Case Numbers: 1401755/2016
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THE EMPLOYMENT TRIBUNAL

SITTING AT: **SOUTHAMPTON**

BEFORE: **EMPLOYMENT JUDGE EMERTON**
MEMBERS: **Mrs B Catling, Mr J C Sanger**

BETWEEN:

(1) Miss K Stefanko
(2) Miss J Woronowicz
(3) Mr J Jonik

Claimants

AND

(1) Maritime Hotel Ltd (in Voluntary Liquidation)
(2) Mr N Doherty

Respondents

ON: **22-24 July and 8 August 2019**

APPEARANCES:

For the Claimant: **Dr E McGaughey (FRU Representative)**
For the First Respondent: **Mr N Doherty (assisted by Mr S McQueen)**
For the Second Respondent: **in person**

RESERVED JUDGMENT FOLLOWING REMITTAL BY EMPLOYMENT APPEAL TRIBUNAL, AND RE-HEARING

The unanimous judgment of the tribunal is as follows:

Previous Judgment, unaffected by the appeal

1. For the avoidance of doubt, the tribunal confirms as follows:

    a. The tribunal ruled in 2017 that the all three claimants' claims for outstanding holiday pay, against the first respondent, were well founded, and awarded compensation.

    b. The tribunal ruled in 2017 that the first and third claimants' claims of failure to provide written particulars of employment were well founded, and increased the awards accordingly.

    c. The tribunal ruled in 2017 that the all three claimants' claims of unauthorised deduction of wages, against the first respondent, were well founded. Compensation has not yet been ordered.

    d. The tribunal ruled in 2017 that the all three claimants' claims of breach of contract/wrongful dismissal, against the first respondent, were well founded. Compensation has not yet been ordered.

    e. The tribunal ruled in 2017 that the all three claimants' claims of unfair dismissal, against the first respondent, were well founded (pursuant to section 104 of the Employment Rights Act 1996 – automatically unfair dismissal for asserting a statutory right). Compensation has not yet been ordered.

Liability

2. The claimants' claims of direct discrimination because of race against the first and second respondents, in respect of the manner of dismissal, are well founded.

3. The claimants' claims of direct discrimination because of race against the first and second respondents, in respect of the decision to dismiss, are not well founded.

4. The first respondent failed to provide the second claimant with written particulars of employment required by section 1 of the Employment Rights Act 1996. Pursuant to the ruling of the Employment Appeal Tribunal, the second claimant's award falls to be increased under section 38 of the Employment Act 2002.

Remedy

5. The first respondent is ordered to pay compensation for unauthorised deductions of wages as follows:

    a. The first respondent is ordered to pay £885.30 to the first claimant.

    b. The first respondent is ordered to pay £929.35 to the second claimant.

    c. The first respondent is ordered to pay £1,115.37 to the third claimant.

6. The sums in the above paragraph are ordered gross. They may be liable for lawful deductions for tax and national insurance. They are not subject to any

further adjustment.

7. In respect of compensation for breach of contract (wrongful dismissal), no remedy is required, as this is covered by the compensatory award for unfair dismissal.

8. In respect of the basic award for unfair dismissal, none of the claimants had sufficient qualifying service to be eligible for a basic award.

9. In respect of the compensatory award for unfair dismissal, the tribunal finds that the respondent unreasonably failed to comply with the applicable ACAS Code of Practice. Pursuant to section 207A of the Trade Union and Labour relations (Consolidation) Act 1992, the tribunal considers it just and equitable to increase the compensatory award by the maximum amount of 25%. The figures below include the 25% uplift.

    a. The first respondent is ordered to pay the first claimant the sum of £12,678.96 as the compensatory award for unfair dismissal.

    b. The first respondent is ordered to pay the second claimant the sum of £12,389.33 as the compensatory award for unfair dismissal.

    c. The first respondent is ordered to pay the third claimant the sum of £7,984.95 as the compensatory award for unfair dismissal.

10. The tribunal orders the following compensation for direct race discrimination; the first and second respondents are jointly and severally liable:

    a. The respondents are ordered to pay the first claimant compensation of £2,000.00 for injury to feelings.

    b. Interest of £554.52 is payable on the above sum.

    c. The respondents are ordered to pay the second claimant compensation of £2,000.00 for injury to feelings.

    d. Interest of £554.52 is payable on the above sum.

    e. The respondents are ordered to pay the third claimant compensation of £2,000.00 for injury to feelings.

    f. Interest of £554.52 is payable on the above sum.

11. Pursuant to section 38 of the Employment Act 2002, the first respondent shall pay to the second claimant an amount equal to four weeks' pay, namely £1,274.40.

12. The Recoupment regulations do not apply.

REASONS

Summary of the Case:

13. This was a case in which the three Polish claimants were employed at the Maritime Hotel, Portland, Dorset by first respondent. It was a short period of employment. It should be noted that the hotel changed hands shortly after the claimants were dismissed in July 2016, and there has been no suggestion that the current owners of the hotel have any liability.

14. All three claimants were dismissed after falling out with the second respondent, Director of the first respondent, having asserted statutory rights relating to wages and written particulars of employment. The dismissal was swift, less than amicable, and failed to follow and proper procedures. Various sums of money remained owing to all three claimants. They had not been given written particulars of employment. The claimants were asked to vacate their hotel accommodation and leave the following morning. All returned to Poland. They brought claims of race discrimination, breach of contract/wrongful dismissal, unfair dismissal, failure to pay outstanding holiday pay and unauthorised deduction of wages.

15. In a reserved judgment after a three-day hearing in June 2017, a tribunal dismissed the discrimination claims. It upheld all the other claims, save that it determined that the second claimant had insufficient service to be eligible for an increase in her award as a result of the failure to provide written particulars. Remedy was ordered for holiday pay and failure to provide written particulars (the latter in respect of the first and third claimants), and it was intended to deal with the other outstanding remedy matters (including unfair dismissal compensation) at a remedy hearing, but the claimants requested that remedy was stayed pending an appeal to the Employment Appeal Tribunal (EAT). The EAT allowed the appeal to the extent that the second claimant was eligible for an award to reflect failure to provide written particulars of employment, and that there were flaws in the tribunal's reasoning with respect to direct race discrimination, such that a decision on the discrimination be remitted back to the tribunal to determine whether there was direct discrimination in the dismissal and/or the manner of dismissal.

16. A differently constituted tribunal heard the remitted matters and determined remedy on all outstanding matters in July and August 2019. It ruled that the claimants were not dismissed because of their race, but found that the manner of the dismissal amounted to direct race discrimination, as a result of some inappropriate comments when discussing the dismissal to the claimants (after the decision had been made). Compensation is awarded, as set out above.

Background to the hearing (1) The original tribunal decision:

17. Issues had been identified at a preliminary hearing on 25 January 2017, at which the claimants appeared in person, but the respondents were represented by Counsel. Employment Judge Roper identified detailed issues relating to:

    a. Automatically unfair dismissal against the first respondent (section 104 of the Employment Rights Act 1996 – the statutory right not to have

deductions made from wages);

b. Direct race discrimination against both respondents (solely in relation to the dismissal being the less favourable treatment);

c. Unpaid annual leave against the first respondent;

d. Breach of contract against the first respondent (in relation to entitlement to paid notice – essentially a claim of wrongful dismissal);

e. Failure to provide written particulars of employment against the first respondent; and

f. Unauthorised deduction from wages against the first respondent.

18. It should be noted that, in consultation with the parties at the PH, it was clear that any claim for harassment was not pursued: Employment Judge Roper identified only one act of direct discrimination, relating only to the act of dismissal. Neither party wrote to the tribunal to indicate that it disagreed with the issues which had been recorded. These were the specific issues which were considered by the tribunal at the substantive final hearing in 2017.

19. The original hearing of the case took place in Southampton before a full tribunal panel comprising Employment Judge Kolanko and two non-legal members, on 5-7 June 2017, with reserved judgment discussions in chambers on 20 July 2017. All parties were legally represented. Reserved judgment and reasons were sent to the parties on 31 August 207, with a corrected version signed on 13 October 2017 (correcting a typographical error).

20. The tribunal found that all three claimants' claims for unpaid holiday pay were well founded, and compensation was ordered. *That matter has been dealt with and is now closed.*

21. The tribunal awarded an amount equal to four weeks' pay to the first and third claimants' claimant, pursuant to section 38 of the Employment Act 2002, because of a failure to provide written particulars of employment. *That matter has been dealt with and is now closed.*

22. The tribunal did not award four weeks' pay to the second claimant, on the understanding that she had insufficient employed service to qualify for that right.

23. The tribunal found that all three claimants' claims for unpaid wages, for breach of contract, and for unfair dismissal, were well founded. *As far as liability is concerned, these matters have been dealt with and are now closed.* It is plain from the reserved judgment and reasons that the tribunal, before reserving its judgment as to liability and remedy, had heard and were expecting to deal with further remedy matters in chambers on 20 July 2017. It was clear that a schedule of loss had been provided, and the parties had reached agreement as to how calculations of wages should be approached. However, the judgment records that after the conclusion of the hearing, Mr McGaughey, on behalf of the claimants, sought to revise his earlier submissions/concessions in relation to the calculation of unpaid wages. The tribunal listed a remedy hearing for 4

September 2017, although this was later vacated.

24. The tribunal did not make any determination as to whether or not the compensatory award for unfair dismissal (or damages for breach of contract) should be increased because of breach of the ACAS Code of Practice.

25. The claimants had brought claims of direct race discrimination. The tribunal dismissed these claims.

26. All outstanding remedy matters were due to be dealt with at the remedy hearing. When the hearing was vacated, the parties were asked to supply availability in order to list a new remedy hearing as early as possible. However, the claimants appealed against the judgment, and Dr McGaughey submitted that the remedy hearing be stayed pending the outcome of the appeal. The tribunal agreed to stay the hearing. Whatever the claimants' motivation in making such a request, it had the unfortunate, but inevitable, consequence that the tribunal ordered no compensation for unfair dismissal, for unauthorised deduction of wages and for breach of contract.

27. Company House records confirm (as was canvassed at the hearing on 22/23 July 2019) that after the reserved judgment was sent to the parties, initial steps were taken to wind up the first respondent, albeit compulsory strike off action was suspended on 17 January 2018, and a voluntary liquidator was appointed on 19 February 2018.

Background to the hearing (2) :The EAT decision:

28. Leave to appeal was given, and an appeal hearing took place before HHJ Stacey (sitting alone) on 25 September 2018. Dr McGaughey represented the appellants. There was no appearance or representation by or on behalf of the respondents. A written judgment (UKEAT/0024/18/OO) was issued on 18 December 2018.

29. HHJ Stacey dealt with three issues on appeal. (1) The second claimant's eligibility for an increase in award due to the failure to provide written particulars of employment. (2) the tribunal's approach the evidence concerning a complaint of direct race discrimination. And (3) "the effectiveness of the litigation process to enforce the claimants' rights where the first respondent before the tribunal is now in voluntary liquidation".

30. The claimants did not receive leave on proceeding with a separate claim of harassment related to race.

31. In respect of the failure to provide written particulars, HHJ Stacey pointed out that in fact the second claimant's six week's employed service was sufficient that she qualified for the right to written particulars, taking into account (in particular) sections 1(1), 1(2), 2(6) and 198 of the Employment Rights Act 1996 and EU Directive 91/533/EEC. She was therefore entitled to a remedy under section 38 of the Employment Act 2002. At paragraph 29, HHJ Stacey found as follows:

> 29. I therefore conclude that it is an error law for the Tribunal not to have found that the Second Claimant was entitled to a section 1 statement which she should have received on

> or before 19 July 2016 regardless of whether her contract still subsisted at that date. I declare that the First Respondent failed to comply with the Second Claimant's entitlement to a section 1 ERA 1996 statement by 19 July 2016.

32. In respect of the race discrimination, paragraphs 30-37 set out a detailed analysis as to why the tribunal's decision on race discrimination could not stand, as a result of an incomplete explanation as to how it applied the burden of proof and reached the conclusion that the dismissal "had nothing whatsoever to do with race discrimination". However, at paragraph 36, HHJ Stacey also made comment (whilst noting her use of the term "whistleblowing," presumably in a colloquial sense, when in fact referring to "asserting a statutory right"), before setting out the overall conclusions in the following paragraph:

> 36. It could perhaps be argued on the Respondents' behalf that the finding at paragraph 21 that the only reason for the Claimants' dismissal is the whistleblowing effectively answers the Claimants' concerns since it makes an explicit finding of a non-racial and exclusive reason for the dismissal that in effect deals comprehensively with the race discrimination allegation. With some hesitation however, I would not have accepted the argument had the Respondents been here to make it. It is certainly a possibility, but without further explanation by the Tribunal it is not sufficient. It is also apparent from the claim form that the Claimants allege discrimination in both the fact of and manner of their dismissal, and the particularly brutal manner of dismissal has not been considered sufficiently by the Tribunal.
>
> 37. Overall, I therefore consider that there has been enough shown to me today by Dr McGaughey to say that the Tribunal has erred by failing to consider the burden of proof, failing to reach findings on material evidence and/or failed sufficiently to explain its reasons for its Judgment in order to be **Meek**-compliant.

