EMPLOYMENT TRIBUNALS

Claimant: Mr M Nowak

Respondent: Daniel Thwaites PLC

Heard at: Manchester **On:** 28-30 September and (in chambers) 1 October 2020

Before: Employment Judge Phil Allen
Ms B Hillon
Mr B Rowen

REPRESENTATION:

Claimant: In person
Respondent: Ms K Barry, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not dismissed and his unfair dismissal claim does not succeed.

2. The claimant was not subject to less favourable treatment because of his race.

3. The claimant was not subject to unlawful indirect race discrimination.

4. The claimant was not subject to harassment on the grounds of race.

REASONS

Introduction

1. The claimant was employed at the Langdale Chase Hotel from April 2014 until 25 November 2017 as a Housekeeper. The respondent took over the hotel in April 2017. The claimant resigned on 6 November 2017. He alleged that he was subjected to conduct which amounted to harassment on the grounds of race, direct discrimination on the grounds of race and/or indirect race discrimination. He also

alleged that he was constructively dismissed. The respondent denies that he was subjected to any discrimination or harassment and contended that he resigned as he had found alternative employment.

Claims and Issues

2. Preliminary hearings were conducted in the case on: 22 May 2018; 27 March 2019; 11 September 2019; and 30 March 2020. The last of these preliminary hearings took place on the dates when the case was listed for hearing, but it could not go ahead due to the Covid-19 pandemic. The issues to be determined were identified and recorded as an appendix to the order which followed the 30 March 2020 hearing. It was confirmed that they remained the issues to be determined at the start of the final hearing.

3. The issues identified were as confirmed at paragraphs 4 to 7 below. Remedy issues were also identified in the case management order, but this Tribunal has determined only issues of liability as part of this decision.

4. *Constructive unfair dismissal*

   a. Did the respondent commit a fundamental breach of the claimant's contract of employment?

   b. Did such a breach or any act of race discrimination amount to a breach of the implied term of trust and confidence?

   c. Did the claimant resign in response to that breach?

   d. Did the claimant delay in resigning such that it can be held that the breach was waived and the contract affirmed?

5. *Direct race discrimination*

   a. Has the claimant been subject to the following less favourable treatment:

      i. Mike Vincent denying the claimant the right to speak Polish when not on duty and not in the presence of guests;

      ii. Mike Vincent pressurising the claimant into signing a new contract of employment;

      iii. Mike Vincent excluding the claimant from receiving a proper or any share of gratuities;

      iv. Mike Vincent ignoring the claimant in the workplace;

      v. Mike Vincent refusing to attend meetings with the claimant;

      vi. Mike Vincent responding aggressively when the claimant repeated a request for such meetings;

vii. Mike Vincent instructing the claimant aggressively and abusively not to speak other than in English; and

viii. The claimant's dismissal.

b. Was the claimant treated less favourably than an English employee?

6. *Indirect race discrimination*

a. Did the respondent apply the provision, criterion or practice that English must be spoken in the workplace?

b. If so, did it put those whose nationality was not English at a disadvantage?

c. Did it put the claimant at a disadvantage?

d. Can the respondent show that this was a proportionate means of achieving the legitimate aim that guests had a good experience and received a good service at the hotel?

7. *Harassment on the grounds of race*

a. Did the respondent subject the claimant to the following conduct:

i. Mike Vincent denying the claimant the right to speak Polish when not on duty and not in the presence of guests;

ii. Mike Vincent pressurising the claimant into signing a new contract of employment;

iii. Mike Vincent excluding the claimant from receiving a proper or any share of gratuities;

iv. Mike Vincent ignoring the claimant in the workplace;

v. Mike Vincent refusing to attend meetings with the claimant;

vi. Mike Vincent responding aggressively when the claimant repeated a request for such meetings;

vii. Mike Vincent instructing the claimant aggressively and abusively not to speak other than in English; and

viii. The claimant's dismissal.

b. Was the conduct unwanted?

c. Did that conduct have the purpose or effect of:

i. violating the claimant's dignity; or

ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Procedure

8. The claimant represented himself throughout the hearing. Ms Barry, counsel, represented the respondent.

9. The hearing was conducted at the Lowry Centre and was the first Tribunal case to be heard at this new venue. It was emphasised to the parties at the start of the hearing that if they had any concerns or issues with the arrangements at the new venue, or for reasons related to Covid-19, they were to raise any such issues. No issues were raised by either party during the hearing.

