it states that "*dismissal occurs when your employment is terminated either with or without notice. Dismissal without notice is also referred to as summary dismissal and is restricted to cases of gross misconduct*". A list of examples of gross misconduct follows the Disciplinary Policy and Procedure in the bundle, however it is in a different font and contains different formatting. Whether it was actually attached to this procedure or not, it contains what might be described as a standard list of examples and the Claimant in his evidence accepted that matters such as assault, acts of violence or aggression (which are included in this list) would be a proper basis for summary dismissal for gross misconduct.

17 The Claimant gave evidence that during the course of his employment he had some problems with Mr Hemraj which he had raised with Mr Rathore, although he had never raised any race or nationality issue to Mr Rathore.

18 Mr Rathore gave evidence that there was an occasion when Mr Rathore came across a disagreement occurring between the Claimant and Mr Hemraj which Mr Rathore felt that he had sorted out at the time.

19 In advance of the hearing, the Claimant produced a rota of times that he was scheduled to work. There was an attempt, on behalf of the Claimant, after the conclusion of witness evidence to introduce additional material relating to rotas which was refused by the Tribunal for reasons set out at that time (which are attached to this judgment and reasons). In relation to the rota, the Employment Tribunal noted that on a number of occasions, the Claimant started work early after finishing work late. On its face, this appears to have been a breach of working time regulation 10(1) requiring an 11-hour rest break. The Employment Tribunal had no evidence as to any specific comparator of any other specific national origin being treated differently, save from the Claimant's assertion that that was the case which was denied by the Respondent. Mr Rathore, who was responsible for the rota, and Ms Wilderspin asserted that all chefs at the Claimant's level had similar looking rota requirements.

20 The parties agree that the Claimant and Abu Nasir, a kitchen porter, who was an agency worker, had a confrontation on 19 July.

21 On the 19 July 2018, the Respondent says, according to the evidence of Mr Rathore, that Mr Rathore received a phone call about an incident, which had taken place. He had already left work and was at home. Mr Rathore was told by Mubin, the kitchen porter supervisor, that Abu Nasir, a kitchen porter, had called Mubin to report that he had been slapped by the Claimant and that he was going to call the police. Following that conversation, Mr Rathore telephoned Mobarak Sheik Mobarak, a junior sous chef. He was the most senior person who had been working in the kitchen at the time of the incident. Mobarak had not seen the incident but confirmed that there had been an issue and that he was trying to calm the situation down. He also said that Abu Nasir wanted to call the police. Mr Rathore told Mobarak to do all that he could to calm the situation down, to send the Claimant home and to tell him they would be in contact to discuss the matter further and not to come into work before he had been spoken to. Mr Rathore also spoke to Abu Nasir, asked him to resolve the situation and told him there was no need to call the police as they would investigate and take any action required. Abu Nasir said that he was happy with that and trusted Mr Rathore to look into this. Mr Rathore spoke directly to the Claimant and told him to go home and felt that the Claimant understood why he had been asked to go home as the Claimant had been accused of slapping Abu Nasir.

22 Mr Nasir is also of Bangladeshi national origin. The Claimant says that there was a verbal exchange in Bengali, which escalated. The Claimant says that he believed Mr Nasir was going to hit the Claimant and the Claimant said that he pushed Mr Nasir who came at him from the left. The Claimant said Mr Nasir touched his neck and shoulder. The Claimant denies that he slapped Mr Nasir

23 The Claimant accepted that in oral evidence that he told Mr Nasir "*if you say that again I am going to slap you*" and that subsequently Mr Nasir did repeat his comments.

24 The Employment Tribunal was not provided with any direct witness evidence from Mr Nasir or any other witness to the incident.

25 The Respondent said it believes that the Claimant did slap Mr Nasir. When Mr Rathore was informed about the incident on 19 July 2018, he spoke to Mr Nasir and sent the Claimant home.

26 The Claimant says that there was a CCTV camera covering the kitchen. Mr Rathore says it does not cover the relevant area and that in any event Mr Rathore did not seek to view the CCTV footage.

27 On the 20 July 2018, Mr Rathore asked four people who were identified as being in the area to give their account. Mr Kabir said that he did not really see much. Mr Da Costa said that he saw the Claimant slap Mr Nasir. Mr Hassan said that the Claimant slapped Mr Nasir and the fourth witness also said that the Claimant slapped Mr Nasir.

28 When interviewed, Ms Wilderspin took a brief note on what these witnesses said and typed it up for them to sign on the day. In consequence of what they had said, the Claimant was invited to a disciplinary meeting on 22 July 2018 with Mr Rathore. That

invitation was by letter dated the 20 July 2018 and in that letter, he was warned that a potential outcome of the meeting could be summary dismissal for gross misconduct on the basis that physical assault was viewed by the company to be gross misconduct.

