



EMPLOYMENT TRIBUNALS

Claimants: Mr Marek Nowak
Ms Kamila Hoffmann

Respondents: Took Us A Long Time Ltd

Heard at: Birmingham

On: 25, 26, 27 and 28 November 2019
20 December 2019 (in chambers)

Before: Employment Judge Coghlin QC
Mr N Forward
Mrs M O'Rourke

Appearances

For the claimants: Ms D Janusz, paralegal
For the respondents: Ms B Clayton, counsel

JUDGMENT

The unanimous judgment of the tribunal is that:

- (1) The claimants' claims of race discrimination are not well founded and are dismissed.
- (2) The second claimant's claim that the respondent made an unauthorised deduction from her wages in respect of a day's work on 9 July 2018 succeeds. The respondent is ordered to pay the claimant this sum of £104.55.

REASONS

Introduction

1. The claimants were chefs at the respondent's Birmingham restaurant. By ET1s presented on 24 October 2018 the claimants bring claims against their former employer for direct race discrimination and unpaid wages. At the outset of the hearing Ms Janusz, the claimants' representative, made clear that the only wages claim being pursued was the second claimant's claim to be paid for having done a day's work on 9 July 2018.
2. At the heart of the case is a stark factual disagreement. The respondents say that the claimants resigned in July 2018. The claimants say that they did not, and that the respondent dismissed them by treating them as having resigned when they had not. The claimants say that this dismissal was an act of direct race discrimination. The aspect of "race" relied on for the purpose of the claimant's discrimination claims is that the claimants are both of Polish nationality.

The issues

3. The liability issues which the tribunal had to decide were as follows:
 - (1) Did the claimants resign from their employment in July 2018 or were they dismissed by the respondent?
 - (2) If they were dismissed,
 - (a) were they treated less favourably than the respondent would have treated others who were not of Polish nationality in materially the same circumstances?
 - (b) was their race (ie Polish nationality) a material reason for their dismissal?
 - (3) Did the second claimant work on 9 July 2018? If so, it is agreed that an unauthorised deduction from her wages was made.

The hearing

4. The claimants were represented by Ms D Janusz, a paralegal. Ms Janusz represented her clients with conspicuous ability. The respondent was also well represented by Ms Clayton, counsel. The tribunal was also greatly assisted by the two interpreters, Ms Marina Maranska and Ms Anna Maria Ruchalaska. The tribunal is grateful to them all for their assistance.

5. The tribunal was referred to documents in two bundles. It was provided with witness statement from fourteen witnesses, and heard oral evidence from nine, as follows (those whose names are italicised did not attend to give oral evidence):
 - a. for the claimants:
 - i. Mr Marek Nowak, the first claimant;
 - ii. Ms Kamila Hoffmann, the second claimant;
 - iii. Ms Emila Hoffmann;
 - iv. Mr Lukasz Sobesto;
 - v. Mr Krystian Maludzinski;
 - vi. *Mr Victor Daniel Fernandes da Silva*; and
 - vii. *Ms Magdalena Ukrainska*;

 - b. for the respondents:
 - i. Mr Fernando Freitas;
 - ii. Mr Wanderson De Souza;
 - iii. Mr Joshua Field;
 - iv. Ms Marilena Tzemali;
 - v. *Ms Kamila Krutekova*;
 - vi. *Mr Ian Ryder*, and
 - vii. *Mr Jonny Plant*.

The facts

The parties

6. The respondent runs a nationwide chain of restaurants called "Wildwood".

7. The claimants, Mr Nowak and Ms Kamila Hoffmann, are partners. They live with Ms Kamila Hoffmann's sister, Ms Emila Hoffmann. Mr Nowak was employed by the respondent from March 2017 as head chef. Kamila Hoffmann was employed by the respondent from May 2017 as a chef. They worked together at Wildwood in Birmingham, alongside Emila Hoffmann who was also a chef there, and alongside Mr Lukasz Sobesto, another chef. All four are of Polish nationality.

