



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Hussain  
**Respondent:** Dishoom Limited  
**Heard at:** East London Hearing Centre  
**On:** 5 and 6 September 2019; 14 November (in chambers)  
**Before:** Employment Judge Gardiner  
Ms T Breslin  
Ms J Owen

## Representation

**Claimant:** Miss E Godwins, Legal Representative  
**Respondent:** Mr D Bansal, Solicitor  
**Interpreter:** Mr M Salahuddin

# JUDGMENT

**The judgment of the Tribunal is that:-**

The Claimant's direct race discrimination claim under Section 13 of the Equality Act 2010 fails, and is dismissed.

# REASONS

## Introduction

1. The Respondent operates several restaurants across the United Kingdom. From 26 August 2017 until 4 July 2018, it employed the Claimant as a chef in its Shoreditch

restaurant. The Claimant is of Bengali national origin. On 4 July 2018, he was summarily dismissed. The reason given in his dismissal letter was “poor general performance”. The Claimant says that his dismissal was an act of direct race discrimination in that he was treated unfavourably compared to how a hypothetical Indian employee in his situation would have been treated. He also complains about various incidents occurring before he was dismissed, although these are raised by way of background only.

2. At the outset of the case, it was agreed that the issue of liability would be decided before hearing any evidence in relation to remedy. This approach was taken given that there were only two days allocated for the final hearing and there was insufficient time to reach conclusions on the issues of both liability and remedy. In the event, submissions concluded at the end of the second day and a further day was arranged for the panel to deliberate without the parties being present.
3. The Tribunal has heard evidence from the Claimant, who gave his evidence with the help of a Bengali interpreter, Mr M Salahuddin. Bengali is the Claimant’s mother tongue, although he also understood some Hindi. The Claimant’s ability to understand and speak English was limited. As a result, Mr M Salahuddin interpreted for the Claimant throughout the hearing.
4. The Tribunal has also heard evidence from Mr Shatrughan Rathore, who was the Head Chef at the Shoreditch restaurant, and Mr Hemraz Hemraz, who was his Sou Chef. A witness statement was also submitted on behalf of Andrew O’Callaghan, but Mr O’Callaghan did not give evidence on the issue of liability. The focus of his witness statement concerns the opportunities available to the Claimant to secure other work.
5. In addition, the Tribunal has been referred to documents in an agreed bundle, which runs to 136 pages. On the second day of the hearing, four further pages were added to the bundle by agreement. These were computer screenshots from the Respondent’s database, referred to as Fourth. At the conclusion of the evidence, both the Claimant and the Respondent made closing submissions. Mr Bansal, solicitor for the Respondent, also handed in written submissions in defence of his client’s position and in denial of the claims made.

## **The issue**

6. The sole issue for the tribunal to determine is whether the Claimant’s dismissal was an act of direct race discrimination. At the Preliminary Hearing before Employment Judge Massarella heard on 13 June 2019, the Claimant clarified that pre-dismissal issues were not separate claims but background to the single claim that the dismissal was an act of direct race discrimination.

## Factual findings

7. Mr Hussain was initially employed by the Respondent as a Tandoori Curry Chef, as recorded in his contract of employment. As Tandoori Curry Chef he was the most senior chef in the Tandoori Curry section. He was not provided with a job description. He was responsible for his section when he was on shift. This responsibility included batching, dispensing, production and maintaining the hygiene and quality of the product.
8. He was joining a multi ethnic workforce. The Tribunal was not provided with data as to the national origins of those working in the kitchen at the time he started. However, although there was a high turnover of staff, we find it was broadly similar to the composition of the workforce based in the Shoreditch kitchen during the period of the Claimant's employment. There was a range of nationalities. Within the workforce at Shoreditch, the most common countries of national origin were Bangladesh, India and Nepal. However, apart from the Claimant and one other employee, no other Bangladeshi employee was at the seniority of Senior Chef de Partie. By place of birth, the other Senior Chefs de Partie were Indian, Nepalese, and Pakistani. More junior roles were populated by a range of nationalities and countries of birth, with the most numerous being Bangladeshi, Nepalese and Indian in that order.
9. The Head Chef was Indian, as was the Senior Sou Chef and the Junior Sou Chef.
10. Within the restaurant, the Claimant's line manager was Mr Rathore as the Head Chef. However, on any particular shift, the Claimant often reported to Hemraj Hemraj who as Sou Chef was senior to him and the most senior employee on the shift.
11. Under the Claimant's contract of employment the following wording appears in Clause 16 :

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 employment.
12. The Claimant signed his contract of employment. Before doing so, no-one had translated the contract for him into Bengali.
13. The Disciplinary Procedure clarified that discipline or dismissal could take place without following the Disciplinary Procedure if an employee had less than 24 months' continuous service.
14. The contract recorded his place of work as Kensington/Shoreditch. This was because it was anticipated that he would undertake his initial training at the Shoreditch restaurant, and then transfer to the Kensington restaurant which was

about to open. In the event, he asked if he could stay at the Shoreditch restaurant, and this request was granted by Mr Rathore.