29 On the 22<sup>nd</sup> July 2018, the Claimant duly attended the meeting. There was no interpreter at the meeting. Ms Wilderspin had difficulty accurately noting everything said at the meeting, given that much of the conversation between Mr Rathore and the Claimant was conducted in Hindi. The Claimant says that he gave the same account of pushing Mr Nasir in self-defence as he gave to the Tribunal. Mr Rathore says that the Claimant initially said that he had slapped Mr Nasir but then he retracted this and insisted that he merely held his hand against Mr Nasir's face but then later in the meeting he again admitted in Hindi slapping Mr Nasir. Ms Wilderspin's note has the words 'I slapped him' crossed out and states "*I held my hand out against his face. I made physical contact with Abu. Abu did not raise his hand*".

30 The grounds of resistance did not state that the Claimant had admitted slapping Mr Nasir. The Claimant in oral evidence denied accepting that he had slapped Mr Nasir or indeed even that he had held his hand against Mr Nasir's face.

31 The Claimant was not given the witness statements from the four individuals or told who they were. He could not therefore challenge their evidence. Mr Rathore told the Tribunal that he had told the Claimant that witnesses had seen him slap Mr Nasir but not who those witnesses were.

32 The Claimant says that at the end of the disciplinary meeting, Mr Rathore handed him a dismissal letter, which must have been prepared earlier. Mr Rathore and Ms Wilderspin say that they sent the Claimant out for a break, consulted an HR mentor, made the decision to dismiss, typed up the letter and then called the Claimant back to give it to him. The parties agree that Ms Wilderspin did not type up her note of the Claimant's account and/or ask him to sign that. The outcome letter also dated 22 July 2018 fails to give the Claimant a right of appeal.

33 The Claimant says that other employees of Bangladeshi origin were also dismissed, a Mr J and a Mr M. The Respondent said that there were good reasons relating to conduct and capability in relation to those individuals and the Respondent gave other examples of the recruitment and indeed promotion of those from Bangladeshi origin.

34 The Claimant confirmed in oral evidence that he had no issues with any of the Respondent's four internal witnesses who he said were good people and indeed that he had no issues with Mr Rathore who the Claimant also said was a good person.

## The law

35 The following sections of the Equality Act are relevant to the discrimination part of the claim:

### 13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

...

**23 Comparison by reference to circumstances**

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

...

**136 Burden of proof**

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) 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.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

...

36 The test on a claim for wrongful dismissal is whether the employee's actions amounted to gross misconduct, thereby breaching the contract of employment and entitling the employer to summarily dismiss him without paying notice.

**Conclusions**

*Wrongful Dismissal*

37 The Tribunal concluded on the balance of probabilities that the Claimant did slap Abu Nasir.

38 The Tribunal accepted Ms Godwin's submission that it must take care in determining a wrongful dismissal claim when a Respondent does not produce at the Tribunal any witness to an alleged incident.

39 However, the Tribunal heard evidence from Mr Rathore as to what the witnesses had said to him and most importantly the Tribunal heard evidence from Mr Rathore as to what he says was admitted by the Claimant at the disciplinary meeting on the 22 July 2018.

40 There is a clear conflict of evidence. The Employment Tribunal were not greatly assisted either way by Ms Wilderspin's imperfect note of the evidence as she did not understand much of what was being said in Hindi.

41 The Claimant gave live evidence. Those four internal witnesses did not. Three of them said that the Claimant slapped Mr Nasir and Mr Rathore confirmed that they said this. Only limited weight can be given to those four witnesses given their non-appearance at the hearing.

42 The key factor is whether on balance, the Tribunal prefer Mr Rathore's evidence as to the Claimant's admission of the slap on the 22 July 2018; or the Claimant's evidence that no such admission was made.

43 On balance the Tribunal accepted Mr Rathore's evidence that he valued the Claimant as a worker, that he was saddened by having to make the decision and that the Claimant had said these things on the 22 July. The Tribunal did not consider that the Respondent's process was good and accepted many of Ms Godwin's criticisms of that process but the Tribunal did gain the impression of Mr Rathore as someone who was

trying to ascertain whether or not the Claimant had slapped Mr Nasir and on balance the Tribunal preferred Mr Rathore's evidence as to the admission being made by the Claimant on the 22 July 2018.

44 Mr Rathore's evidence in general was measured and clear. The Tribunal preferred Mr Rathore's evidence that the Claimant had admitted to him that he had slapped Mr Nasir and the Tribunal accepted that the Claimant *had* slapped Mr Nasir on the 19 July 2018. Even taking account of the fact that the Claimant's oral evidence came to the Tribunal via the interpreter, his evidence in general and on this specific point was not as clear or consistent as that of Mr Rathore.