The October 2017 resignation

8. In October 2017 these four chefs decided to resign. They drafted handwritten letters of resignation. Each letter bore the date 28 October 2017 at both the top and the bottom, and indicated that the individual's last shift at work would be 3/11/17. Mr Nowak, as head chef and in practice the leader of the group of four, spoke to the general manager of the restaurant, Mr Fernando Freitas. Mr Nowak showed Mr Freitas the four resignation letters, which were in the kitchen. The letters were not however handed in to him, and Mr Freitas persuaded Mr Nowak not to resign. Mr Nowak in turn persuaded the other three chefs not to resign either. The letters were left in the kitchen, but some time later the chefs noted that they had disappeared. They suspected, and we accept, that they were taken away and kept by Mr Freitas.
9. Mr Freitas in evidence accepted none of this. He denied that there had been any such attempted resignation by the four chefs in October 2017. He denied seeing any letters of resignation. We preferred the evidence of the claimants on this point, which was supported by the evidence of both Emila Hoffmann, Mr Sobesto, and another witness who was present, Mr Krystian Maludzinski. Their account was further corroborated by various pieces of contemporaneous documentary evidence. The four chefs had each taken photographs of their letters on 28 October 2017, and in the cases of Mr Sobesto and Mr Nowak the metadata of those photographs demonstrated that they had indeed been taken that day. Further, a Facebook exchange from 22 October 2017 between Magdalena Ukrainka and Emila Hoffmann indicated that she and at least one other were contemplating resigning that week.

The March 2018 resignation

10. Mr Nowak again wished to resign in March 2018. He again wrote a handwritten resignation letter, but he was persuaded to stay.

June 2018

11. In or around June 2018 the claimants indicated that they and Emila Hoffmann wished to have a period of time off in August (perhaps starting in late July). They wanted to go to Poland to celebrate a relative's birthday on 8 August. The evidence about this was contradictory and unclear, and there was no contemporaneous documentation in relation to it. However it seems that the length of time requested (the respondent's witnesses recall this being about 3½ weeks) was too much for the respondent to accommodate, bearing in mind that this holiday would entail the simultaneous absence of three of its chefs, and the request was refused. It is not clear whether a shorter period of holiday was or would have been granted.

July 2018

12. Mr Freitas' evidence was that on 6 July 2018 Mr Nowak resigned orally, and submitted written resignation letters on his own behalf and on behalf of Kamila and Emila Hoffmann, and that following this a meeting was held the same day at which notes (which are page 91) were taken. For reasons given later, we did not accept this evidence. The notes at page 91 were of a meeting not in July 2018 but in March 2018 following Mr Nowak's resignation at that stage.

13. On 9 July 2018, Mr Nowak was not at work. We are satisfied that Kamila and Emila Hoffmann both worked that day. They are not shown on the respondent's formal rota, but we find that the rota is in this regard inaccurate. The fact that the Hoffmanns were both at work was demonstrated (1) by their oral evidence, which we accepted; (2) by their attendance being recorded in a handwritten rota used by the kitchen staff, which Kamila Hoffmann signed at the end of their shift and which she then photographed, a photograph which was time-stamped at the end of the shift that day; and (3) by other time-stamped photographs and a dated photograph posted on social media which again showed they were there that day.¹

14. The handwritten rota shows Kamila Hoffmann working that day from 10am to 10.45pm. It is common ground that Ms Hoffmann was not paid for that day, and the respondent accepts that if the tribunal finds that she did work that day, she is entitled to payment.

¹ By this stage the claimants and Emila had formed the habit of photographing documents and the premises, since they were concerned about potential underpayment for their work or criticisms as to the state of cleanliness in which they had left the restaurant.

Her claim of unauthorised deductions from wages therefore succeeds. Her hourly rate of pay under her contract was £8.20 and accordingly she is owed £104.55 by the respondent and the respondent is ordered to pay her this sum.

15. That day, 9 July 2018, Mr Nowak went to his GP. He suffered from a long-standing skin condition, contact dermatitis, which affected his hands. His GP signed him off work for 5 weeks and prescribed medication.
16. Mr Nowak submitted his “fit” note to Mr Freitas by email at 11.56pm on 9 July 2018. Mr Freitas forwarded it to his own manager, Wanderson de Souza, at 00.19am on 10 July, saying “sorry Wanderson for the late email. Just got emailed Marek sick note. Attached is 5 weeks sick note.”
17. Less than three hours later, at 2.31am that night, Kamila Hoffmann sent an email to Mr Freitas attaching a self-certification form saying that she expected to be unfit for work for 7 days. She gave the following details in the form: “I’ve come to some sort of injury in my right leg, I find it very difficult to work.” She said she had suffered this injury at 10.45pm on 9 July and she expected to be off until 17 July.
18. At 2.43am that same night, Emila Hoffmann sent an email to Mr Freitas, also attaching a self-certification form saying she was suffering from “stomach flu which causes diarrhoea making it extremely difficult to work.” She said she had begun to suffer from this at 10.45pm on 9 July and she expected to be off until 17 July.
19. These three emails, sent in quick succession on the same night, all adopted the same format. The subject heading simply set out the individual’s name and payroll number (though Mr Nowak’s email also said “Employee’s statement of sickness”). There was no text in the body of the email. They had the hallmarks of being sent in a co-ordinated fashion, and the tribunal was unimpressed by the attempts of the claimants and Emila Hoffmann in their oral evidence to downplay the degree of co-ordination. But that co-ordination in the sending of sick notes in the middle of the night – two by self-certification, in each case for a week, the other for an obviously genuine condition but which had by that point been ongoing for some time – by three members of the same family living in the same house would have been striking to any employer receiving them.