36. In respect of the right to an effective remedy, HHJ Stacey pointed out that leave to advance this argument had not been given, but she in any event dealt with it, if briefly, at paragraphs 38-39. Dr McGaughey had sought to argue that all heads of complaint should be enforceable against the second respondent, even though he was not the employer. She dismissed that as a ground of appeal.

37. HHJ Stacey's conclusions are as follows, at paragraphs 40-43:

> 40. The appeal is allowed in part. The Second Claimant was entitled to and did not receive her statement of terms and conditions contrary to sections 1 to 7 of the **Employment Rights Act 1996** and, since other parts of her Tribunal claim were successful, she is entitled to an award under section 38 of the **Employment Act 2002**. It is a judgment for the Tribunal to decide
> whether to award her two or four weeks' pay, (or if exceptional circumstances apply) and to make findings of fact about the Second Claimant's week's pay and to calculate the amount due to her.
>
> 41. I also find that the issue of whether the Claimants were subject to unlawful direct race discrimination in their dismissal should be re-heard, since the Tribunal erred in its approach to the burden of proof and/or in the sufficiency of its reasons.
>
> 42. I remit the case back to the Tribunal as follows:

> (1) To calculate the Second Claimant's week's pay and decide whether she should receive two or four weeks' pay, or if exceptional circumstances apply, for the non-provision of her section 1 statement of terms, pursuant to section 38 **Employment Act 2002**;
> (2) Secondly, to rehear all three Claimants' claims that the fact of and manner of their summary dismissal on 7 July 2016 amounted to unlawful race discrimination by either or both of the First Respondent and the Second Respondent in accordance with sections 109 and 110 **EqA 2010**.

> 43. The next question is whether the case should be heard before a fresh Tribunal or remitted back to the original Tribunal. Applying the factors listed in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 at paragraph 46 to the circumstances of this case, whilst there is no concern about the professionalism of the Tribunal and there is no risk of bias or partiality, I see force in the argument that to remit it back to the same Tribunal could constitute a second bite of the cherry. Some considerable time has passed since the original Decision and the Tribunal may well not remember it particularly well. The elements of the case that need re-hearing will not require a lengthy hearing or benefit from all the background information and will focus simply on one day and a few hours of conversation. I accept Dr McGaughey's submission that remission to a fresh Tribunal is the preferred option.

Background to the hearing (2): Arranging a second tribunal hearing:

38. The position after the EAT judgment was therefore as follows:

    a. Remedy had yet to be awarded in respect of unauthorised deduction of wages, breach of contract and unfair dismissal (*this was wholly unaffected by the EAT decision, save that the remedy hearing was substantially delayed because the claimants wished for remedy to be stayed pending the EAT outcome*).

    b. An amount needed to be awarded to the second claimant under section 38 of the Employment Act 2002, pursuant to the EAT's ruling on liability.

    c. The tribunal needed to rehear the direct discrimination claims relating to the dismissal, and if any claim was successful, to award any additional compensation as appropriate.

39. On 15 January 2019 the parties were notified that, the case having been remitted back to the Employment Tribunal, a preliminary hearing (PH) would be listed. It was noted that the respondents' solicitors (Healeys LLP) had played no part in the EAT hearing, and the tribunal queried if they were still on the record. Notice of the PH was sent to all parties, and copied to the respondents at the postal address of the hotel.

40. The PH went ahead on 21 February 2019 by telephone, before Regional Employment Judge Pirani. The first respondent (by now in voluntary liquidation) was not represented. The second responded represented himself. The case was listed for a three-day hearing in July 2019, to allow for reading (three hours), oral evidence from the parties (six hours), closing submissions and the tribunal's

deliberation, before announcing oral judgment and dealing with any remaining remedy matters. A polish interpreter was arranged, albeit in the event very little of the hearing required any translation. The judge noted the history of the case in the case management summary, and the outstanding actions following the EAT judgment, and made comment, as follows (paragraphs 12 and 13):

> 12. After a hearing on 25 September 2018 HHJ Stacey remitted the case back to a fresh Tribunal as follows:
>
> i. To calculate the Second Claimant's week's pay and decide whether she should receive two or four weeks' pay, or if exceptional circumstances apply, for the non-provision of her section 1 statement of terms, pursuant to section 38 Employment Act 2002;
>
> ii. Secondly, to rehear all three Claimants' claims that the fact of and manner of their summary dismissal on 7 July 2016 amounted to unlawful race discrimination by either or both of the First Respondent and the Second Respondent in accordance with sections 109 and 110 EqA 2010.
>
> 13. **Discussion**: Most of the relevant findings of fact have already been found and were not subject to appeal. The timetable above is an over-estimate as the remaining issues are narrow in scope and mostly confined to submissions. In addition, the tribunal hearing the remitted hearing must deal with remedy on all the claims. Because the bundle originally prepared for the hearing was difficult to decipher it is agreed that a further bundle will be prepared by the claimants. The second respondent indicated that he may enter into personal bankruptcy. If this occurs, he is to keep the tribunal informed.

41. The claimants were ordered to provide an updated schedule of loss, and to prepare an agreed bundle limited to 150 pages for the remitted substantive/remedy hearing. The parties were not directed to provide new witness statements (no doubt because they had already supplied their witness statements), but were directed to prepare written submissions, with copies of authorised copies of cases relied upon.

42. The respondents' representatives having come off the record, and the first respondent (the former employer) being in voluntary liquidation, it is evident that the second respondent (who had not in fact entered into personal bankruptcy prior to the hearing) was ill-prepared for the new hearing, did not assist in the preparation of the bundle or exchange of witness statements, and it transpired that he was unable to access any of the case papers. Dr McGaughey related that the Mr Doherty, the second respondent, had emailed him on 15 July 2019, asking for confirmation of the date of the hearing. Unfortunately, rather than supplying that information, Dr McGaughey told Mr Doherty that the date was in the case management order. Quite evidently, Mr Doherty (whose life seems to have been in some disarray by that point) had mislaid his copy and not made a diary note of the dates.

43. The case was listed before a differently constituted tribunal. It should also be noted that Employment Judge Kolanko had retired in 2018.

Conduct of the hearing:

44. The claimants provided a bundle of 224 pages, which also included and the claimants' original witness statements [*the respondents' original statements were also available*], the claimants' written submissions from the original hearing and the appeal, and various other documents. The tribunal had already copied and started to read the ET1s and ET3, the original 2017 Employment Tribunal judgment, the 2018 EAT judgment and the 2019 case management order.

45. Despite the orders from Regional Employment Judge Pirani, the bundle exceeded the specified size, the claimants failed to provide adequate updated schedules of loss, and neither party had prepared a written summary or skeleton of their case. Dr McGaughey did not provide the tribunal with copies of cases he relied upon.

46. On the first day of the hearing, listed for 10:00, there was no attendance on behalf of either respondent, and the judge made the usual enquiries as to whether any recent communication had been received from the respondents. There was none. The tribunal noted that, as a matter of public record, the first respondent was still in creditors' voluntary liquidation, but there appeared to be no further relevant information post-dating the preliminary hearing. The tribunal called the case on at 10:42, swore in the Polish interpreter, and made enquiries of Dr McGaughey as to any information he had in respect of either respondent, and what the claimants' proposals were in respect of the hearing.

47. Dr McGaughey's understanding was that although in voluntary liquidation, the first respondent still existed, but may well have no money to satisfy any compensation awarded by the tribunal. The hotel where the claimants had worked was under new ownership. He described his exchange with Mr Doherty the previous week, and indicated that as far as he was aware the second respondent was not bankrupt. He had a current contact telephone number for Mr Doherty, which he supplied to the tribunal.

48. The judge confirmed what matters the tribunal would need to determine, and asked Dr McGaughey if the claimants wished to propose that the hearing went ahead in the respondents' absence, under rule 47, which appeared to be easily the simplest solution, and one which the tribunal had expected that the claimants would wish to pursue. Dr McGaughey explained, however, that the claimants wished to go ahead with the hearing, but wanted, if possible, to do so with the participation of the respondents; he did not want the tribunal to proceed in the respondents' absence, if they were contacted and indicated a wish to attend. In the circumstances, the tribunal decided that it would not be in the interests of justice to proceed immediately in the respondents' absence, especially as Dr McGaughey had refused to confirm the date of the hearing to Mr Doherty when in contact with him the previous week; the tribunal agreed to adjourn temporarily to see if it was possible to make contact with the respondents to ascertain their intentions.

49. On behalf of the tribunal, a member of the administrative staff was able to make contact with the second respondent on the mobile number supplied by the claimants. Mr Doherty answered his phone. On the instructions of the tribunal, Mr Doherty was reminded that the hearing was listed to start at 10:00 that morning,

and asked if he was planning to attend. His answer indicated that he would wish to attend, but would not be able to get to Southampton until the evening.

50. The hearing temporarily resumed (in the respondents' absence), and Dr McGaughey confirmed that he would wish the substantive hearing to commence the following morning. The tribunal confirmed what evidence the claimants were hoping to call and the likely factual issues concerning liability and remedy. The tribunal ensured that a complete set of papers was set aside for the respondents to read on arrival, and directed that Mr Doherty be telephoned. A clerk advised Mr Doherty by telephone that he should arrive at the tribunal at 09:00 the following morning, ready for the hearing to start at 10:00. He was advised to email to the claimants the witness statements of any witness evidence he wished to call, with any additional documents he wished to rely upon. A copy of the last case management order was emailed to Mr Doherty, as he had evidently mislaid his copy.

51. The tribunal read the case papers.

52. On the morning of Tuesday 23 July 2019, the second respondent in fact arrived late, and the tribunal therefore did not call the case on until 10:37. He was accompanied by his former business partner, Mr Steve McQueen, who had also given evidence at the first hearing.

53. The judge confirmed the purpose of the hearing to the parties, also reading out paragraphs 12 and 13 of the case management order of 21 February 2019. Mr Doherty, as second respondent, represented himself. He also explained that, with Mr McQueen's help, he would also represent the first respondent. The tribunal confirmed that it expected to hear relatively brief oral evidence, limited to the matters in dispute, namely the two allegations of direct discrimination identified by the EAT, and evidence relating to loss of earnings and injury to feelings. Most of the matters could be dealt with by way of submissions. Dr McGaughey explained that he wished to call all three claimants to give oral evidence.

54. The Judge identified that there seemed to be relatively few factual disputes, but noted that paragraph 10.18 of the original judgment had been a little unspecific as to what Mr Doherty had said to the second claimant about she and her two colleagues returning to Poland. When the judge discussed this with Mr Doherty, Mr Doherty conceded that he had said, "*If you are not happy here, just fuck off back to Poland*". In the circumstances, and noting the contents of the EAT judgment, the judge queried whether it was still necessary to hear oral evidence as to liability at all. Dr McGaughey was adamant that he wished to cross-examine, in order to try to establish additional facts relating to discrimination, and to prepare the ground for an application he wished to make in respect of exemplary damages and an alleged tax fraud. He suggested 20 minutes for each witness. Mr Doherty and Mr McQueen indicated that they wished to give oral evidence. Dr McGaughey asked if it would be possible to delay closing submissions until the following day, although he accepted that he would be ready to make submissions that afternoon. Mr McQueen explained that he would need to leave Southampton that evening, as he needed to be back in Newcastle-upon-Tyne the following day; Mr Doherty, who was unemployed and penniless, had a job interview the following day, which he needed to attend. Both explained that if

the hearing continued until the following day, they would not be able to attend.

55. The tribunal took the view that the complexity of the issues raised, including additional matters identified by Dr McGaughey which he wished the tribunal to determine, would take at least a day in chambers, and that it would not be in the interests of justice to invite the parties to come back in the morning to make closing submissions. There should not be a need for much oral evidence, as all parties had had ample notice of the need to prepare their submissions. The tribunal considered that the hearing should be strictly timetabled under its powers at rule 45. A timetable was announced to the parties after a 30-minute break for the parties to prepare for the oral evidence, which they did not seek to dispute, and in the event the tribunal allowed a little longer to the parties. Oral evidence was to complete by 3:00pm, before closing submissions, with a maximum of 20 minutes for each party.

56. Oral evidence commenced at 1155; the first claimant adopted his witness statement. Dr McGaughey wished to play to the tribunal the recording which had been made of their exchanges with Mr Doherty (for which transcripts had been supplied, and which were referred to in the original judgment from the 2017 hearing). Whilst the tribunal noted that the transcript was not in dispute, and that this did not appear to be a helpful use of the limited time available, there was no objection from the respondents and it consented to hear the recording. Dr McGaughey was also permitted to ask detailed additional questions in chief. Cross-examination by Mr Doherty was relatively brief. The second and third claimants also gave oral evidence, again with further questions from Dr McGaughey and cross-examination. After the lunch break Mr Doherty and Mr McQueen gave oral evidence, adopting their original witness statements, and both being cross examined at some length. The tribunal also asked questions of Mr Doherty. There had been more respondent oral evidence than the timetable had allowed for, but the tribunal permitted Dr McGaughey to complete his planned questions.