15. His starting salary was initially £30,000, comprising a basic salary of £23,000 and a share of the Tronc amounting to £7,000. That was increased to £32,000 at the end of September 2017. This increase applied to all chefs at the Claimant's level, regardless of their ethnic or national background, as the Claimant himself accepted in cross examination. He was sent a letter announcing the increase which started "Dear Chefs". We do not accept the Claimant's allegation that Indian chefs were paid less than chefs from other nationalities because they were cheap labour.
16. The letter ended by talking about a Referral Bonus. This Bonus was a bonus of £1000 offered to existing chefs for each new chef recommended if those recommended were hired and passed their probation. This reflects the evidence given to the Tribunal, which we accept, that there was a shortage of chefs of suitable quality to staff the Respondent's kitchens.
17. During the period until Christmas 2017, the Claimant worked well with no obvious issues about the standard of his performance. There are no recorded instances of concerns about his ability to perform every aspect of the role.
18. In December 2017, he transferred to the Indian Curry Section within the kitchen at the Shoreditch restaurant. He was given two weeks training. In recognition of his commendable attitude during training, he was awarded the title Star Employee at a regular staff meeting.
19. On around 12 January 2018, the Claimant was issued with what the Respondent's computer database describes as a verbal warning. The warning was issued by Mr Rathore and Mr Hemraj was also present. The Claimant told the Tribunal he got on well with Mr Rathore. The reason for imposing this warning is recorded as follows :

Not performing after giving continuous warning and feedback, not able to perform his job roll, this is effecting customer, food quality and other employees (his co-workers). Burnt almos 8 kg of chicken ruby on 10 January 2018, burnt dal, all food went to bainmarie was cold (checked by me and I reheated everything myself as he couldn't do). Although he was having one chef with him to help him since morning, most of his job done by his co-workers.

20. The Respondent's record is the result of several previous incidents where there were concerns about the quality of the Claimant's work and a general impression he was over dependent on his team to prepare the food. These incidents were brought to the Claimant's attention at the time, although the Claimant may not have appreciated that he was receiving a formal disciplinary sanction. The Claimant was not sent any document noting that a verbal warning had been issued to him as part of any formal process. The main improvement noted as being required was that

“Being Indian chef should be able to run section independently as per company guide line”.

21. Thereafter, from 13 January 2018 onwards, the Respondent kept an ongoing record of incidents involving the Claimant on its database, called Fourth. This noted instances of burning food, failing to put food away at the end of the day in the correct storage units, and of being repeatedly late for work. Over the period from 13 January 2018 until 16 June 2018 there were seventeen instances of underperformance that merited a written record. Although there is no written record that these were discussed with the Claimant, we think it is likely they would have been raised with the Claimant in order to encourage him to improve his performance. We reject the Claimant’s evidence that he only made one mistake, namely a mistake with the garnish in April 2018.
22. We do not find that the Respondent’s Indian employees imposed additional pressure on the Claimant or other Bangladeshis in order to persuade him to leave his employment as a result of the pressure he was experiencing. If the Claimant was feeling under pressure, this was because he was not able to fulfil the requirements of his role.
23. By the end of February 2018 the Claimant had been in post for six months. Under his contract of employment, he was subject to a six month long probationary period. Despite this, there was no formal assessment of the Claimant’s performance at that point, or any awareness that his probationary period was coming to an end. The Respondent by its silence effectively treated the Claimant as having passed his probation. Given the mounting evidence as recording on the Fourth database, this was not because they considered that his performance was satisfactory in all respects. The Respondent’s focus at that point and for some time thereafter was on improving the Claimant’s performance, rather than looking to terminate his employment for having failed his probation.
24. In March 2018, Mr Rathore and his manager Mr Arun Kumar discussed with the Claimant whether he was willing to step down to the role of Demi Chef de Partie, and accept a reduced salary of £25,000. This was because it was felt that the Claimant’s performance was at the level of a Demi Chef de Partie rather than at the level of a Senior Chef de Partie. The Claimant was told that if his performance had improved and there was a vacancy we would give him the opportunity to move back to the Senior Chef de Partie role before anyone else.
25. The Claimant was unwilling to accept the proposed demotion and asked for more time to prove he was able to perform at the required level. He continued in his position as Senior Chef de Partie for the next three months until his dismissal. We do not accept the Claimant’s contention that he was forced to accept a demotion at some point before he was dismissed.
26. On 7 June 2018, he was given a further verbal warning by Hemraj Hemraj. The recorded reason for the warning was that he did not make lamb stock, even though