20. At 6.33am Mr De Souza responded to Mr Freitas' email which had brought Mr Nowak's absence to Mr De Souza's attention: "Thanks for the email. Vitor will be there to cover it." This was a reference to Mr Victor da Silva, another chef employed by the respondents who had been working in other Wildwood restaurants, and had been working in Lincoln on 8 July.
21. Mr da Silva is Portuguese. It was part of the claimant's race discrimination case that Mr Freitas brought him (as a Portuguese person) into the restaurant to replace Mr Nowak (a Polish person). But we find that the decision to bring him into the restaurant was not that of Mr Freitas but of Mr De Souza, who needed to find cover in a hurry for Mr Nowak's absence, and who knew that Mr da Silva was available (and the claimants did not suggest that Mr De Souza was influenced materially or at all by race).
22. At 6.53am Mr Freitas forwarded Emila Hoffmann's email, attaching her self-certification form, to Mr De Souza.
23. At 12.14pm on 10 July Mr Freitas sent an email to Mr De Souza in the following terms (with some spelling errors corrected):

"Subject: Chefs Resignations

Hi Wanderson,

Please find attached the resignation letters from three chefs, received today. Copies were given, originals were retained by them. They have also e-mailed me at three o'clock this morning. Marek e-mailed over an unfit to work letter and Kamila and Emila have sent me self certified sick notes. I believe Marek has already e-mailed this to you. We were aware of the situation, they did inform us that they were all to go away on holiday in August all of them for three and a half weeks, this was declined and they have now put the business at risk. Please could you advise us on whether to terminate or not as there is confusion over the sick notes and resignations. If we are terminating them please deduct over payments of holiday that has been paid.

Wanderson thank you for your support on sending chefs to support us during this time."

24. Mr Freitas attached three resignation letters to this email. It is common ground (and it is anyway plainly obvious) that these resignation letters were amended versions of the letters signed by Mr Nowak, Kamila Hoffmann and Emila Hoffmann in October 2017 which Mr Freitas had retained. The letters had been crudely amended: the date had been erased from the top and bottom of the letters, and the date of the last shift that would be worked, which in the original had said "3/11/17", had been erased and replaced with "13/07/18". The tribunal has concluded, for reasons which we shall set

out more fully below, that Mr Freitas amended the letters and submitted them to create the pretence that the claimants had resigned when in fact they had not.

25. On 13 July 2018 Kamila Hoffmann attended her GP, who signed her off work for another week, until 20 July 2018. She emailed her “fit” note to the respondent on 16 July 2018.
26. On 17 July 2018, Mr Freitas emailed Mr De Souza to say that although Mr Novak and the Hoffmann sisters had given notice which had now expired, “I am still receiving refreshed sick notes from them as I think they plan on extending the period they can receive pay.” He asked “Do you want me to notify them that they have been terminated and so no longer have a right to claim sick pay or just leave it the way it is?” Mr De Souza replied that Mr Freitas should tell them that the respondent had accepted their notice. Mr Freitas then wrote to the three individuals referring to them having resigned on 13 July 2018 (by this he meant that this was the date of the expiry of the notice they had given).

The claimants’ objections and complaints

27. Mr Nowak emailed Mr Freitas back on 19 July 2018:

“Regarding my referral (*sic*) what’s the reason behind it? Why have I been fired? And could you please email me the reason for me losing my job along with a copy of the contract.”

28. Mr Freitas replied on 20 July 2018:

“Please see attached your resignation letter which you gave to me and a copy of your contract as you have requested. I sent acceptance of your resignation on Wednesday² to your personal e-mail, once again no response and you made no effort to contact the site.