57. After a short adjournment, the tribunal heard oral submissions from both parties. The hearing ended at 1655.

58. The tribunal, before rising, explained that the parties would not be expected to return the following morning, because there would not be time to prepare and deliver oral judgment and reasons on all matters. The judge explained that the reserved judgment and reasons would be produced in due course, but that in light of the numerous matters raised by Dr McGaughey in closing, and the need to approach the decision especially carefully in accordance with the EAT rulings, it was likely that more than one day in chambers would be needed to rule on all outstanding matters, and the written reasons would necessarily have to be quite long to explain the background to the case and the tribunal's analysis. The tribunal would be unlikely to be able to meet again until sometime the following month, due to holiday commitments. The judgments would be sent to the parties as soon as it had been signed.

59. The tribunal deliberated on 24 July 2019 and 8 August 2019, and reached its conclusions on all disputed matters. The tribunal noted its findings, and its reasons for those findings, at the time, and these written reasons were subsequently produced by the judge. Owing to a recording malfunction, it was

not possible to produce a written judgment from oral dictation at the time. It has, regrettably, taken longer than expected to finish these written reasons, as a result of the judge's absences from the office and pressure of other work. The judgment was signed on 24 December 2019 (with the interest calculated accordingly, but required cross-checking some details in the trial bundle when the judge was next in the office, which regrettably further delayed the ability of HMCTS staff to send the judgment to the parties.

The Issues

60. In respect of liability, there is in reality no dispute in respect of eligibility for increasing the second claimant's award under section 38 of the Employment Act 2002, in light of the original tribunal's findings of fact and the analysis of the EAT. The tribunal would need, however, to confirm the second claimant's gross weekly pay and decide how much to award (whilst noting that the tribunal riled in 2017 that it should be an amount equivalent to four weeks' pay for the other two claimants).

61. Within the scope of the issues remitted back to the Employment Tribunal (see above), the tribunal would need to determine, in respect of each claimant, whether there was less favourable treatment because of race (namely, Polish nationality) by:

    a. Dismissing the claimants; and

    b. The manner of dismissal.

62. The tribunal noted that the "manner of dismissal" might have been better pleaded as harassment related to race, and some of the matters complained of appeared to follow the act of dismissal, but that was not how it had been pleaded, on the basis of the remittal back to the ET.

63. These claims are brought jointly against the first respondent, as the employer, and the second respondent, as the director of the first respondent who was responsible for dismissing the claimants (and against whom complaint is made as to the manner of dismissal). No point is taken by the respondents as to the first respondent's liability for any discriminatory acts by the second respondents. It would therefore follow that the respondents would be jointly liable for any acts of discrimination found to have occurred.

64. In respect of remedy, the tribunal would need to determine gross and net weekly pay for each claimant, so as to be able to calculate remedy. It would need to determine the amount of any under-payment, in respect of the unauthorised deduction of wages claims. It would need to determine any contractual damages due (whilst avoiding double recovery for the unfair dismissal). It would need to determine the awards for unfair dismissal (automatically unfair for asserting statutory rights relating to written particulars and not having deductions made from wages), including any loss of earnings for each claimant (with mitigation of loss being in issue). In the alternative, the loss of earnings might be recoverable as compensation for discrimination.

65. The claimants seek an uplift of up to 25% in relation to compensation flowing

from the dismissal, as a result of failure to follow procedures.

66. The claimants seek compensation for injury to feelings in respect of discrimination. The claimants also seek exemplary damages. The judge queried with Dr McGaughey at the start of the hearing whether there was any proper basis for exemplary damages, noting that the skeleton submissions appeared to be rather optimistic, rather than persuasive arguments of real substance, and perhaps his clients would be better served if the limited time available was spent on more meritorious matters. Dr McGaughey was insistent, however, that the claimants wished the tribunal to consider these matters.

67. The schedule of loss had also included an application for a costs order, albeit it did not specify why the claimants might be eligible for costs. In the event, this was not pursued.

Parties' closing submissions

68. What appears below is not intended to be a comprehensive summary of all matters raised by the parties, but rather an overview of the salient points. The tribunal read the contents of the bundle, and made a careful not of the parties' oral submissions.

69. Dr McGaughey did not expressly rely upon his written submissions which had been prepared for the 2017 hearing (and were now overtaken by events, at least in part), but he did refer to parts of their contents. The relevant parts may be summarised as follows (omitting parts which had already been dealt with by the tribunal in 2017 or the EAT in 2018): Comment is made upon the facts generally, with a number of express assertions as to fraud by the respondent. It is asserted that no written particulars had been provided and that all three claimants were entitled to the higher amount of four weeks' pay, that they are entitled to compensation for underpayment of wages, that they are entitled to compensation for automatically unfair dismissal, and that the claimants were discriminated and harassed on the grounds of their race before, during and after asserting their statutory rights. Mr Doherty was accused of being a racist. Exemplary damages were sought in the sum of £30,000, on the basis of "being dismissed in a racist manner, after their wages were denied pursuant to a tax fraud scheme", and of being evicted from their homes. The respondents had also lied, influenced employees to sign witness statements and "continued their mendacious victimisation of the claimants up to and throughout the hearing". Dr McGaughey also referred to paragraphs 27-33 of his written submissions on appeal as relevant to race discrimination, but in fact they do not cover that ground. He might have had in mind paragraphs 6-21, which set out an analysis of why the claimants believed the tribunal took the wrong approach to direct discrimination.

70. In oral submissions as to liability on the direct race discrimination, and remedy on all remaining issues, Dr McGaughey concentrated on five matters. Firstly, he suggested that the second claimant should be awarded four weeks' pay, like her colleagues, for the failure to provide written particulars. Secondly, in respect of discrimination, he asserted that the facts were already made out, and Mr Doherty's remarks relating to Poland, polish accents and understanding of English should be seen as stigmatising the whole group, together with earlier incidents such as remarks on Brexit. He argues that Mr Doherty was a racist [*the*

judge needed to point out that the claims under the Equality Act relied on discriminatory acts of discrimination, rather than the need to brand individuals as "racists", and invited Dr McGaughey to concentrate on the relevant issues]. He suggested that injury to feelings should be at the upper middle band of *Vento*, with "daily indignities" [*the judge pointed out that the claim related to the dismissal, and the manner of the dismissal, not earlier allegations of harassment – Dr McGaughey argued that this was all relevant to dismissal*]. Exemplary damages should be awarded. Thirdly, and fourthly, the calculation of compensation for deduction of wages and for the compensatory award for unfair dismissal (also compensation for discrimination) was set out in the schedules of loss, upon which he relied. He suggested that the claimants had mitigated their loss as best they could. Fifthly, he invited the tribunal to find that in reality Mr Doherty should be seen as the employer. The judge pointed out that this was not an issue before the tribunal – plainly the first respondent was the employer, and the EAT had dismissed the argument that all claims should be enforceable against the second respondent, Mr Doherty. The tribunal would not be addressing this issue. Surprisingly, Dr McGaughey continued to argue the point after being told that the tribunal would not be making a ruling in his favour, and he insisted that there was a "very strong case" that Mr Doherty should be treated as the employer for all the non-discrimination claims. He was not able to assist the tribunal in respect of any grossing up of awards which might be required, but confirmed that the first and third claimants had worked in the UK for the last year and details of net pay were provided.

71. Mr Doherty was given the opportunity to respond on his own behalf, and on behalf of the first respondent, but was evidently finding proceedings rather overwhelming, and was unable to address the tribunal at least at first. The tribunal was content to let Mr McQueen speak on behalf of both respondents, although Mr Doherty later felt able to contribute, too. Mr McQueen argued that he and Mr Doherty had been in business for 15 years and had never had a problem like this before. They were not racist, and employed many other foreign staff. Discrimination was denied. He found it sickening to be accused of racism. He was reminded by the judge of the matters which the tribunal was dealing with, and had no submissions on how much the second claimant's award should be increased as a result of the failure to provide written particulars of employment, or the outstanding wages. As for compensation for loss of earnings following dismissal, he pointed out that he had offered all three claimants alternative employment in the area, with accommodation, and he believed that they were claiming more than was fair, that their English was quite good and they should have been able to find other alternative employment. He disputed that exemplary damages were appropriate. Mr Doherty (who appeared to be struggling with his emotions) added that it was not fair that he faced claims of racism, but the third claimant had acted in a homophobic way towards him, as a gay man. On the two linked aspects of the direct race discrimination claims, he found the allegations ridiculous, and it had cost him his life and his future – he did not know what more he could do. If had had any money, he would have paid for continued legal representation, but he had no money.

72. Dr McGaughey was permitted to reply. He argued that the "real victims" were the three claimants, not Mr Doherty. He confirmed that it was now no part of his case that Mr Doherty was a racist – people can and do change. The only question was whether the right to be treated equally was infringed. The claimants' case was

that rights were infringed.

The Facts:

73. Having heard further oral evidence, albeit relying on the original un-amended witness statements, with some additional questions in chief and cross-examination on limited matters (and following HHJ Stacey's advice in respect of focussing principally, "*simply on one day and a few hours of conversation*"), the tribunal takes a similar view of credibility and of the facts as the 2017 tribunal. The tribunal does not consider that the findings are controversial, and is satisfied that they are right. It is also noted that in 2017, the tribunal heard from four additional witnesses, who were not called at the 2019 hearing. Further comment, and further findings of fact (and an explanation as to where they differ from the original 2017 findings) are set out below.

74. The tribunal therefore re-affirms and adopts the original 2017 findings of fact, on a balance of probabilities, as set out at paragraph 10 of that judgment and reasons, in the 20 sub-paragraphs below:

    a. The first respondent is a company running a hotel the Maritime Hotel situated in Portland Dorset. The second respondent is its sole director and co-shareholder with a Mr Steve McQueen. The claimants are Polish nationals.

    b. Miss Stefanko (first claimant) had an interview with, and was offered a post by Mr McQueen at the hotel on 20 April 2016. The details of discussion of the terms of employment to be offered to Miss Stefanko are less than satisfactory and disputed between the parties. Miss Stefanko states that she was informed that her hourly pay would be at £7.20 per hour with 50p per hour deducted for food and accommodation. No further information was provided according to Miss Stefanko. Mr McQueen in his evidence indicated that £7.20 per week would be guaranteed 28 hours during the winter months and more in the summer and that £70 would be deducted for wages per week for food and board**.** He asserts that he covered the duties to be required as recited in a document headed "Interview Notes-General Duties" (bundle page 105). Miss Stefanko disputes seeing such document or being informed of its contents. We address this dispute later**.**

    c. It is common ground however she was offered duties as a waitress covering breakfast and evening dinner shifts. She was informed that the breakfast shift was from 7 AM to 12 noon, and dinner from 6 PM to 10:30 PM or when guests finally left and the tables were then prepared for the following breakfast, which we were informed could take up to midnight to complete. Because of variables such as the level of business and when guests left, the hours varied from day to day. It is common ground however that in the course of the interview, Mr McQueen asked Miss Stefanko if she had any friends who would be interested in taking up similar posts in the hotel as they were particularly busy at the time, and required further staff, and if they were willing then he would take them on. Miss Stefanko

informed him that her boyfriend was employed elsewhere but if he could be allowed to stay in the hotel, then he would be willing to give up his job and join the respondent. Mr McQueen informed her that her boyfriend Mr Jonik (second claimant) should hand in his notice and join the hotel staff without the need for any interview.

d. Miss Stefanko commenced employment the following day on 21 April. The claimant initially was living in accommodation in Weymouth.

e. On 2 May 2016 Mr Jonik commenced employment at the hotel. Mr Jonik states that he did not have any interview, or discussion of terms with the respondent, and simply relied upon what his girlfriend Miss Stefanko had told her about the job. Mr Maclean contends that he had the same discussion of terms and duties as he alleged he had with Miss Stefanko, and went through the main duties as per bundle page 105. We address this dispute later**.** On this day both Miss Stefanko and Mr Jonik took up residence in the hotel.

f. At an early stage in their employment, Miss Stefanko and Mr Jonik informed Mr McQueen that they needed to return to Poland mid-May for a few days, Mr McQueen was content with this, and informed Miss Stefanko they would manage in their absence.

g. Prior to Miss Stefanko and Mr Jonik leaving for Poland on 14 May, the respondents contend that despite not having completed their probationary periods the claimants were provided with their contracts of employment (bundle page 81 and 97). The claimants deny ever receiving these documents and only became aware of them when they appeared in the tribunal bundle. The documents are surprising in that they recite that Miss Stefanko's employment started on 30 June, and Mr Jonik on 20 June. Both are incorrect, and of course in excess of a month from the date the respondents allege they received the contracts. The documents purport to confirm the provision of accommodation which is unspecified. It indicates that accommodation is provided for the better performance of their duties, presumably as opposed to being any benefit in kind, and under a specific heading of deduction from wages it a omits any reference to deduction whether it be 50p or £70 per week from wages, which is later referenced by Mr Queen in a subsequent meeting on 23 June, which we address later in our findings. We address this dispute later on.

h. On 2 May 2016 Miss Stefanko received her first wage slip (bundle page 133) purporting to show that she had worked 40.5 hours for the 2 weeks at a rate of £7.20, which was the national minimum wage rate at the time. It should have been received on the previous Monday, and thereafter her wage slips were dated on subsequent Fridays every 2 weeks.

i. Miss Stefanko and Mr Jonik left for Poland on 14 May 2016. There is dispute between the parties as to when the claimants returned.