he had apparently received a proper handover from a previous chef. It is recorded that "he is not serious for his work and he said he is not my job" [sic]. The required improvement was the same as previously : "Being Indian chef should be able to run section independently as per company guide line". Whilst there is a dispute between the Claimant and the Respondent as to the precise events in relation to this particular incident, a contemporaneous record was made on the Respondent's database. We accept that Mr Hemraj gave the Claimant a verbal warning in relation to this incident, and did so because he genuinely believed that the Claimant was at fault in relation to the lamb stock. In relation to this incident, as with others, the Claimant's recollection was limited and we prefer the evidence from the Respondent's witnesses.

27. On 25 June 2018, the Claimant received a letter referring to his job title. The letter stated that his job title would change from Indian Chef to Senior Chef de Partie. This change would take effect immediately. This letter was a standard letter which was sent to all other employees at his grade. The change was a general change made to update job titles. It was made, as the letter suggests so that the job title better reflected the skill and level of contribution made by the role to the Respondent's business. This letter does not imply any criticism of the Claimant's performance.

28. On 2 July 2018 he was handed a letter signed by Mr Rathore. This letter was an invitation to a Disciplinary Hearing. It was written in English but Mr Rathore explained the effect of the letter in Hindi. The Tribunal considers that the Claimant was able to understand the explanation notwithstanding it was given in Hindi rather than in Bengali.

29. The letter included the following content :

As you will be aware from previous meetings we have been concerned with your performance and tardiness which has resulted in numerous notes to file as well as meeting to discuss your improvement at work. We have not seen any improvements in your work.

These actions are viewed by the company to be poor performance and tardiness. As a consequence, the outcome of this meeting may be that you are issued with a disciplinary warning or that you may be terminated.

30. The disciplinary hearing went ahead on 4 July 2018. It was held at a corner table in the basement restaurant at lunchtime. The Claimant attended alone without any representative. It was conducted by Mr Kumar, although Mr Rathore was in attendance. Communication in the meeting took place in Hindi and the Claimant accepted he understood Hindi and was able to speak a little. The Claimant was asked to explain his poor performance over the previous months. The first part of the hearing lasted at least ten minutes. There was then a break in which Mr Kumar considered the outcome. He decided that the Claimant should be dismissed. A

dismissal letter was typed by Mr Rathore and this was handed to the Claimant when the meeting resumed. It was explained to the Claimant in Hindi that he was being dismissed for poor performance. The Claimant was asked to, and did sign the dismissal letter.

31. The letter stated that the reason for dismissal was general poor performance. The letter cross referred to the Forth computerised record, although this content had not been shared with the Claimant at any point. The letter informed the Claimant he would be paid in lieu of his one week's notice and paid for his accrued holidays. He was not offered an opportunity to appeal against his dismissal. Mr Rathore explained this by saying he did not consider this was a requirement given that the Claimant had not been employed for more than twenty-four months.
32. The Claimant contends that his dismissal was part of a pattern of dismissing Bangladeshi employees without any proper basis for doing so. In his witness statement, the Claimant did not identify any other Bangladeshis who had been dismissed for potentially unfair reasons. In cross-examination, for the first time, the Claimant identified the names of Bangladeshi individuals he considered had been treated unfairly. His evidence was vague. Under cross examination he was forced to accept that some of the named individuals had resigned as a result of the pressure of working at the Respondent rather than been dismissed. The Tribunal has been provided with no evidence that any such pressure was prompted by their nationality or ethnic origin and was more than the inherent pressure of working in a busy kitchen. One person named by the Claimant, Shahadat Hasan, was apparently dismissed for gross misconduct in assaulting a colleague in the kitchen. He apparently lodged a race discrimination claim before the Employment Tribunal. After a two day hearing, on the evidence of Mr Rathore, that claim was dismissed.
33. In his evidence to the Tribunal, Mr Rathore, referred to two other Bangladeshi employees, namely Abdul Aziz and Mr Mohammed Atiqur Rahman. Mr Aziz had been working in the Carnaby and Kensington restaurants and had been dismissed for poor performance in December 2017. Mr Rahman resigned in October 2017 after working for only one month at the Shoreditch restaurant, apparently because he found that the business was too busy for him.
34. During the Claimant's employment, he was applying to the Home Office for permission to bring his family to the United Kingdom. As the Claimant accepted in his witness statement, the Respondent had agreed to provide him with the necessary documents in order to make the application. Under cross examination, the Claimant confirmed that the Respondent had written a letter on his behalf in support of his family's application.
35. In his witness statement, the Claimant had alleged he had been put under particular pressure in June 2018, during the month of Ramadan. He alleges he had been asked to work back to back shifts with a minimal break between the two shifts. However, this was not put to the Respondent's witnesses during cross-

examination and did not feature in the Claimant's closing submissions. We can therefore attach no evidential weight to this allegation.