As you can see this resignation letter is in your hand writing and had been signed by you. I have accepted this and followed company procedure in your termination of employment.

Need I remind you that on your departure you did not work the required notice period and put the business at risk.

I wish you all the best for the future.”

29. On 21 July 2018 Kamila Hoffmann emailed Mr Freitas in identical terms to those used by Mr Nowak in his email of 19 July. Mr Freitas replied

² This appears to be a mistaken reference to the email sent to Mr Nowak on *Tuesday* 17 July 2018; in his very similar email to Kamila Hoffmann on 21 July, set out above, the corresponding wording gives the day correctly as Tuesday rather than Wednesday.

“Please see attached your resignation letter which you gave to me and a copy of your contract as you have requested. I sent acceptance of your resignation on Tuesday to your personal e-mail, there was no response and you made no effort to contact the site.

I wish you all the best for the future with your career in beauty.”

30. On 22 July 2018 Mr Nowak made a report to the police’s Action Fraud line. He reported that his employer had told him that he had resigned when in fact he had not and that Mr Freitas had sent him an image of a resignation letter which Mr Nowak stated was forged. Mr Nowak subsequently followed up this complaint with the police in late August (after a hiatus in early August when Mr Nowak was in Poland) but it appears that the police did not ultimately take action.

31. On 26 July 2018 Mr Nowak lodged what he described as a grievance (though the respondent says that given that it came after employment ended it was better described as a “complaint”), alleging fraudulent activity on the part of Mr Freitas in claiming that Mr Nowak had sent a letter of resignation when this was not true.

32. This complaint was investigated by Mr Joshua Field, whose job title was Head of Recruitment of the respondent but who in substance was a senior HR officer based at Head Office in London. Mr Field spoke to Mr Freitas by telephone on 30 July 2018. The note of this call was mis-dated 30 June 2018. It read as follows:

“I asked Fernando to explain Marek’s accusations that he had forged his resignation letter.

Fernando was absolutely clear that Marek had verbally resigned on the 8th July and then handed in his resignation letter. I asked him to clarify this as on the 10th July he had e-mailed saying that he had received it “today”. He explained that this was sent in error and referred to the sick note.

Fernando also explained that Marek had resigned a number of times prior to this, he sent me examples of these letters.³ However, he explained that previously we had persuaded Marek to stay.

This was potentially Marek’s motive in withdrawing his resignation.”

33. Mr Field’s evidence was that he also spoke to two other members of staff, Ms Marilena Tzemali (Supervisor) and Ms Kamila Krutekova (Front of House Supervisor), who both told him that Mr Nowak had resigned verbally on 8 July and then handed resignation

³ Although Mr Field said in this note that he had been sent “examples” of previous resignation letters, his evidence (which we accept) was that the examples provided were of Mr Nowak’s March 2018 resignation letter, the (disputed) July 2018 resignation letters and a letter written by another chef who had resigned in June, which was in a similar format.

papers to Mr Freitas. He took no notes of his discussions with these two individuals. We shall return to this evidence below.

34. Mr Field rejected Mr Nowak's complaint on 2 August 2018. The next day, Mr Nowak emailed to Mr Field photographs of the resignation letters dated 27 October 2017 which had been amended to create the July 2018 letters. Mr Field spoke to Mr Freitas about this new evidence, and Mr Freitas assured him that he had received no resignation letters from Mr Nowak other than in March and July 2018. On 9 August Mr Field confirmed his rejection of Mr Nowak's complaint and concluded that it had been Mr Nowak himself who had changed the date on the resignation letter.
35. Meanwhile on 6 August 2018 Kamila Hoffmann had lodged a "grievance" in similar form to that provided by Mr Nowak's. This was rejected by Mr Field on 13 August; Mr Field took the view that it covered the same ground as Mr Nowak's complaint and as his complaint failed so did hers.