The claimants contending that it was 19 May 2016 (5 days), whereas the respondents contend that it was after 9 days. Timesheets for Mr Jonik reveal that he plainly was working for the respondent on returning on the 19th. Miss Stefanko and Mr Jonik returned with a friend Miss Woronowicz (the 2nd claimant) who was anxious to obtain employment with the respondent, and who commenced employment the following day, we find without any interview or discussion with the respondent, doubtless relying upon the terms conveyed her by her colleagues. Miss Woronowicz was accommodated in property controlled by the first respondent adjacent to the hotel.

j. It appears about this time that all 3 claimants appeared to be concerned as to whether they were going to be paid for the hours worked. Mr Jonik had not received any payments since starting on 2 May until 22 June which apparently arose from bureaucratic difficulties according to the respondent. Miss Stefanko who had by that stage received a first wage slip as recited earlier was concerned that it did not reflect the hours she had been working. The claimants therefore set about photocopying their timesheets (bundle page 116-129) which covered the period from 23 May to late June 2016.

k. At the same time it appears that the respondent was happy with the claimants' performance of their duties. Mr Doherty had complimented Miss Stefanko on her involvement in her duties and her ability to spot areas needing improvement, and informed her that she had the skills to become a restaurant manager.

l. On 24 June 2016 all claimants received wage slips, Miss Stefanko's 4th wage slip (bundle page 134), Mr Jonik's first wage slip (bundle page 142), and Miss Woronowicz's first wage slip (bundle page 138). After studying them, the claimants became concerned that the hours on the wage slips did not record all the hours they had worked. Also it is proper to record the wage slips made no reference to any deductions be it £70 per week or 50p per hour in respect of accommodation/food deductions.

m. It appears as a result of their concerns, all 3 claimants arranged a meeting with Mr McQueen and Mr Doherty on 23 June 2016, which they were to secretly record. The recording reveals (bundle page 161-177) that the meeting was primarily addressing Miss Woronowicz's unrecorded hours of work, although it appears that all three claimants were raising the same concerns. In the recording Mr McQueen is indicating that from the £7.20 per hour was being deducted not 50p but 70p food which he indicated on an average hourly week would be £70 per week. Miss Woronowicz complains that she was not receiving payment for 108.5 hours referable to her first 2 weeks and that there was a shortfall certainly of £140, and one day on 20 May 2 when she was not paid at all. Miss Woronowicz repeatedly complains that she has worked 108.5 hours and even multiplying that by £6.50 it did not reflect the payment in her wage slip. A flavour of the discussions is best reflected in the

following extract (bundle page 161):-

Steve — We are on about actual salary. Actual salary was 572 for Kuba. Minus taxes, isn't it?

Nick — I have told him today they have been emergency taxed.

Justyna — Yeah it's about hours not about tax because our salaries are not correct.

Later on — No, no we balanced the money against the hours because what happens is the hourly rates which I explained to Kamila,, right. It is £7.2.

Justyna — Oh right

Steve — But you actually get. We take some hours off to bring to round it down to £6.50 **[We interpose to indicate that that should in fact have been £7.20]**

Justyna — Okay.

Steve — which is what I said to you, right, to bring it down to £6.50. Because the accommodation is more or less for nothing, really.

Later on (bundle page 176)

Justyna — I show you the way I'm doing it. Can I? It is like 108.5.6.5 okay. That's… But you are paying me like 7.2 so I put that 7.2 all right and it's supposed to be 98 hours on your payslips. But it is less.

Steve — It is less, it is less than that, right, to avoid the tax to bring the tax down.

Justyna — I understand that but I'm talking about that account. Not about that. I'm talking about that account. Should be 705 and taxes are taxes.

Steve — Yes we know that… What, we gonna do is we gonna pay this as it is, right. We would have to change the system because it is now… may run at a loss. On our side because of the way you have done yours the other than mine, right, because if we put 6.5 on here shows that you work for less than minimum wage

Justyna — I understand that, Steve, so that's why you should put not 108 hours but 98 hours and for that 10 hours is yours because the flat.

Kuba — Yeah

Justyna — Because of…

Steve — But then you will pay more tax because you made more money. This is what I'm saying to you. You will…. Listen how do it. If I put 98 hours on here you will pay more National Insurance and more tax.

Justyna	Okay but I'm gonna get more money.
Kuba	But you take…
Jusyna	Still.
Steve	No you won't.
Justyna	Yes I do.
Steve	No you won't.
Justyna	I do because…
Steve	I will show you. Then I will put that hours on and you will find out that you will have to pay more tax because you have made a larger amount of money.
Justyna	Okay so they gonna give me back the taxes after I go home, I don't care. I just wanna have that one correctly.
Steve	Right so it's £140.05 p, right. Get it sorted out on Monday for you all all right?
Kuba	Okay and…
Steve	Right so that's that stop
Kuba	And for me.
Steve	now I have seen how you doing yours and the way that were doing hours. What we might have to do in future is a… Is a… Just call accommodation £50 or something like that just 50 or something like that. I will tell you how we do it with Nick.
Justyna	Prepare some form for us?
Steve	Yes contracts.
Justyna	Some contracts

n. During the meeting which is less than clear Mr McQueen is plainly indicating that deductions are being made variously 50p- 70p per hour and then £70 per week in respect of food and/or accommodation, which are not reflected in the wage slips then or subsequently provided to the claimants. The latter comments recorded above together with the claimants' evidence satisfy us that at no time during this period were any contract documents draft otherwise provided to the claimants.

o. The evidence presented to us has generally been of a very poor level, however we judge from what we have heard that there were tensions between the claimants and the respondents in particular Mr Doherty and Mr McQueen and Mrs Friedi-Mackenzie the duty manager during this period. We are satisfied that the claimants repeatedly made known their dissatisfaction concerning their wages, primarily the lateness of payments, and the amount of hours recorded as having been worked, and in particular the subsequent failure of the respondent to make up the promised shortfall in wages that appears to have been acknowledged at the meeting on 23 June. We discern that during this period the claimants made observations to the effect that they would not continue working under this state of affairs. We have noted references in the respondent's statements to the claimants threatening to walk out at various times if their demands were not met. We judge this to be an unfair interpretation of the claimants simply stating that they would not continue working if the current problems with late and insufficient payments were not properly addressed.

p. On 7 July 2016 Miss Woronowicz was on duty in the evening, the others were not on duty and were in their room in the hotel. It appears that Miss Woronowicz spoke to Mr Doherty repeating her complaints of late payment and the failure to pay her the hours she had worked. Mr Doherty appears to have responded by saying that it was the fault of his bank, an explanation Mr Doherty had given previously for late payment. Miss Woronowicz did not believe this, and said that if they (that is all the claimants) were not paid they would not come into work the following day. Mr Doherty left in a state of agitation, and appears to have discussed matters with Miss Friedi-Mackenzie.

q. Within a few minutes Miss Friedi-Mackenzie went to Miss Woronowicz and informed her that the claimants were to leave and not come back, a point that was acknowledged by Miss Friedi-Mackenzie in a secret recording made later that day (bundle page 184). Miss Woronowicz then sought out Mr Doherty to clarify if in fact they were dismissed. Miss Woronowicz in her statement indicated that Mr Doherty stated *I can't look at you anymore and hear all your whining about your salary, I'm sick of it."* We accept that this comment was made by Mr Doherty and further accept that Mr Doherty swore at her and called her a self centred bitch. We do not accept as contended by Miss Woronowicz that he called her a "*self-centred Polish bitch,"* but did intimate that if she thought things were so bad she should go back to Poland. It is quite clear that Mr Doherty was angry at this stage, and Miss Woronowicz was upset, and repeatedly requested that she be paid the money that was owed by the respondent before she left.

r. Miss Woronowicz then went to see her colleagues in their room, and informed them that they had to pack up their bags and leave. All three claimants decided to speak to Mr Doherty to clarify the

position and again decided to record the meeting. It is fair to say that Mr Doherty was still in a very agitated state repeatedly swearing and indicating that they were to pack their bags and leave. The claimants repeated that their wages still needed to be sorted out. It is not necessary to attempt to summarise the lengthy transcript which is largely incoherent (bundle page 178-189). The recording reveals that Mr Doherty at the outset mimics Mr Jonik's accent, and acknowledged that he had only been paid £400 for 2 months working. He appears to have believed that the Miss Woronowicz had been refusing to hoover the dining area at the time, which we discern was the assertion made by Miss Friedi- McKenzie in her evidence before the tribunal. It appears that Mr Doherty is conflating the claimants repeated concerns about receiving correct payments with the fact that all staff apparently had not been paid that Friday because of an alleged problem at the HSBC Bank, which appears to have fuelled Mr Doherty's attitude towards the claimants, and prompted him to repeatedly indicate that they should pack up their bags and leave. In the course of the discussion Miss Friedi McKenzie (bundle page 184) intervened to indicate that it was she who had sacked them "*I did this because I'm not going to be held to ransom."* Mr Jonik indicated that they would certainly hoover providing they got paid. The claimants were informed that outstanding payments would be forwarded to them in due course.

s. It has been the case of the claimants that they never received final payments specifically referencing wage slips dated 22 July 2016 (bundle page 134, 138, 142), which they say they had never received. The respondents continued to dispute this during hearing until they were shown the claimants bank statements which revealed receipt of other wage slip payments but no payments around 22 July 2016.This prompted the respondents to make payment on the 2nd day of this hearing into the claimants' bank accounts.

t. The claimants left the first respondent's premises the following day.

75. The tribunal notes that in 2017 (see paragraph 13 of the 2017 judgment and reasons) it was found that the evidence was unsatisfactory, "*such as the tendency to over-exaggerate a number of issues on both sides, such as the suggestion by the claimants that Mr Doherty and Mr McQueen were in a perpetual state of insobriety throughout the working day which we do not accept*". The current tribunal also noted a tendency to exaggerate, albeit mainly by the claimants, and a tendency to resort to over-emotive language to bolster their claims, and to deliver inappropriate and unwarranted personal attacks on Mr Doherty, such as the repeated branding him as being "a racist," when the facts do not support such a conclusion (which is in any event not required under the provisions of the Equality Act 2010). This can also be seen in the bald statements that the claimants had been so badly treated that they would feel unable to return to the UK to work, whereas in fact two of them have done just that, notwithstanding the sentiments in the witness statements they chose to

adopt (without amendment) in oral evidence. The claimants have not done themselves any favours by conducting their case in this way.

76. In contrast, the tribunal found the respondents' oral evidence (in 2019) to be reasonably credible. Neither Mr McQueen nor Mr Doherty appeared to be very well prepared, and did not always focus on the detail in cross-examination, in answering questions or in closing submissions. But when asked a direct question, the tribunal found their answers to be reasonably clear and plausible, especially as they did not appear to have been thought out in advance. Both men were clearly offended to be branded as "racist", and pointed out that they had employed a multi-racial workforce and indeed had specifically recruited Polish workers, as a matter of choice. Mr Doherty was also offended by being (as he saw it) mocked by the third claimant as a result of his sexual orientation. Indeed, in his oral evidence, Mr Doherty showed no animus against Polish workers (or any non-British workers). What he did show, however, was a tendency to over-react, in an emotional way, when challenged or told he was wrong. That is entirely consistent with the main narrative of the factual events, when three of his employees challenged him robustly as to their statutory entitlements: Rather than discuss and resolve the issues in a rational way, Mr Doherty, when pushed further by these employees, over-reacted by dismissing them on the spot. This over-reaction to challenge was also reflected in the way he answered questions and presented his case at tribunal.

77. As referred to earlier in these reasons, the tribunal had noted that in the 2017 findings of fact (see paragraph 74(q), above), the tribunal had found that Mr Doherty "*did intimate that if* [the second claimant] *thought things were so bad she should go back to Poland. It is quite clear that Mr Doherty was angry at this stage…".* Because this appeared a little ambiguous, the judge asked Mr Doherty at the start of the 2019 hearing what he had said, and he answered, (see paragraph 54, above), and Mr Doherty conceded that he had said, "*If you are not happy here, just fuck off back to Poland*".