10. The Tribunal arranged for a Polish language to be available for the claimant throughout the hearing. In fact, the claimant chose to ask and answer questions in English without the assistance of the interpreter, as he was able to. Interpretation was provided during submissions. A Spanish language interpreter was also provided for the evidence of Ms Tomas and Mr Martinez Corrales. Both witnesses could speak some English and Ms Tomas required only limited assistance from the interpreter.

11. The Tribunal was provided with a relatively small agreed bundle of documents, with only 126 pages (of which half were pleadings and related documents). The Tribunal read the documents in the bundle to which they were referred either in witness statements or in the course of evidence. Any reference to a page number in this Judgment is a reference to the bundle unless otherwise indicated. Three additional pages were provided to the Tribunal during the hearing and were considered: Ms Tomas' resignation letter from her employment with the respondent; and two emails regarding requests for information from the claimant.

12. The case management order following the preliminary hearing on 30 March 2020 recorded that the case was ready for hearing with the agreed bundle prepared and witness statements having been exchanged. The Tribunal understands that witness statements were provided by the respondent first and thereafter by the claimant, in or around February 2020. An earlier case management order, made following the preliminary hearing on 22 May 2018, had recorded (40) that no witness may be called to give evidence whose statement had not been exchanged in accordance with that order unless permission was granted by the Tribunal.

13. The claimant produced for this hearing statements for two additional witnesses who he wished to call, those statements having not been provided when other statements were sent: Mr Thomas Noblett; and Mr Andrew Tighe. The respondent objected to those witnesses being allowed to be called or to their statements being admitted.

14. It was agreed that the two statements would be read by the Tribunal at the same time as reading the other witness statements. Following the time spent reading, the claimant was given the opportunity to make his application for the statements to be admitted and for the witnesses to be allowed to be called. The claimant explained that the reason why the statements had been prepared was to address three paragraphs in Mr Vincent's witness statement in which he referred to the claimant's use of a company vehicle. Both statements did address that issue, but they also included some content which related to other matters. The respondent objected to the statements being admitted, its representative highlighting that: the

statements were provided very late; the possibility of additional witnesses or statements had not been raised at the preliminary hearing on 30 March 2020 (which took place after all other statements had been exchanged); the statements were clearly prepared in response to the respondent's own statements; and the content was not relevant to the issues to be determined.

15. The Tribunal considered the application but decided that the statements should not be admitted and the two witnesses would not be allowed to give evidence. The reasons for this decision were explained at the time, being in summary: that the claimant had provided no good reason for the late provision of the statements and, in particular, why such evidence had not been provided prior to, or referred to at, the 30 March 2020 preliminary hearing; and, in any event, the issue which was the reason for the preparation of the statements (the claimant's use of the company vehicle) was not relevant to any of the issues which the Tribunal needed to determine (as defined in the list of issues). Neither party raised any valid argument as to why the issue of the vehicle was relevant to the issues to be determined, and, the Tribunal determined that it did not need to make any findings in relation to it.

16. The Tribunal heard evidence from the claimant and he was cross examined.

17. As the claimant's other witnesses were not able to give evidence on the second day of the hearing, it was agreed with the parties that the respondent's witnesses would give evidence before the other witnesses called by the claimant.