Analysis of the claimants' purported resignation in July 2018

36. We have already indicated our conclusion that the claimants did not in fact resign in July 2018, and that the letters of resignation provided by Mr Freitas had in fact been amended by him. We now pause to set out the basis on which we have reached this conclusion.
37. We begin by recognising that this is a very serious finding to make. It is essentially a finding of reprehensible and dishonest conduct on the part of Mr Freitas. That is a finding which we would not be prepared to make without cogent evidence.
38. We also bear in mind that this is a case where, as both parties agree, one or other party has behaved in a cynical and dishonest manner: either it is the respondent, in the person of Mr Freitas, who has concocted resignation letters on the part of the claimants in order to engineer the appearance of a resignation that never was, or it is the claimants who have engaged in a no less dishonest and cynical attempt to make it seem that Mr Freitas has falsified the resignation letters.
39. The matters which have led us to our conclusion on this issue are these:

- a. For reasons set out above, we rejected Mr Freitas' evidence on the closely connected question of the discussions about resignation in October 2017.
- b. Mr Freitas' account of the timing of the alleged resignations did not bear scrutiny and contained what the tribunal considered significant and telling inconsistencies. His initial account, given to Mr De Silva, was in his email on 10 July when he said that the resignation letters had been received "today". The tribunal considers his explanation given to Mr Field on 30 July 2018, that he was referring in this email to the sick notes not the resignation letter, to be unpersuasive. Then, when challenged by Mr Field on this point, Mr Freitas told Mr Field that he was "absolutely clear" that the resignation was given on 8 July. This too was the position taken in Mr Freitas' witness statement in these proceedings. Yet he began his oral evidence by saying that he now realised that the resignation had been on 6 July (this was in light of evidence which he had now heard from other witnesses).
- c. We did not accept Mr Freitas' evidence that the meeting noted at page 91 took place in July 2018 (in his witness statement, he said the 8th, in his oral evidence the 6th). If Mr Freitas' account were correct, the content of the note would be very odd. It begins "*the purpose of this meeting is about Marek Nowak and the resignation letter that he provide. The reason for the resignation letter as Marek Nowak says is because he received a better offer. Also, he was not happy any more working for Wildwood.*" The use of the singular here – "letter" – is telling. It suggests that the discussion was about the March resignation letter, when Mr Nowak was indeed the only person to resign, rather than what, according to Mr Freitas' evidence, was the resignation of three chefs on the same day in July. The meeting notes are entirely about Mr Nowak. There is no reference anywhere to the resignation of others.

The notes of this meeting were taken by Ms Tzemali. She gave evidence to the tribunal that she could not remember when the notes were taken beyond them being in the "spring/summer". This is equally consistent with them having been made at the time of Mr Nowak's March resignation, and Ms Tzemali said that the notes might have been made in March. She also said she recalled they were around the time of a particular Head Chef's meeting, which would place them near to the date given by Mr Freitas, but although the tribunal found Ms Tzemali an honest witness we found her recollection on this point was vague.

- d. On Mr Freitas' account, and on the documentary evidence, Mr Freitas did not mention the three (alleged) resignations to Mr De Souza until lunchtime on 10 July. As Mr Freitas said in his oral evidence, when being asked about the October 2017 resignations, if four resignations had been given on the same day, "the first thing I'd do is that I'd report it to my area manager straight away." It is implausible that if three chefs had indeed resigned on 6 July, or even 8 July, Mr Nowak would not have mentioned this to Mr De Souza sooner than lunchtime on 10 July. The resignation of three chefs, including the head chef, on one week's notice presents an urgent problem for a restaurant of the size of Birmingham Wildwood (there were only about 4 or 5 chefs in the team as a whole) and one which, had it happened, Mr Freitas would have reported straight away.
 - e. Mr Freitas worked alongside Kamila Hoffmann on 6, 7 and 9 July, and alongside Emila Hoffmann on 8 and 9 July. It is common ground that there was no discussion of any sort about the resignations which they had supposedly given on 6 (or 8) July. It seems unlikely that if they had resigned Mr Freitas would not have mentioned it to one or both of them.
 - f. On Mr Freitas' case the resignation letters which were given to him on 6 July were photocopies. This must have struck him as odd, but on his account he accepted them without comment.
 - g. The actions of the claimants in the days after their alleged resignations is wholly consistent with their not having resigned. If Kamila Hoffmann had indeed resigned on 6 July, giving notice expiring on 13 July, there is no cogent reason why she would visit the GP again on 13 July and obtain a "fit" note for a further week, and submit it to the respondent on 16 July. For Mr Nowak's part, as soon as he was told by Mr Freitas that he had resigned, he denied it (asking why he had been dismissed), and then went to the police.
 - h. Having heard them being cross examined, we found the evidence of the claimants, and Emila Hoffmann, on this point to be credible. We were not however impressed by Mr Freitas' evidence in general or on this point in particular.
40. As we have noted above, Mr Field's evidence was that both Ms Tzemali and Ms Krutekova told him that Mr Nowak had resigned verbally on 8 July and then handed

resignation papers to Mr Freitas. We place no weight on that evidence for the following reasons.