78. Notwithstanding that the tribunal had been enjoined by the EAT to focus on the short period of time surrounding the dismissal, Mr McGaughey was keen to cross-examine on earlier events, which the tribunal permitted, as these were matters from which discriminatory inferences might be drawn, albeit the tribunal had in 2017 not found that anything of significance had been said in the past. There were, of course, no claims of discrimination arising from them – it was relevant only as background. Having heard the oral evidence as to previous conversations where nationality might have come up in one way or another, the tribunal finds, on a balance of probabilities, that the claimants have not succeeded have satisfying them of the primary facts relied upon. The tribunal found the claimants evidence to be rather unclear, and Mr Doherty's and Mr McQueen's denials to be clear and emphatic (in contrast to Mr Doherty's candour in frankly conceding his use of the offensive phrase referred to at the end of the previous paragraph). Dr McGaughey did not put to Mr Doherty in cross-examination many of the factual allegations he sought to rely upon; in fairness to all parties, the judge then put the key factual allegations to Mr Doherty, at the end of his oral evidence. Mr Doherty gave clear and factual answers. The claimants made no complaint at the time, until after they were dismissed, despite being willing to argue the toss in respect of their wages and their statutory rights. They were prepared to make covert recordings of what their managers said

(although no point on admissibility appears to have been taken), but nothing of any relevance has been provided prior to 7 July 206.

79. The first claimant's witness statement contains a wide range of allegations of various types of misconduct, most of which are irrelevant. She asserts that Mr McQueen (who is not the alleged discriminator) and Mr Doherty made earlier remarks about Brexit, on unspecified occasions, making derogatory remarks about immigrants (despite his having recruited the claimants in the first place), and Mr McQueen had made remarks about Donald Trump and about not preparing Halal food. She makes no specific factual racial allegations in respect of 7 July 2016, save for matters relating to the recorded transcript (which are not in dispute). The second claimant complained that "the owners" had made an error in recording her name on her payslip, and speculates that this was "just for fun". She also referred to conversations about immigrants in the context of Brexit, although she also records (paragraph 14 of her witness statement) "*It was strange because a few time the hotel owners had asked us if we had more friends from Poland who would like to join the hotel because Polish people are hard workers*". She asserted that Mr Doherty had called her a "Polish Bitch" on 7 July, which he denies, and which the tribunal in 2017 expressly found had not been said (this tribunal agrees). The other 7 July allegations are a matter of record. The third claimant also refers to the Brexit conversation.

80. The tribunal has agreed with the 2017 finding that the reference to "Polish bitch" is exaggeration and was not said, it finds that the speculative assertion that the error on the payslip was in some way motivated by racial bias lacks any substance, and whilst it is probable that Brexit was discussed (as it had been up and down the UK, and doubtless in Poland), it prefers the clear denials of any untoward remarks about immigrants coming into the UK. It prefers the clear denials from Mr Doherty and Mr McQueen that, at the same time they were choosing to recruit Polish people, they were also suggesting in some way that immigration should be stopped.

81. The tribunal also accepted the respondents' evidence that despite having employed people of various nationalities, including Polish people, in the hotel, nobody had ever previously been dismissed. It was also clear that nobody had ever confronted him so bluntly over failure to pay wages due.

82. The tribunal considers that the chronology of events, around the dismissal, is significant. Further comment will be made in the conclusions, but it should be noted that Mr Doherty's use of inappropriate language related to Polish followed has angry reaction to being challenged on wages, and followed his decision to dismiss all three employees who were jointly complaining as to the arrangements for paying wages. The tribunal's key primary findings of fact, not only taken from the 2017 findings but reflecting its own view of the evidence, may be summarised as follows:

    a. Prior to exchanges on 7 July 2016, Mr Doherty (and the first respondent's management generally) had not made any derogatory remarks about Polish employees, and had indeed actively sought Polish workers for the hotel.

    b. An initial meeting between the claimants, Mr Doherty and Mr

McQueen (covertly recorded by the claimants) on 23 June 2016 flagged up the claimants' dissatisfaction with being paid less than their entitlement. There is nothing in the exchange which is even remotely capable of leading to discriminatory inferences.

c. After 23 June 2016, all three claimants made it clear that they were not prepared to continue working if the current problems with late and insufficient payments were not met.

d. On the evening of 7 July 2016 the second claimant raised the issues again, plainly in the context that this related to her and the other two claimants. This caused Mr Doherty to become agitated.

e. A few minutes later Mr Doherty sent a message via a manager informing the second claimant that the claimants were to leave and not come back. Ie: they had been dismissed. From Mr Doherty's perspective, this was an end of the matter, and the claimants would be out of his hair for good.

f. The second claimant sought out Mr Doherty to clarify the position, and had a second meeting with him (on 7 July 2016). Mr Doherty was, or became, angry, and the second claimant was upset.

g. Mr Doherty told the second claimant, "*I can't look at you anymore and hear all your whining about your salary, I'm sick of it.*" He also called her a "*self-centred bitch*", an offensive and inflammatory term, but one without racial connotations.

h. During the course of the angry conversation between the second claimant and Mr Doherty, he went on to say, "*If you are not happy here, just fuck off back to Poland*".

i. A little later, all three claimants then confronted Mr Doherty, who was still in a very agitated state, repeatedly swearing and indicating that they were to pack their bags and leave. This was the third meeting of 7 July 2016. The tribunal has heard the recording and read the transcript. It was clear from this (if not already self-evident) that Mr Doherty was, and remained, angry.

j. During this conversation, the recording makes it clear that Mr Doherty mimics the third claimant's Polish accent. He also said (in the context of his having explained to them about a problem with HSBC Bank), *"… it seems to be going through one ear and out of the fucking other because they don't understand English but the only time they understand English is when it suits them*".

k. It was made clear to all three claimants that they needed to be out of the hotel accommodation by the following morning.

Conclusions (1) – Identity of employer:

83. The tribunal found it unfortunate that this argument continued to be pursued,

despite this being rejected on appeal by the EAT, and despite Dr McGaughey being reminded by the judge at the start of the 2019 hearing that the issue was simply not before the tribunal. The argument is wholly without merit. The original PH defined issues, with no suggestion at the time that the second respondent might in some novel way take on the employer's responsibilities from the employing Company. The tribunal had no hesitation in proceeding, in 2017, on the basis that all claims were against the first respondent, as employer, and that it was only for the direct discrimination that Mr Doherty might also be liable (as named discriminator). That decision has not been overturned by the EAT, and must stand. It was not identified by Regional Employment Judge Pirani on 21 February 2019 as a matter to be determined.

84. For the avoidance of doubt, the tribunal has no hesitation in rejecting the submissions that the tribunal should order that the second respondent should be liable for any acts other than acts of discrimination which he carried out.

Conclusions (2) - Matters remitted from the Employment Appeal Tribunal:

Remedy under section 38 of the Equality Act 2002

85. It is clear that the 2017 tribunal approached the evidence relating to the failure to provide written particulars on the basis that it was the same for all three claimants, and the only reason that no award was made to the second claimant was that she had a shorter period of service. The tribunal believed that as she had only six or seven weeks' service, the right had not accrued. The first and third claimants had around 11 weeks and 9 weeks, respectively. The EAT pointed out that the right had accrued after one month's service, and that she therefore had the same rights as the other two claimants.

86. The 2017 judgment recorded (paragraphs 10.7 and 25) that compliant written particulars were not provided, highlighted disagreements over wages (the entitlement to which should have been set out clearly in the written particulars, although this was not an observation made in 2017) after wage slips had been received, and set out the central narrative that the respondent over-reacted by dismissing the claimants when they complained about these matters. Paragraph 25 also notes that the tribunal had rejected the respondent's evidence that such documents were provided, and concluded that it was just and equitable to award a sum equivalent to four weeks' pay.

87. The tribunal considers that it would be just and equitable to take the same approach in respect of the second claimant as the tribunal had taken in respect of the first and third claimants in 2017. The tribunal also concludes that a further relevant point, adding weight to the second claimant's case, is that the central dispute in the case, and one which evidently led to the disagreement ending up with the automatically unfair dismissal, is that the employer had not clearly set out in writing what the basis of remuneration was. Had proper documentation been provided in the first place, it might have been possible to avoid the disagreement over what the contractual entitlement to wages actually was. The tribunal considers that this clearly falls on the higher "four weeks' wages" rather than the lower "two weeks' wages".

88. The tribunal therefore concludes that it is just and equitable to award the second

claimant the higher amount of four weeks' pay, pursuant to section 38(3) of the Employment Act 2002.

89. In the event, the first respondent did not dispute the second claimant's calculation that her gross weekly wages were £318.60. The award is therefore 4 x £318.60, namely £1,274.40.

Direct race discrimination

90. Reference has been made, at paragraph 32 above, to the EAT's conclusions (at paragraphs 36 and 37 of the EAT's decision). This tribunal has been at pains to approach the issue in light of HHJ Stacey's observations, which are worth repeating in full (there is no need to repeat the conclusions at her paragraphs 36 and 37, having been set out above):

> *The Race Discrimination Complaint*
>
> 30. The Claimants' argument is that the Tribunal erred in law in dismissing the complaint of race discrimination by misapplying the burden of proof and stating there was no evidence of less favourable treatment when its own findings recorded such treatment.
>
> 31. In considering an appeal of this nature, it is important to be clear of the distinction between an error of law and facts found by a Tribunal that it has been entitled to reach. Only the former is susceptible to interference by this Appeal Tribunal. It is easy to allege a misapplication of the burden of proof when the real criticism is merely a dislike of the Tribunal's legitimate findings. Where neither of the Respondents has participated much in the appeal it is also worth considering what points could have been made on their behalf.
>
> 32. Section 136 Equality Act 2010 ("EqA 2010") provides that:
>
> > "(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 [which includes an employment tribunal in section 136(6)(a)] must hold that the contravention occurred.
> > (3) But subsection (2) does not apply if A shows that A did not contravene the provision."
>
> 33. I agree with Dr McGaughey's submission that when, as here, there are specific findings that comments have been made which appear on their face to be related to race and amount to less favourable treatment such as mimicking one Claimant's Polish accent and telling another to "Fuck off back to Poland" the Tribunal needed to have explained its reasoning as to how it applied the burden of proof and reached the conclusion that the dismissal had nothing whatsoever to do with race discrimination.
>
> 34. The difficulty is compounded by the Tribunal not having referred at all to the burden of proof provisions in its Decision or answered the questions it posed itself in paragraph 3 of its Judgment. Another troubling aspect is that the Claimants' evidence included many other allegations of the use of racial epithets by the Respondents and other race-tainted behaviour which have not been addressed by the Tribunal which did not make relevant findings one way or another on the specific allegations. It is therefore difficult to see how the Tribunal could conclude, as it did in paragraph 24, that "We have to say that we have received no evidence to suggest that the hypothetical comparator in similar circumstances

> … would have been treated [differently]". They had heard evidence, but it is unsure what they made of it.
>
> 35. Hale LJ's (as she then was) observations on the "*Porcelli* principle" and the useful rule of thumb that the more specific the insult and the injury by reference to a protected characteristic, the more persuasive must be the proof that the behaviour was completely unrelated to a protected characteristic in Pearce v Governing Body of Mayfield Secondary School [2001] EWCA Civ 1347 are apt in this regard. Especially since some of the comments or incidents appear overtly racial.

91. It should also be noted that HHJ Stacey had been erroneously informed that the 2017 tribunal had made a finding that Mr Doherty had said "fuck off back to Poland" (see HHJ Stacey's paragraph 33). In fact the tribunal had not recorded making any such finding of fact. As Mr Doherty conceded the point in open tribunal in 2019, however, this error has no material effect on the EAT's reasoning.

92. It is correct that the 2017 tribunal made no express finding on some of the claimants' factual allegations made as part of their background to the claim of race discrimination, albeit paragraph 13 of the 2017 judgment makes it tolerably clear that the evidence was unsatisfactory and they had rejected, as exaggeration, some of the claimants' evidence. It is plain that they drew no discriminatory inferences from the background evidence, and it appears that this was covered by their conclusions as to background evidence being exaggerated. However, as HHJ Stacey pointed out, it was not expressly clear which evidence had been accepted and which was rejected, notwithstanding that the list of issues at paragraph 3.3. of the 2017 judgment and reasons asked the question, "[If the hypothetical comparators were treated less favourably], *have the claimants proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic*".

93. The tribunal has, above, set out its findings of fact. It rejects some of the allegations, for the reasons given, and records at paragraph 82, the key findings of fact.

94. There is no need to set out the relevant law again, which is set out in detail in the 2017 Employment Tribunal judgment and reasons (paragraphs 3 and 12) and the EAT decision (as set out above).