18. The Tribunal heard from the following witnesses called on behalf of the respondent, each of whom had prepared a statement and were questioned about that statement by the claimant in cross-examination: Mr Mike Vincent who is employed as a General Manager and who worked at the Langdale Chase Hotel between 20 April 2017 and 22 May 2017 as an Integration Manager, and later from 1 August 2017 as General Manager; Ms Kasia Kosianska, Head Housekeeper at the Langdale Chase Hotel; and Ms Hayley Leece, Reception Manager at the Langdale Chase Hotel. The Tribunal also asked questions of the witnesses.

19. On the third day of hearing, the Tribunal heard evidence from the following witnesses called on behalf of the claimant: Ms Maria Calatayud Tomas; and Mr Manuel Martinez Corrales. Both witnesses were former employees of the respondent who had also worked at the Langdale Chase Hotel. Ms Tomas had left on 2 September 2017 and Mr Martinez Corrales on 24 November 2017. Each witness had prepared a statement, were cross-examined and were asked questions by the Tribunal. Each of these witnesses gave evidence remotely by CVP video technology, being asked questions by those in attendance at the Tribunal hearing.

20. The claimant also provided witness statements from two other former employees of the respondent who had worked at the Langdale Chase Hotel: Ms Adriana Szuch-Tomys; and Ms Anabel Cuervo Diaz. As these witnesses did not attend the Employment Tribunal hearing, these statements were given limited weight. The respondent's representative submitted that they should be given no weight at all. On the issue of language they were given no weight, as the respondent was not able to cross examine them on this contentious issue.

21. After the evidence was heard, each of the parties made submissions.

22. At the end of the third day of hearing the Tribunal reserved judgment and accordingly makes the findings confirmed below.

Facts

23. In the course of the hearing the Employment Tribunal heard evidence about some matters which ultimately did not impact upon the Judgment the Tribunal reached. The Tribunal has not recorded in this Judgment all of the evidence heard or made findings on matters which were not relevant to the outcome. At the hearing, the Tribunal focussed upon the precise allegations as clarified at the preliminary hearing on 30 March 2020 and as they were recorded in the List of Issues.

24. There was no dispute in the evidence that the claimant did a good job for the respondent and there was no question about his work ethic or about the quality of his work. There was evidence that the claimant took on additional duties when he did not need to do so. It was clear that the respondent, and Mr Vincent in particular, had no issue with the claimant and his work. He was a good employee. It is clear from the claim that the claimant himself was in no doubt that he believed that he had been treated unfairly by the respondent. He clearly believed that he had been treated adversely by Mr Vincent.

25. The background context to the issues about which the Tribunal heard evidence was the change in ownership of the hotel which occurred in April 2017. It is clear that the hotel moved from a family run hotel, to one which needed to comply with a broader corporate culture. It was clear that this had an impact on the staff and caused significant disruption to established relationships.

26. Mr Vincent initially worked at the hotel as an Integration Manager, but it does not appear that there were any concerns or issues in relation to the period of time when he fulfilled that role. Ms Thomas in evidence said she was happy in her role until June 2017, which was after Mr Vincent had left the hotel after fulfilling the Integration Manager role.

27. Alongside the change in management and corporate culture, there was also a move to transition the hotel from being a three star establishment to one that was a four star hotel. That involved additional duties and work and required a step up in the way that the hotel was operated. For the housekeeping staff, this involved some significant changes, including that guests needed to be provided with bath robes (which needed to be washed) and coffee machines (which needed to be stocked and cleaned).

28. It was common ground between the parties that prior to the change of ownership, the practice at the hotel had been that English should usually be spoken by staff when in client areas.

New contracts

29. The respondent offered the staff new contracts of employment. The respondent's evidence was that those contracts included some enhanced benefits. There is no dispute that the staff were initially told that they did not need to accept the new contracts and that they were able to remain on their existing terms if they preferred. It appears that later, those who had not signed the contracts were the

subject of further requests when they were asked if they would sign the new contracts on offer.

30. The Tribunal was provided with a copy of the contract which was offered to the claimant (75-81). That document is dated 3 July 2017, suggesting that it was not offered to him until that date. The claimant had two concerns about the new contract: the notice period; and the mobility clause.