- a. It is hearsay, and while hearsay evidence is not excluded, the tribunal approaches it with caution.
- b. As we have said, Mr Field took no notes of any discussions with these two individuals.
- c. Ms Tzemali was called to give evidence to the tribunal. She was quite unable to say that Mr Nowak had resigned on 8 July. She could do no better than to say that it was in the “spring/summer” of 2018.
- d. A witness statement was provided from Ms Krutekova, in which she said that she saw Mr Nowak resigning on 8 July. Following receipt of this statement, the claimants produced a supplementary statement in response from Mr Maludzinski. Mr Maludzinski stated that on 19 October 2019 he mentioned Mr Nowak’s case with Ms Krutekova, and said that he knew that Mr Freitas forged Mr Nowak’s resignation letter, and Ms Krutekova responded that she knew this too but could not talk. Mr Maludzinski attended tribunal and gave oral evidence; Ms Krutekova did not. In these circumstances we do not consider it safe to place any weight either on Ms Krutekova’s witness statement, or on Mr Field’s undocumented report of what Ms Krutekova said to him in July/August 2018.

41. Taking all these matters into account, we are satisfied on the balance of probabilities that the claimants (and Emila Hoffmann) did not resign in July 2018, and that Mr Freitas amended the letters of resignation which they had previously prepared in October 2017 to give the false impression that they resigned in July 2018.⁴

42. By treating the claimants as having resigned when they had not, the respondent dismissed them.

The law

⁴ We add that the claimants made various allegations relating to Mr Freitas’ conduct and character in a broader sense. There were allegations of theft and other misconduct. We did not find these allegations proved to anywhere near the standard we would require having regard to the seriousness of such allegations, and we found these allegations of no assistance in answering the factual questions which we had to address.

43. **Section 13** of the **Equality Act 2010** (“**EqA**”) provides, so far as relevant:

13 Direct discrimination

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

[...]

- (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

[...]

44. **Section 23 EqA** provides, so far as relevant:

23 Comparison by reference to circumstances

- (1) On a comparison of cases for the purposes of section 13 [or] 19 there must be no material difference between the circumstances relating to each case.
- (2) The circumstances relating to a case include a person's abilities if—
- (a) on a comparison for the purposes of section 13, the protected characteristic is disability [...]

45. **Section 39 EqA** provides, in relevant part:

Employers and Applicants

...

- (2) An employer (A) must not discriminate against an employee of A's (B) -

...

- (c) by dismissing B [...]

46. **Section 136 of the EqA** provides, in relevant part:

Burden of proof

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

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

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

...

(6) A reference to the court includes a reference to

(a) an employment tribunal;

...

47. We remind ourselves of the guidance set out by the Court of Appeal in **Igen Ltd & Ors v Wong** [2005] ICR 931. Although it was given in the context of a case brought under the sex discrimination provisions of the Sex Discrimination Act 1975, it applies equally to claims brought under the Equality Act 2010:

“(1) Pursuant to section 63A of the 1975 Act, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in section 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary

facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.

(10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

48. However the authorities make it clear also that in many cases it is sensible and appropriate to focus on the second stage of the enquiry, namely the "reason why" question, where the tribunal is in a position to make positive findings of fact in relation to that question.

Further findings of fact and conclusions

49. The claimants' case is put on the basis that Mr Freitas, as the person who decided to dismiss them in the way that he did, was materially influenced by their race, which is to

say their Polish nationality. They do not say that anyone else within the respondent was influenced by their nationality. They assert that when they were removed, the respondent sought to replace them in the kitchen with Portuguese staff (Mr Freitas is himself Portuguese). They also say that Mr Freitas prohibited them from speaking Polish while at work. We consider these matters below.

Replacing Polish staff with Portuguese staff?