95. Turning first to what HHJ Stacey referred to as the "**manner of their dismissal, and the particularly brutal manner of dismissal**", the tribunal considers that there is nothing in the lead up to the conversations of 7 July 2016 from which any discriminatory inferences can properly be drawn. Indeed, the respondents were keen to employ the claimants, and the fact that they were Polish appears, if anything, to have been seen as an advantage. There are plenty of indications that Mr Doherty was prone to over-react when his authority was challenged, irrespective of the nationality of the employees concerned, and that he and the claimants had already fallen out over wages.

96. Taking into account the reverse burden of proof, and the correct approach to the law set out in the EAT decision, the tribunal notes that there are a number of

troubling aspects to what happened, albeit the only overtly racial matters post-dated the decision to dismiss, when Mr Doherty had become agitated and angry with the claimants over the issue of wages and their demands on that subject.

97. The tribunal deliberated long and hard as to whether there were in reality any discriminatory aspects to the events surrounding, or following, dismissal at all, on the basis that it was clear that Mr Doherty was angry with the claimants over the wages dispute, rather than their nationality, and what he said was plainly in the context of his anger at their continuing to "argue the toss" with him, even though they had already been dismissed. Had they, like Mr McQueen, come from Newcastle, doubtless Mr Doherty, lashing out in his anger (in the heat of the moment), would have said something like "*If you are not happy here, just fuck off back to Newcastle*". However, in considering less favourable treatment (compared to a hypothetical comparator), the position is, of course, rather different when the terms used relate directly to protected characteristics within the Equality Act. That said, the main thrust of the case is that the claimants were summarily dismissed (with an immediate departure from the hotel) when they should not have been, and that Mr Doherty became very angry with them.

98. Looking at the aspects of the dismissal capable of being discriminatory, the tribunal considers it clear that the anger directed at the second claimant (who took part in the first and second meetings with Mr Doherty on 7 July 2016) was a response to the dispute over wages, and the claimants continuing to argue with him, and not in any sense in response to race. The anger was not in itself less favourable treatment, as it was a response to the dispute over wages, and the noted failure to follow any sort of fair procedure is reflected in the uplift of 25% in the compensatory award. The tribunal accepts that this was the first time that any employees had challenged Mr Doherty over wages in this way and refused to accept his response, and that this was the first time he had dismissed any member of his multi-racial workforce. The tribunal considers that, drawing appropriate inferences from the evidence as a whole, it is abundantly clear that any employees behaving in this way would have provoked the same response. Mr Doherty's response was angry, disproportionate and unlawful, which he appeared (belatedly) to appreciate at the 2019 hearing, even if he had sought to defend the claims in 2017. It was, however, not because of race – the decision to dismiss was untainted by race, in the sense that British employees behaving in this way would also have been summarily dismissed, and asked to leave straight away.

99. The first matter which the tribunal considers bears racial connotations, which is after the decision to dismiss, and the communication of the dismissal (and the immediacy of the dismissal) is Mr Doherty's use of the phrase "*If you are not happy here, just fuck off back to Poland.*" This was gratuitously insulting, and the tribunal, on balance, considers that it goes further than merely using an offensive phrase indicating departure, but expressly links the swearing to nationality, coming within race, a protected characteristic. Whether an employee from Newcastle, on being told to "fuck off back to Newcastle" would be any less offended, is a moot point, and this was, in effect, the only defence which Mr Doherty ran (having admitted the use of the words). However, being from Newcastle is not a protected characteristic, and the insult is simply not applicable to someone who is not from Poland. Even if this is not perhaps a particularly significant point, compared to being on the receiving end of insulting language

anyway (having just been dismissed), the tribunal considers that that the admitted use of the term is capable of being less favourable treatment, in the sense of being because of the protected characteristic, and Mr Doherty's explanation cannot be said adequately provide a non-discriminatory explanation for the treatment. There is some risk of being overly technical: on a common-sense basis, the tribunal considered that this should properly be seen as direct discrimination because of race.

100. In the third meeting on 7 July, Mr Doherty mimics the third claimant's Polish accent. This also passes the discrimination test. In everyday terms, it was insulting, plainly linked to nationality (in a way that a Geordie accent, for example, would not be), and Mr Doherty hasn't really given any adequate non-discriminatory explanation, other than that he was angry anyway, and the third claimant did not come with clean hands because he himself mocked Mr Doherty's sexual orientation as a gay man. A comparator might well have had his accent mocked, but the significance here is that the accent is plainly supposed to be Polish – it is because the third claimant (and indeed all three claimants) is Polish. It is also more than merely being insulting (in a non-discriminatory way), and takes matters a stage further This is also less favourable treatment. Similarly, the disparaging reference to "the only time they understand English is when it suits them" is less favourable treatment in that it adds a racial dimension to what would otherwise merely have been a dispute over the explanation for late payment of wages. It is gratuitously insulting, in a racial context, and Mr Doherty has given no satisfactory explanation (other than his anger and overreaction).

101. Although further inferences might be drawn, the tribunal considers that it would be taking matters too far to brand the requirement to vacate the hotel's accommodation as discriminatory. The tribunal considers that it is clear that having decided to dismiss, and to dismiss without notice whilst demanding an immediate departure, it would follow necessarily that Mr Doherty would expect the three employees he had dismissed to vacate the accommodation by the following morning. Notwithstanding the "fuck off back to Poland", it is hard to see why a hypothetical comparator would be treated any different. Mr Doherty was angry with them for raising statutory rights, and wanted them out. That included vacating the hotel (even if Mr McQueen suggested to the claimants they could come to another of his establishments). The tribunal considers that the eviction the following morning, brutal though it may be, is a consequence of the dismissal, and is wholly unrelated to the claimants' nationality. Similarly, the tribunal does not consider that other aspects of Mr Doherty's hot-headed dismissal of the claimants can be plausibly linked to race – Mr Doherty would have been equally angry and unreasonable had non-Polish employees raised their grievances about pay in the same way.

102. The claim of less favourable treatment, in respect of some aspects of the manner of dismissal, are well founded. These relate specifically to: the use of the phrase "*fuck off back to Poland*", mimicking a Polish accent, and as a Polish-speaker choosing not to understand English. Those three primary facts are proved, it amounted to less favourable treatment which would not have been meted out to a non-Polish employee (or if it was, it would have been meaningless and hardly amounting to any sort of detriment), and the tribunal draws the inference that the difference in treatment was because of the claimants' Polish nationality. The rather half-hearted explanation that Mr Doherty's anger was not directed at the

claimants' Polish-ness does not really engage with the language actually used.

103. As for the **act of dismissal itself**, the tribunal recognises that the first respondent was always in some difficulty, in failing to call plausible evidence as to the reason for dismissal, when it was plain to the 2017 tribunal that the real reason for dismissal was for raising a statutory right, which Mr Doherty did not like. Comment has been made above, in considering the difference between the act of dismissal and the subsequent words used, and the tribunal relies upon those conclusions. It should be noted that at paragraph 21 of the 2017 judgment and reasons, the conclusion was unequivocal:

> "We are satisfied that the claimants' repeated unhappiness with this state of affairs and their continuing to complain to the respondent, and intimating that this state of affairs could not continue, was the only reason for their summary dismissal by Mr Doherty on 7 July. We therefore find that their dismissals were automatically unfair pursuant to section 104 of the Employment Rights Act 1996."

104. The background evidence amply justifies that conclusion, which the tribunal finds entirely logical, and with which it strongly agrees. One does not need to look any further to find the explanation, but the tribunal recognises that such a dismissal can nevertheless be tainted by discrimination. HHJ Stacey pointed out (see above) at paragraph 36 that it would be possible to argue that paragraph 21 contains an explicit finding of a non-racial and exclusive reason for the dismissal that in effect deals comprehensively with the race discrimination allegation. However, she also found that "*without further explanation by the Tribunal it is not sufficient*." This tribunal has given the matter a great deal of further thought, and has nevertheless come to the same conclusions as the 2017 tribunal, whilst also having accepted that there was a separate head of claim relating to the manner of dismissal, which it has upheld (and for which the claimants can therefore be compensated).

105. The tribunal has noted HHJ Stacey's comments in her judgment, and is alert to the risks of repeating the errors of law she detected in the 2017 judgment and reasons. It is alert to the reverse burden of proof provisions of the equality act, and agrees that comments about Poland (or accents, or use of the English language) immediately following dismissal, are primary facts from which inferences might be drawn about Mr Doherty's decision to dismiss, which had been made a little earlier. That said, HHJ's concerns at paragraph 34, about the claimants' evidence apparently including "*many other allegations of the use of racial epithets by the respondents and other race-tainted behaviour*" has not been borne out by the evidence put before the tribunal, and certainly not within the tribunal's primary findings of fact. It would appear that the claimants' cases were represented to HHJ Stacey at the EAT as being stronger than they in fact were. For example, Dr McGaughey suggested, at one point during the 2019 hearing, that the discrimination in this case was "*the worst that I have ever seen*." Whilst unable to comment on what Dr McGaughey may or may not have seen, it certainly does not share that general view. The tribunal has taken into account the "*Porcelli* principle" and the Court of Appeal's analysis in *Pearce v Mayfield Secondary School*, but would draw a clear distinction between the decision to dismiss, and three subsequent comments made in the heat of the moment after the claimants continued to challenge Mr Doherty's decision to dismiss. The

tribunal considers that these comments were not part of the dismissal, but were in the context of an angry reaction to the claimants' indicating that they did not accept his decision.

106. The tribunal, in 2019, rejected the notion that there were any primary facts relating to possible discrimination, pre-dating the claimants' dismissal. Similarly, although the dismissal took place just after the Brexit referendum date by a fortnight or so, it would be reading too much into the case to draw some sort of analogy. The tribunal, having heard further oral evidence in the way proposed by the EAT, does not draw any inference that the *reason* for dismissal was race, or that the dismissal itself was in any sense tainted by discrimination. Incidentally, the tribunal notes that the only effect on the outcome (had it decided otherwise) would be to increase the level of injury to feelings, and the interest, likely to be payable. Indeed, it is unfortunate that the claimants chose not to go ahead with the original remedy hearing which would have dealt with the compensatory awards for unfair dismissal, which are in any event below the statutory maximum for unfair dismissal.

107. The tribunal attaches weight to the wealth of evidence relating to Mr Doherty's tendency to over-react to being challenged (as it observed for itself) and entirely agrees with the conclusion of the 2017 tribunal as to the reason for dismissal. It was only after the claimants continued to argue the toss, and challenge Mr Doherty's decision to dismiss, that there were any racial aspects to what occurred. The tribunal notes that there were repeated expressions of anger, swearing and so on, which is itself entirely gratuitous, but the tribunal considers that it is clear that non-Polish employees who asserted rights and argued the toss with him would also have provoked a similar reaction, with a similar dismissal accompanied by angry words. The difference here is not that there was less favourable treatment by dismissing the claimants, but that some of the subsequent insults had racial connotations. Mr Doherty was not angry because of race, but as indicated above, part of his looking for ways to belittle the employees who continued to challenge his authority was to stray into inappropriate and discriminatory language. Whilst it would be possible for inferences to be drawn, and projected back onto the original reason for dismissal, the tribunal considers that that would be a step too far. Put simply, the tribunal does not draw the inference that the decision to dismiss was in any sense tainted by race, and agrees with the 2017 tribunal that the sole reason was that they had raised statutory rights.

108. Taking into account the reverse burden of proof, and the possibility of drawing inferences from three comments made by Mr Doherty after he had dismissed, there is an arguable case that the decision to dismiss may have been tainted by discrimination. However, the tribunal does not draw that inference. The facts really are that plain: no employee had previously challenged Mr Doherty's authority so bluntly before, he had never dismissed anyone before, he had had many Polish employees before, and the evidence points very clearly to the fact that he over-reacted and could not countenance employees challenging his authority like that. He and Mr McQueen liked having polish employees: the reason for dismissal was wholly unconnected with race, it was all to do with Mr Doherty's reaction to what they did and said. British employees could have behaved the same way (it is perhaps surprising that nobody ever had done previously), and they would also have been summarily dismissed in the heat of

the moment. The subsequent use of a couple of gratuitiously insulting turns of phrase does not turn an "automatically unfair dismissal" into a "discriminatory dismissal". Mr Doherty did not put his case with any great clarity, but in his own way was seeking to explain that he did not dismiss the claimants because they were Polish. The tribunal fully accepts that explanation. There was no good reason for dismissal – indeed, raising a statutory right is an automatically unfair reason – but that poor reason was nevertheless the real reason, and that reason had nothing whatsoever to do with the claimants' Polish nationality. There was no less favourable treatment.

109. To answer the questions posed at paragraph 3 of the 2017 judgment and reasons (albeit in a slightly different way, because the fact of less favourable treatment was elided with the explanation for such treatment, which is not how this tribunal would formulate the questions) the respondents dismissed the claimants, but this was not less favourable than the way a hypothetical comparator would have been treated. Although discriminatory inferences could theoretically be drawn from the primary facts, the tribunal does not do so. Looking at the facts in the round, the tribunal agrees with the 2017 decision that the sole reason for the summary dismissal (untainted by discrimination) was the "*claimants' repeated unhappiness with this state of affairs* [in relation to wages*] and their continuing to complain to the respondent, and intimating that this state of affairs could not continue*".