36. At the Preliminary Hearing before Employment Judge Massarella on 13 June 2019, the Claimant gave two explanations for why he had been dismissed. The first was that the Respondent had a policy of dismissing employees short of two years continuous employment so that they do not acquire unfair dismissal rights. The only evidence as to the length of service of the Respondent's workforce at the Shoreditch restaurant is contained in the table on page 78 of the Bundle. This shows eight employees who have more than two years continuous employment, including one Bangladeshi in a Demi Chef de Partie role. However there are four further Bangladeshi employees with over one and a half years service. The Claimant has advanced no evidence to support the alleged policy. We do not consider that the Respondent has such a policy. The Respondent wanted to retain capable employees, including Bangladeshi employees, given the general shortage of qualified chefs.
37. The Tribunal does not accept the Claimant's contention that it dismissed employees approaching one years' continuous employment in order to avoid giving those employees a pay rise. As from 1 October 2017, the Respondent did increase its employees pay by an increment, on the first anniversary of his employment, as indicated in the letter dated 29 September 2017. There is no evidence that the Respondent chose to dismiss employees shortly before the end of the first year of their employment. Of the 18 staff who had left the Respondent's Shoreditch restaurant between August 2017 and July 2018, only two were dismissed after about 11 months. One was the Claimant and the other was an employee named Islam. Islam chose to leave in circumstances where he was feeling under pressure and had already received a formal warning for his performance, although the Respondent recorded his departure as dismissal on performance grounds. Fifteen of the eighteen departures were recorded as resignations.

## **Legal principles**

38. Section 13 of the Equality Act 2010 is worded as follows :

- (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.

39. The Claimant seeks to compare himself against how a hypothetical Indian employee would have been treated, who was in all other respects in a comparable position to the Claimant.
40. The focus is on the mental processes of the person that took the decision said to amount to discrimination, namely Mr Kumar's decision that the Claimant should be dismissed. The Tribunal should consider whether Mr Kumar was consciously or unconsciously influenced to a significant (ie a non-trivial) extent by the Claimant's nationality. His motive is irrelevant.



41. Section 136(2) of the Equality Act 2010 is worded as follows :

- (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.

42. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paras 22-32).

43. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that his treatment was in part the result of his nationality.

44. In order for the burden of proof to transfer from the Claimant to the Respondent, it is well established that it is insufficient for the Claimant merely to show a difference in status and detriment treatment (see *Madarassay* at paragraph 54). To shift the burden of proof a claimant must also prove something more. That is, in the present case the Claimant must prove facts from which the Tribunal could infer that there is a connection between his nationality and his dismissal, in the absence of a non-discriminatory explanation.

45. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the Claimant's treatment.

## Conclusions

46. On our factual findings, there are no facts from which the Tribunal could decide in the absence of any other explanation, that at least part of the reason for the Claimant's dismissal was his Bangladeshi nationality or ethnic origin. In many respects the Respondent took decisions in relation to the Claimant during his employment that were to his benefit. He was granted his wish to remain in the Shoreditch restaurant rather than being moved to Kensington following initial training. Along with all other employees at his level, he was given a £2000 pay rise at the start of October 2017. He wanted to move to the Indian curry section of the kitchen around December 2017 and this request was granted. He was granted the award for Star of Week. The Respondent assisted the Claimant with his family's immigration application. Despite various concerns about the Claimant's performance the Respondent did not terminate his employment at the end of his probation period. In all these respects the Claimant was treated fairly and with respect.

47. We find that the only reason for the Claimant's dismissal was his performance. As recorded contemporaneously in two warnings and seventeen other incidents, he was not performing at the level that was required from a Senior Chef de Partie. This had been raised specifically with him at the meeting in March when he had asked to consider stepping down to the less onerous role of Demi Chef de Partie. The Claimant had asked for more time to prove his ability to perform the Senior Chef de Partie role. However, his performance did not improve and this was the reason why, three months later, the Respondent considered that a decision had to be made about his future, and decided that he should be dismissed.

48. For these reasons, the race discrimination claim fails.

Employment Judge Gardiner  
20 November 2019