31. The contract includes a broad mobility clause that said that the company may, at any time, ask that an employee relocate their place of work to anywhere within the UK. That was substantially different to the term that had previously applied. The Tribunal heard evidence that other employees were also concerned about this provision, which appears to have been common to all of the contracts. Ms Leece confirmed that this clause caused general concern.

32. In relation to notice, the claimant's previous contract had required him to give one week's notice for each complete year of employment, which at the time would have required him to give three weeks' notice. The new contract, as typed, required him to give the company eight weeks' notice. Importantly, the document provided to the Tribunal had handwritten amendments on it which have been agreed and signed by the claimant and Mr Vincent (77) and in which the notice period was reduced from eight weeks to four. The contract was signed by the claimant on 20 August 2017.

33. The claimant's evidence in his statement was, *"We were put under extreme pressure by management even with the threat if we did not sign then we would not get paid".* In fact, the claimant's evidence in answering questions during the Tribunal hearing, was not consistent with this statement. He did not give any evidence which substantiated what is said in that part of his witness statement. There was no evidence given by him about how pressure was genuinely applied.

34. Mr Vincent denied that pressure was placed on the claimant to sign. His evidence was that the contract was not his focus. The Tribunal find the evidence provided by Mr Vincent to be truthful (both on this issue and generally). His evidence was clear and strong on key issues. In terms of the contract, he was focussed on getting the hotel running smoothly as a four star hotel and the contract was not his central concern.

35. Having heard the claimant's evidence, the Tribunal finds that whilst he may have been asked on more than one occasion to sign the new contract, the Tribunal did not hear any evidence which genuinely asserted any undue pressure being placed on the claimant to sign the contract. The Tribunal does not find that any threats were made (whether in relation to pay or otherwise). It is clear that the claimant was asked on more than one occasion to sign the contract, but as is clear from the fact that the contract was amended by request, such repeated requests were not evidence of any significant or undue pressure being placed on the claimant. The Tribunal finds it relevant that the respondent altered the contract in order to address one of the claimant's concerns. Also of relevance to the Tribunal in reaching this decision was the fact that the claimant signed the contract on 20 August 2017, being only 20 days after Mr Vincent had returned to the hotel as General Manager.

36. The Tribunal does not find that the mobility clause placed employees who were foreign nationals at a disadvantage compared to those who were not. The Tribunal also finds that the same approach was taken to all employees by the respondent, as is evidenced by Ms Leece's concerns about the mobility clause.

Tips

37. The Tribunal was told that the previous owners had not allocated tips to staff. When the respondent took over the operation of the hotel they arranged for staff to be paid tips. The process was undertaken by Mr Wood who was responsible for making the allocation. This was a manual process which was ultimately entered onto the respondent's system. This process was not operated by Mr Vincent. The Tribunal accepts Mr Vincent's evidence that he had nothing to do with the allocation of the tips.

38. In relation to the claimant, he was not paid what he was due for tips in November 2017. The respondent's evidence was that this was as a result of a clerical error. This error was rapidly resolved. The claimant was paid the tips due on 7 December 2017 (82) and the information was provided in a payslip dated 28 December 2017 (108). Following the claimant leaving the respondent's employment, the question of tips was raised in a letter sent jointly by the claimant and Ms Szuch-Tomys on 17 January 2018. The Tribunal is not sure why this issue was raised in January 2018 as a complaint, when the tips had already been paid.

39. When asked, the claimant himself did not know whether he was genuinely alleging that this was on the grounds of race. When he was asked about whether it was on the grounds of race he said that it was *"hard to say".* He accepted that he had not identified the non-payment at the time that he resigned, and he accepted that it was not an issue which led him to resign. The Tribunal finds that there is no evidence that this non-payment was deliberate and/or discriminatory and it accepts the respondent's case that the non-payment was a clerical error.