110. The claim of less favourable treatment in respect of the dismissal itself is not well founded.

Conclusions (3) - Remedy:

Matters not requiring further consideration of remedy

111. For the avoidance of doubt, the tribunal repeats that compensation had already been awarded to the claimants in 2017, in respect of outstanding holiday pay.

112. For the avoidance of doubt, the tribunal repeats that an award pursuant to section 38 of the Employment Act 2002 had already been awarded to the first and third claimants in 2017.

Adjustment for breaches of the ACAS Code

113. Although in the schedule of loss, the tribunal had not addressed this matter in its 2017 judgment (making no finding either way, and awarding outstanding holiday pay without any adjustment). The tribunal heard very few submissions on the point, although it had been identified at the start of the hearing as a matter in issue. In order to save time, the tribunal did not take the step which would it would usually have taken, in expecting a claimant who sought to rely upon uplift to set out precisely how the Code of practice was said to have been breached, and what awards it was relevant to (and why). This was because the tribunal considered that on the facts of this case it could easily make up its own mind, on the basis of findings of fact made in 2017. All parties knew that the matter was in issue, and could have addressed the tribunal further, had they wished to.

114. Notwithstanding the very short period of employment, the tribunal considers that

the ACAS Code of Practice on Disciplinary & Grievance Procedures 2015 was applicable to the dismissal (there was no argument that the grievance procedures were engaged). It was an automatically unfair dismissal for asserting statutory rights, and the sequence of events leading to dismissal was set out in the 2017 judgment (paragraphs 10.16-10.19 in particular, and the conclusions at paragraphs19-23). This is not one of those cases where there is any benefit from conducting a detailed gap-analysis of what is prescribed as the minimum standard in the Code of Practice. There was a failure to provide for any recognised procedure at all, with no advance notice of a meeting, no proper procedure, nothing in writing, no right to be accompanied given, and no right of appeal given. On the face of it, noting that Mr Doherty was evidently dismissing because he was dissatisfied with the way the claimants were seeking to assert their statutory rights, this was a dismissal to which the ACAS Code of Practice should apply. The respondents have not sought to argue, in July 2019, that the Code was not applicable. The tribunal is content to find that it was applicable, and that not even lip-service was given to following any sort of fair procedure. It was a very significant breach, for which the respondents have not argued that it was reasonable to depart from a proper procedure.

115. In the circumstances, the tribunal considers that it is just and equitable that the compensatory award for unfair dismissal should be increased by the maximum of 25%, pursuant to section 207A of the Trade Union and Labour relations (Consolidation) Act 1992.

116. There is no proper basis for increasing the awards for unauthorised deduction of wages, as the Code of Practice is not relevant. As for discrimination, which relates to the manner of dismissal, it would be a logical error to assume that the 25% increase should be applied to injury to feelings. The tribunal has awarded injury to feelings not because the claimants were dismissed, but because of three things said by Mr Doherty after he had dismissed the claimants. None of these matters ("fuck off back to Poland", mimicking a Polish accent, and comments as to understanding of English) fall within a matter covered by the ACAS Code of Practice. The successful claim of direct discrimination is separate from the unfair dismissal claim. Although, for the sake of consistency, HHJ's phraseology has been used above in respect of the "manner of dismissal" (which relied on the way the EAT appeal had been argued by Dt McGaughey), a fuller or more accurate label as to the tribunal's findings would be to describe the discriminatory acts as "comments made after Mr Doherty had dismissed the claimants". As such, having addressed its collective minds to the matter, the tribunal came to conclusion that whilst the compensatory award for unfair dismissal should be increased by 25%, no such uplift should be applied to injury to feelings.

Unauthorised deduction of wages

117. The tribunal having already found in 2017 for all three claimants in respect of liability, the only reason no award was made at the time was that after the hearing, Dr McGaughey sought to change the basis of calculation from that he had set out during the hearing, and the respondent declined to concede the point. The claimants then asked for remedy to be stayed (although one might think that it would have been in their interests to have this matter determined at a remedy hearing as early as possible), and the tribunal did so. At the 2019

hearing, the claimants put forward a basis of calculation (giving credit for sums subsequently received from the first respondent), which appeared to the tribunal, on the face of it, to be reasonably logical, and which was adopted by each claimant as a matter of evidence. As matters transpired, no alternative basis of calculation was advanced by the respondents, and it was not put to the claimants, or argued in submissions, that there should be a different calculation. In the circumstances, the tribunal accepts the claimants' calculations.

118. The tribunal notes that at paragraph 13 of the 2017 judgment, when the respondents were legally represented by a solicitor, it was commented that "the respondent provided no documentation on the central issue of hours worked, and remuneration owed to the claimants". Nothing has changed, in 2019. At paragraph 14 of the 2017 judgment, comment was made on deductions made from wages. Paragraphs 16 and 17 recorded that the tribunal had concluded that claimants were not paid for the hours worked, and had made further deductions which were not permitted by the National Minimum Wages Regulations. The calculations were to be dealt with at the remedy hearing, which the claimants asked to be stayed.

119. Dr McGaughey has provided the tribunal with new calculations, which (as noted above) the respondent has not challenged. The tribunal accepts the calculations, and therefore awards the following compensation to the claimants (as is normally the case, awarded as gross wages, but the sums may be liable for lawful deductions for tax and national insurance), as follows:

    a. The first respondent is ordered to pay £885.30 to the first claimant.

    b. The first respondent is ordered to pay £929.35 to the second claimant.

    c. The first respondent is ordered to pay £1,115.37 to the third claimant.

Breach of contract

120. The claimants were dismissed without notice, and the tribunal found in 2017 that the claims (effectively of wrongful dismissal) were well founded. The remedy sought is damages for the failure to pay notice pay. As the lost earnings for the period which would have been the notice period are covered by the compensatory award for unfair dismissal, and the claimants are not seeking double recovery of their losses, no further compensation falls to be ordered.

Unfair dismissal

121. The tribunal found in 2017 that all three claimants were automatically unfairly dismissed for asserting a statutory right, but left remedy to be deal with on 4 September 2017 (but postponed and then vacated).

122. The claimants do not claim a basic award, in view of their very short periods of service.

123. As far as the compensatory awards are concerned, these are made up of a

number of elements.

124. The Employment Tribunal usually makes a small award for loss of statutory rights. In this case, the claimants were employed for only a very short period before dismissal, and have not claimed such an award in their schedules of loss, and this was not raised by Dr McGaughey. The tribunal considered the matter, and in the circumstances have concluded that such an award should be made.

125. All three claimants claimed compensation broken down to the sum of £84.00 each, for expenses arising directly out of the dismissal, and provided supporting evidence. This related to the petrol cost of reaching a channel port, and the cost of a ferry to the continent. The respondents made no submissions on the point, and did not challenge the evidence. Noting that the claimants were evicted from their hotel accommodation, had nowhere to go, and indeed were effectively told by Mr Doherty to go back to Poland, the tribunal considers that these expenses arose from the fact and manner of the dismissal, and that it is just and equitable that the first respondent should refund these relatively modest sums to the claimants.

126. The more substantive sums are claimed by each claimant in relation to loss of earnings, with mitigation of loss being in issue. The tribunal did not consider that the claimants provided clear information or very clear schedules of loss, despite knowing that one of the principal purposes of the hearing was to determine compensation for loss of earnings (whether as unfair dismissal or discrimination compensation), and despite being legally represented and having ample time to prepare for the hearing. This made the tribunal's task considerably more complex and time-consuming. The schedules of loss are undated, and provide inadequate information to calculate a just and equitable level of compensation, and do not deal with the issue of mitigation of loss. The claimants' witness statements do not cover any loss of earnings following dismissal. The three claimants did, however, provide some documentary evidence relating to subsequent employment. These documents are in Polish, and the claimants have not provided translations. They did provide oral evidence, but although Dr McGaughey was given considerable latitude in asking additional questions-in-chief of the three claimants, only limited further evidence was forthcoming. Mitigation of loss is in issue, the respondents submitted that the claimants were asking for more money than was fair, and the tribunal is not prepared simply to award (subject to the statutory cap) all the money requested, without questioning the basis upon which the claimants are asserting that they are owed money.

127. As a starting point, each of the claimants is, it seems, a hard worker, in a sector where the tribunal takes judicial notice that work is easily available, whether in the UK or in any other EU country. The first respondent was hardly generous in its wages (part of the disagreement that led to dismissal), so it is not the case that it should be at all difficult to find alternative employment at a similar, or better, level of remuneration. The 2017 judgment criticised the claimants for exaggerating their evidence. The tribunal, in 2019, finds that there has been an over-use of emotive terms (such as, quite unnecessarily and inappropriately, seeking to label Mr Doherty as "a racist"), and a failure to provide adequate evidence as to attempts to mitigate their loss.

128. Each claimant is awarded the £84.00 referred to above. As far as loss of

earnings are concerned, the tribunal has carefully considered each claimant in turn, accepting the (undisputed) figures in the schedule of loss in respect of their gross and net UK earnings. In each case, the effective date of termination was 7 July 2016, and no wages were paid after that date, and no notice was paid. Issues of grossing-up do not arise.

129. For the **first claimant**, her gross annual pay should be taken as being £15,292.68 – this is that statutory cap on the compensatory award for unfair dismissal. In fact, the tribunal has awarded a sum below this level, in any event. Her net annual pay (after tax and national insurance) was £13,678.70, and net weekly pay was £263.05. The schedule of loss asserted that she worked in Poland from 23 August 2016, rising to £2.50 an hour from October 2016, then completing the first year of a degree, continuing to earn some money. She earned a total of £2,824.00 in Poland, during the period 23 August 2016 to 30 April 2017. She also states that she earned £4,370 in Poland – it would appear that this was in the first year, but it is unclear. The schedule of loss in the bundle asserted that "*it is highly unlikely that she will return to the UK for work*". A second (undated) schedule of loss stated that she returned to the UK in June 2018 "*and has earned £14,567.21 since*". She did not give any clear oral evidence about her earnings, her degree study, the timings of her return to the UK, or what her work was in the UK. She claims loss of earnings to the statutory limit.

130. The tribunal accepts that wages in Poland are lower than in the UK, and although the first claimant's evidence as to her paid work was very sparse indeed, does accept that in the first year she found work very quickly, and is prepared to accept that, at least in the first year, she probably reasonably mitigated her losses. However, having originally decided to come to the UK, where wages are higher (with the intention that it should be her "second home"), having worked briefly in the UK and gone back to Poland, and then having decided to return to the UK two years after departing, she failed adequately to explain why she did not mitigate her loss by returning the UK earlier, and also why she should be compensated for her decision to study for one year of a degree. She also does not satisfactorily explain what earnings she had in her second year of absence.

131. The tribunal considers, on balance, that it would be fair to compensate the first claimant for loss of earnings for the first year, in full, recognising that it would be extremely difficult to obtain (in the shorter term) a salary at anything like the level she was paid in the UK. If she was willing to apply for, and start studying for a degree, just over a year after dismissal, rather than work full time, this adds weight to the conclusion that one year's loss of earnings (less earnings in Poland) would be a fair level of compensation. That said, even without the first claimant's decision to reduce her short-term earning potential by studying at University, the tribunal considers, in all the circumstances, that one year represents a suitable period over which to consider compensation. The claimants were all working in the hospitality sector, likely to be particularly busy in the summer, and the tribunal considers that it should have been possible to find suitable work on a similar (or higher) salary by the following summer. The previous year they had sought, and found, work in the UK in the summer, and could have done the same. The tribunal rejects the arguments that because the claimants had a bad experience working at a small private hotel in Portland, that they would feel unable to work again in the UK (especially as two of the

claimants, having expressed that sentiment, then in fact returned to the UK to work). It was reasonable to return immediately to Poland, and to seek work there, but by the first anniversary of dismissal the claimants could have sought, and found, work again in the UK. If they chose to remain longer in Poland, with reduced earning potential, that was through their own choice. It is fair to compensate the claimants for loss of earnings from 7 July 2016 for one calendar year.

132. Using the rather unsatisfactory figures supplied in the first claimant's schedule of loss, the tribunal notes that it took her around six and a half weeks to find work, and the earnings in the 35½ week working period up to 30 April 2017 is calculated, on average, as £79.55 per week (her hourly earnings later went up, in a new job, but the weekly hours have not been stated). The tribunal therefore calculates that in the first year after the effective date of termination (with about 45½ weeks' paid work in Poland), the second claimant should be taken to have earned £3,619.53. Net annual earnings in the first respondent's employment would have been £13,678.70, and the tribunal has also awarded £84. In the absence of reliable figures, the tribunal therefore calculates that the earnings in Poland over that year (for which she must give credit) were £3,619.53.