45 On the Claimant's own oral evidence, he had told Mr Nasir that he would slap him if Mr Nasir repeated his offensive comments and on the Claimant's evidence, Mr Nasir did repeat those comments. None of the internal witnesses referred to the Claimant defending himself. The Claimant did agree in oral evidence with every part of the most detailed account from the four witnesses, save for the words "Lucky [the Claimant's nickname] slapped him".

46 Whether or not the Claimant was aware of the list of examples of gross misconduct attached to the disciplinary policy allegedly, as he accepted in his oral evidence he was aware that assault, acts of violence or aggression could be grounds for summary dismissal for gross misconduct.

47 The Employment Tribunal find that the Claimants action in slapping a co-worker were in breach of contract and that his misconduct warranted summary dismissal. It follows that the wrongful dismissal claim is dismissed

#### *Race Discrimination*

48 The detriments alleged by the Claimant were his dismissal (which clearly amounts to a detriment) and that he was subjected to a detriment in being unreasonably subjected to more work pressure than colleagues. The Claimant was alleging that he was treated less favourably because of his Bangladeshi origins. It is for the Claimant to establish facts from which the tribunal could draw the conclusion that he suffered these detriments because of his national origins – sometimes referred to as establishing a *prima facie* case.

49 The Claimant was able to show that on occasion he was scheduled to attend early after having been working late the previous night. That is certainly capable of amounting to a detriment.

50 However, there was insufficient evidence for the Tribunal to be able to conclude that the treatment of the Claimant was 'less favourable' in that it wasn't unique or treatment only accorded to those of Bangladeshi origin or treatment that was different to that accorded to all or some other workers at the same level. In addition, even if the Claimant had been able to establish that others had different rotas, there was insufficient material before the Employment Tribunal to conclude that this could be because of the Claimant's Bangladeshi origin.



51 In relation to the dismissal, the Tribunal can move straight to the question of why the Claimant was treated in the way that he was. The Claimant was dismissed because the Respondent believed that he had slapped Mr Nasir. The Respondent believed this because the Claimant admitted it and his admission was consistent with the other witness evidence that the Respondent had gathered.

52 The process undertaken by the Respondent leading up to that decision was poor, however, the Respondent's decision was based on the evidence of a number of witnesses and most importantly the Claimant's admission at the disciplinary meeting that he had slapped Mr Nasir. That was the reason for dismissal. That is not a reason tainted by discrimination.

53 The Tribunal did not consider that a hypothetical non- Bangladeshi worker would have been treated any differently in the event of him having slapped a co-worker.

*Separate reasons for the rejection of the application by the Claimant [given during the hearing]*

54 After the Tribunal heard the evidence of the Claimant and two of the Respondent's witnesses, the Claimant's representative made an application that the Tribunal receive a collation of screenshots of rotas sent to the Claimant by WhatsApp. This was said to show rotas of sixteen chefs including the Claimant for a period said to be the 27 November to 3 December 2017 and 26 March to the 22 July 2018. The Claimant argued that such material was relevant to the comparative analysis required to be undertaken by the Tribunal on this part of the Claimant's case and that these rotas supported his case in particular that he was singled out in relation to having to come in early after a later shift.

55 His reason for the lateness of the disclosure were that the Claimant was reliant on his solicitor and did not know that he had to produce such a document. The Respondent objected on the basis that it would be prejudiced by having to deal with this matter after the live evidence had closed and that such an ambush was unfair to its position, which had been based on the existing evidence. The Respondent said it was contrary to the overriding objective and that the Claimant had had ample opportunity to comply with the various orders relating to disclosure. The Respondent pointed out that it had sought further details of the Claimant's claim during the tribunal process and that even this new information failed to actually identify comparators; and that at the outset of the hearing, the Respondent had raised an issue as to the inadequacy of the evidence in support of this part of the Claimant's claim but the Claimant had not even sought to rectify this problem at that point.

56 The Respondent said that it could not deal with this matter if the document was allowed in without an adjournment, which might require further witness evidence.

57 The Tribunal unanimously rejected the Claimant's application, having regard to the overriding objective and considering the overwhelming prejudice to the Respondents case. It cannot have been the case that the Claimant, who was represented simply didn't realise that he needed to produce material that he wanted to rely on prior to the conclusion of the witness evidence.

58 Numerous Tribunal orders had set out a number of opportunities for the Claimant and his solicitor to supply information in support of his case at an appropriate time and that it is too late to deal with this information at this stage of the hearing.

Employment Judge Allen

24 July 2019