50. We found no evidence to suggest a practice on the part of Mr Freitas of trying to replace Polish staff with Portuguese.
51. The staff of the respondent's restaurant is highly diverse, as were the staff whom it was recruiting at around this time. The respondent provided evidence (which we accept) of the staff who were recruited to work at the Birmingham restaurant between 7 May and 25 September 2018 (not including staff transferred to Birmingham from other restaurants operated by the respondent). Of the chefs who were recruited in this period, 2 were Polish, 3 were of other Eastern European nationalities, 2 were French, and 2 were Portuguese. Of those two Portuguese chefs, only one was recruited by Mr Freitas; the other was recruited by Victor da Silva, who is not said by the claimants to have been influenced by race in making that decision. These numbers offer no support to the claimants' case that Mr Freitas was intent on replacing Polish staff with Portuguese staff.
52. Victor da Silva was, as we have said, brought in from another restaurant at short notice on the morning of 10 July 2018 to work as head chef at Birmingham. This was in circumstances where Mr Nowak had gone off sick, the kitchen would obviously be short-staffed, and cover was urgently needed. Mr De Souza was aware that Mr da Silva was available at short notice, and he was drafted in. This had nothing whatsoever to do with race or nationality. Moreover it was a decision taken not by Mr Freitas but by Mr De Souza, and it sheds no light on Mr Freitas' reasons for acting as he did in relation to the supposed resignations of the claimants.
53. The high-water mark of the claimant's case is that there were about half a dozen chefs on the rota in the kitchen of the restaurant at the time of the claimants' dismissal and of them, the claimants and Emila Hoffmann were the only ones who were Polish. The others were of different nationalities. None was Portuguese. The claimants point out that the only three individuals for whom Mr Freitas forged resignation letters were the three

Polish people. However we do not accept that on a proper analysis this gives rise to an inference of discrimination. What linked the claimants and set them aside from the others was not just their Polish nationality; it was that they were family members who acted in concert in a number of respects, including by sending near simultaneous sick notes as we have set out above.

54. We accept that the claimants were told not to speak Polish during working hours. This was in line with the respondent's express written policy, set out in the employee handbook, that while at work English should be spoken, as the language common to all members of staff. This policy applied equally to all staff; there was no singling out of Polish speakers, nor any favouring of Portuguese speakers. We do not accept that the claimants were told not to speak Polish even while on their breaks.
55. We closely considered whether Mr Freitas' dishonest conduct in concocting resignation letters, and his untruthful denials of that conduct subsequently including in his evidence to the tribunal, might be indicative of discriminatory motivation on his part. We do not consider that this conclusion can properly be drawn in the circumstances of this case. People lie and act dishonestly for all sorts of reasons. Whether such conduct gives rise to an inference of discrimination depends on the facts.
56. We note that, before they worked for the respondent, Mr Freitas and Mr Nowak had worked together for at least several months for a different restaurant chain. They had got on well, and indeed Mr Freitas then recruited Mr Nowak to work for the respondent. He had then persuaded Mr Nowak and the other Polish staff members not to resign in October 2017, and again persuaded Mr Nowak not to resign in March 2018. In light of this history it is implausible that Mr Freitas harboured any conscious or subconscious antipathy towards the claimants on the basis of their nationality.
57. Taking all these matters together, the tribunal did not consider that the claimants had proved facts (or that there were facts) from which the tribunal could properly conclude, in the absence of an explanation from the respondent, that race was a material reason for Mr Freitas' conduct.
58. We are anyway satisfied that there was a non-discriminatory explanation for Mr Freitas' conduct. His concoction of the resignation letters came shortly after three staff members, acting obviously in concert, had submitted sick notes, leaving the kitchen in crisis. We find on the balance of probabilities that his conduct was a reaction to this

development, coming, as it did, against the background of a history of abortive resignations in October and March, and the request for holiday although that was refused. In each case (save for the March resignation) these things were done by the claimants acting *en bloc*. We note that in his email to Mr De Souza on 10 July 2018 Mr Freitas made reference to the refused holiday request and to the claimants now putting the business at risk (a point which he reiterated in an email to Mr Nowak on 20 July 2018). We consider that these particular matters did indeed operate on Mr Freitas' mind when he acted as he did (albeit that in other aspects of this correspondence Mr Freitas was untruthful). He felt that the claimants were acting inappropriately and that they were putting the business at risk. His concoction of their resignation letters was a reaction to this. It had nothing whatsoever to do with their race. Race was not a factor which operated, consciously or subconsciously, on his mind. Further, we do not consider that Mr Freitas or the respondent would have treated persons of a different nationality more favourably in the same or materially similar circumstances.

59. For these reasons we conclude that the claimant's claims of race discrimination fail, and they are dismissed.

Signed by: Employment Judge Coghlin
Signed on: 27 January 2020