133. The first claimant's net loss of earnings (plus the £84) over the year were therefore £10,143.17. As a result of the 25% uplift for unreasonable failure to follow the ACAS Code, this is increased to £12,678.96. That is the sum ordered as the compensatory award (a little below the statutory cap).

134. For the **second claimant**, her gross annual pay (statutory cap) should be taken as being £16,567.20. Her net annual pay (after tax and national insurance) was £14,545.38, and net weekly pay was £279.72. The schedule of loss asserted that she worked in Poland from 8 August 2016, later rising to £3.60 an hour. She earned a total of £3,735.00 in Poland, during the period 8 August 2016 to 30 April 2017, a period of 38 weeks, and then got an improved job, earning £9,226.42 per annum on average. She still works in Poland, and has no plans to return to the UK. She did not give any clear oral evidence about her earnings and working intentions. She claims loss of earnings to the statutory limit.

135. Again, the second claimant failed adequately to explain why she did not mitigate her loss by returning the UK, or indeed to explain her earnings generally.

136. The tribunal considers, on balance, that it would be fair to compensate the first claimant for loss of earnings (in principle) for the first year, in full, recognising that it would be extremely difficult to obtain (in the shorter term) a salary at anything like the level she was paid in the UK. Using the rather unsatisfactory figures supplied in the second claimant's schedule of loss, the tribunal notes that it took the second claimant around four weeks to find work, and the earnings in the 38-week working period up to 30 April 2017 is calculated, on average, as £98.29 per week (her hourly earnings later went up, in a new job, but the weekly hours have not been stated). The tribunal therefore calculates that in the first year after the effective date of termination (with about 48 weeks' paid work in Poland), the second claimant should be taken to have earned £4,717.92. Net annual earnings in the first respondent's employment would have been £14,545.38, and the tribunal has also awarded £84. In the absence of reliable figures, the tribunal therefore calculates that the earnings in Poland over that year (for which she

must give credit) were £4,717.92.

137. The second claimant's net loss of earnings (plus the £84) over the year were therefore £9,911.46. As a result of the 25% uplift for unreasonable failure to follow the ACAS Code, this is increased to £12,389.33. That is the sum ordered as the compensatory award (a little below the statutory cap).

138. For the **third claimant**, his gross annual pay (statutory cap) should be taken as being £14,022.84. His net annual pay (after tax and national insurance) was £12,815.21, and net weekly pay was £246.45. The schedule of loss asserted that he worked in Poland from 29 August 2016, with variable earnings (depending upon overtime), earning rather more than the other two claimants. He earned a total of £5,065.00 in Poland, during the period 29 August 2016 to 30 April 2017, a period of some 35 weeks. Although the schedule of loss in the bundle states that it is unlikely that he would return to the UK, the second (undated) schedule of loss explains that in fact he started working in the UK again in June 2018. He claims loss of earnings to the statutory limit.

139. Again, the second claimant failed adequately to explain why he did not mitigate his loss by returning the UK earlier, or indeed to explain his earnings generally.

140. The tribunal considers, on balance, that it would be fair to compensate the first claimant for loss of earnings (in principle) for the first year, in full, recognising that it would be extremely difficult to obtain (in the shorter term) a salary at anything like the level he was paid in the UK. Using the rather unsatisfactory figures supplied in the third claimant's schedule of loss, the tribunal notes that it took the third claimant around seven weeks to find work, and the earnings in the 35-week working period up to 30 April 2017 are calculated, on average, as £144.71 per week. The tribunal therefore calculates that in the first year after the effective date of termination (with about 45 weeks' paid work in Poland), the third claimant should be taken to have earned 6,511.95. Net annual earnings in the first respondent's employment would have been £12,815.21, and the tribunal has also awarded £84. In the absence of reliable figures, the tribunal therefore calculates that the earnings in Poland over that year (for which he must give credit) were £6,511.95.

141. The third claimant's net loss of earnings (plus the £84) over the year were therefore £6,387.26. As a result of the 25% uplift for unreasonable failure to follow the ACAS Code, this is increased to £7,984.95. That is the sum ordered as the compensatory award.

Direct race discrimination

142. As set out above, the tribunal did not find that the decision to dismiss was itself discriminatory, but that what Mr Doherty then did (following telling the claimants that they were dismissed with immediate effect) amounted to direct discrimination because of the claimants' Polish nationality (even if it might have been more logical to bring the claims as harassment related to race, rather than direct discrimination). The automatically unfair dismissal has already been subject to a compensatory award, which includes the arguable pecuniary losses, including the travel costs of the precipitate departure from the UK – see above. As set out in the schedules of loss, the claimants claim compensation for injury to

feelings.

143. The claims were presented on 16 November 2016, and the tribunal took into account the Presidential Guidance on Employment Tribunal awards for injury to feelings dated 5 September 2017. It is noted that the *Vento* bands were updated for claims presented on or after 11 September 2017, with a new lower band of £800 to £8,400 (less serious cases), a middle band of £8,400 to £25,200 (cases that do not merit an award in the upper band) and an upper band of £25,200 to £42,000 (the most serious cases). Rather seeking to calculate a very precise level of the band boundaries applicable on 16 November 2016, the tribunal has approached the bands on the basis that the boundary between lower and middle bands would be just below £8,400 at the time.

144. The claimants' cases have been made rather more complicated by their rather exaggerated nature, making rather inflammatory personal attacks on Mr Doherty, and seeking to argue that their feelings were injured by a lengthy litany of perceived injustices, most of which did not amount to any form of discrimination. Similarly, it is not helpful to make vague and overblown references to upset in the schedule of loss and witness statements, without providing supporting medical evidence of any sort (when it is said to relate to medical symptons), and without any real explanation. For example, the first claimant has asserted, "*I am in permanent stress from July 2016 until now*" and "*I am scared after all of this*". The second claimant has asserted "…*but I am also scared now*", and the third "*I am afraid to be in a similar situation and lose my position. I could not explain and express my emotions*". There is no adequate differentiation between the upset at being underpaid (not an act of discrimination), upset in losing their livelihoods (not an act of discrimination), and upset over the tactless way (tainted by discrimination) that Mr Doherty communicated after the decision to dismiss, and the related expectation that the claimants leave the premises forthwith. It is also important to differentiate between compensation properly payable as the compensatory award for unfair dismissal (with 25% uplift for unreasonable failure to follow the ACAS Code of Practice), for which double recovery should be avoided when awarding compensation for injury to feelings.

145. The tribunal has adopted a common-sense approach, noting that the claimants did not provide clear evidence. As HHJ Stacey put it at paragraph 43 of the EAT decision, when ordering a limited re-hearing on whether there was discrimination, "*The elements of the case that need re-hearing will not require a lengthy hearing or benefit from all the background information and will focus simply on one day and a few hours of conversation*." The tribunal has made its findings of fact above, and drawn conclusions as to liability, focussing on the ill-tempered interactions between Mr Doherty and the claimants, over a very short period of time and in two conversations, one immediately following the other.

146. The tribunal considers that the matters amounting to discrimination involve a few insulting phrases, and certainly fall towards the bottom end of the bottom *Vento* band. Of more significance is that Mr Doherty had lost his temper at having a group of employees approach him and demand their legal rights, in robust terms, and their refusal to be put off by excuses or empty promises. The anger and dismissal would unquestionably be upsetting, but the tribunal has found that that was not discrimination. What was discrimination (see above) was some unnecessarily personalised comments, linked to polish Nationality, to add to the

upset which all three claimants would already be feeling for being angrily dismissed for having the temerity to raise statutory rights. What Mr Doherty did was to cause a little additional upset to the three claimants, who were already very upset by what he had said and done.

147. Although some remarks may have appeared to be aimed at particular claimants, the tribunal considers that it would appropriate to adopt a broad approach, and takes the view that remarks concerning Poland or Polish accents could be expected to injure the feelings of all three claimants equally (also on the basis that the second claimant could be expected to report the contents of initial conversations to her colleagues) and considers that the same level of compensation should be paid to each.

148. The tribunal has unanimously come to the conclusion that a just and equitable level of compensation for injury to feelings would be £2,000.00 each (around one quarter of the way up the bottom *Vento* band). This reflects the fact that the main source of upset to the claimants was not the few discriminatory remarks made by Mr Doherty over a short period of time (after he had decided to dismiss), but he further (gratuitously) injured feelings by making three inappropriate remarks, which appeared to be designed to offend, and plainly did so.

149. Interest is awarded at the applicable rate.

Exemplary damages:

150. As indicated above, Dr McGaughey spent a significant part of his allocated time seeking to persuade the tribunal that the facts of this case were so extreme that it was a suitable case for awarding exemplary damages. The tribunal, however, considered that the submissions failed to provide any sufficient basis for such an award, which (to put it mildly) would be a somewhat unusual step for a tribunal to take. Whilst there is, no doubt, scope for academic discussion as to the circumstances when such an award might be merited, this is hardly a suitable vehicle to bring a test case.

151. The claimants' argument, such as it is, relies on the assumption that both respondents' cases were underpinned by an egregious tax fraud. The tribunal found this an over-blown argument. The employer was clearly trying to get away with paying the hotel staff as little as possible, and not abiding by the terms of the contract – whatever those were, as the respondents appeared to have rather chaotic accounting practices, without a proper audit trail and without producing the contractual documentation which was expected of them. This is an experienced tribunal which has, over the years, seen many examples of poor practice by employers, and many examples where tax and national Insurance has not been correctly calculated, or calculated at all. This case is far from being the worst, and the tribunal would characterise it as poor practice rather than any sort of organised fraud, requiring proof of dishonesty.

152. Dr McGaughey sought to characterise the way Mr Doherty ran his hotel as conduct "*calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff*," as envisaged by Lord Devlin in *Rookes v Barnard [1964] AC 1129* (at 1226). It was also submitted that "*they were dismissed in a racist manner [sic] after their wages were denied pursuant to*

a tax fraud scheme, they were also evicted from their homes at the Maritime Hotel". It is also asserted (without supporting evidence) that the respondents profited from having empty rooms, having evicted the claimants. The tribunal makes no finding that there was any such profit. It is asserted that "the respondents can be presumed to have unduly influenced their employees to have names on witness statements "*so calculating they will further profit by avoiding legal liability for their wrongs*"; that arguments was not developed and the tribunal found it of little merit – when there is a dispute of fact a tribunal will usually prefer one party's evidence to another in making findings of fact: it does not follow that the losing party is liable for exemplary damages because a tribunal is unimpressed by the weight of the evidence they seek to call. It is also argued, without any adequate explanation, that "*the respondents continued their mendacious victimisation of the claimant up to and throughout the hearing, including their defamatory allegations against Miss Stefanko: this is calculated to profit from by deterring claims by future employees who the respondents, in all likelihood, will exploit unless they are held to account*". The tribunal found that this was an over-blown and empty argument.

153. The claimants each ask for an additional £30,000 in exemplary damages.

154. Exemplary damages, which are capable of falling within the armoury of remedies available to a court or tribunal when there has been a statutory tort such as discrimination, are aimed at *punishing* the wrongdoer. Two of the three categories identified by the House of Lords in *Rooke v Barnard*, as potentially justifying exemplary damages, are not applicable on the facts of this case. The tribunal accepts, as has been confirmed in more recent cases such as *Ministry of Defence v Fletcher [2010] IRLR 25 (EAT)*, that it is open to an Employment Tribunal to award exemplary damages (admittedly in a case involving conduct by Government servants), a high threshold is required to warrant an award of exemplary damages. The possible category available in this case relates to allegations for discriminatory conduct designed to be self-profiting. The acts which the tribunal have found to be discriminatory are not the so-called fraud (which in any event the tribunal would categorise as no such thing), but the manner of dismissal – namely Mr Docherty's angry and belittling words, the failure to follow any sort of procedure, and the swift and unnecessary eviction from hotel accommodation. This is not a case where there has been a calculated tortious act designed to profit the employer. Far from it. The tribunal would characterise it is and angry over-reaction to employees seeking to enforce their statutory rights, which (as Mr McQueen clearly recognised at the time), was hardly a sensible management act, as it plainly left the hotel short-staffed, with no immediate prospect of finding replacement employees. Indeed, the hotel went out of business shortly afterwards. The rather personalised attack on Mr Doherty's character, and the exaggerated attempt to brand him as a "racist" and a fraudster, is misplaced, and does not assist the claimants' case, which could have been made much more simply and dispassionately.

155. The tribunal has awarded compensation for unfair dismissal, increased by 25% in recognition of the absence of any proper procedure. It has awarded compensation for injury to feelings in recognition of what Mr Doherty said to the claimants, in the heat of the moment, after he had decided to dismiss them for asserting a statutory right. The interests of justice to not require that Mr Doherty and/or the employing Limited Company also need to be punished by the award

of exemplary damages.

Employment Judge Emerton

Date: 15 January 2020

Judgment and Reasons sent to parties: 16 January 2020

FOR THE TRIBUNAL OFFICE