Mr Vincent's conduct

40. In the List of Issues, the claimant alleged that Mr Vincent ignored him in the workplace, refused to attend meetings with him, and responded aggressively when the claimant repeated a request to him for such meetings. The claimant's statement stated that he raised these matters with Ms Kosianska, his line manager. He also said (although very briefly with little in terms of specifics) that he approached Mr Vincent on numerous occasions saying that he wanted to meet with him and was consistently refused. He stated that the requests continued and the refusal became more and more aggressive. He stated that Mr Vincent took to deliberately avoiding him and avoiding eye contact.

41. The Tribunal heard evidence from Ms Kosianska, the claimant's line manager (the Head Housekeeper). She was the right person to whom the claimant should have raised such issues. Ms Kosianska is also Polish. Ms Kosianska's evidence to the Tribunal was very clear, that the claimant had never approached her at all or raised any concerns with her. The Tribunal found Ms Kosianska to be an entirely credible witness. She had an understated approach when giving evidence but was very clear in what she said. The Tribunal found her answers to be honest. When she was being questioned, she was asked whether Mr Vincent was her favourite

General Manager, and she said *"he was not".* She confirmed that they had arguments, but she said he was never rude or angry towards her. The fact that the claimant had never raised issues with her was something about which she was unequivocal. The Tribunal finds this evidence from Ms Kosianska to be true. The Tribunal believes that had the claimant raised issues with Mr Vincent in the ways that he described, he would have first raised those issues with Ms Kosianska. It also finds that had the claimant been rebuffed in the way he described by Mr Vincent, he would certainly have raised those matters with Ms Kosianska (which he did not).

42. The issue of Mr Vincent's conduct towards the claimant and his response to requests for meetings (and whether such requests were made) is a direct conflict of evidence between the claimant's evidence and that of Mr Vincent. As explained above, the Tribunal finds Mr Vincent's evidence to be genuine and credible. For the reasons explained in relation to Ms Kosianska's evidence, the Tribunal does not find that the claimant did approach Mr Vincent as he alleged or that Mr Vincent responded in the way asserted. In his questions, the claimant never put to Mr Vincent the contention that he had ignored the claimant, and therefore Mr Vincent's evidence in that respect is accepted.

43. In reaching this finding, the Tribunal took account of the evidence about what did happen when the claimant and Mr Vincent spoke. Following the claimant's resignation, there was no dispute that the claimant explained to Mr Vincent a number of his concerns about the job. He focussed upon issues such as the washing of bath robes and the provision of coffee machines. As soon as those issues were raised, Mr Vincent immediately spoke to Ms Kosianska about them and also arranged a meeting with the housekeeping staff, following which he took action in a number of respects. The Tribunal also notes that, following the claimant's resignation, Mr Vincent tried to persuade the claimant to stay, which was evidence that the claimant accepted. This appears inconsistent with the conduct alleged by the claimant. On this issue and for the reasons given, the Tribunal prefers the evidence of Mr Vincent.

The claimant's other witnesses

44. The Tribunal heard evidence from two witnesses called by the claimant, whose evidence (if accepted) would have provided considerable support to the claimant's evidence about Mr Vincent and his conduct towards him.

45. Ms Thomas' statement contained an account of her feeling intimidated by Mr Vincent in relation to not signing the contract, and a statement about conversations about language. She alleged in her statement that *"the lack of respect which* [Mr Vincent] *showed any foreign employees was very evident, he was shouting at all of us all of the time, not only in the back of house, but also in front of guests*".

46. In relation to Ms Thomas, the Tribunal found that the evidence she gave and the answers that she provided to questions, did not substantiate the sweeping allegations made in her statement. The occasions she described in detail did not support the assertion made. The Tribunal prefers the evidence of Mr Vincent and Ms Kosianska, to that of Ms Thomas.

47. As confirmed above, Mr Vincent returned to the hotel as General Manager only on 1 August 2017. The Tribunal was provided with a resignation letter from Ms Thomas dated 26 August 2017. Whilst Ms Thomas could not give precise dates,

there is no dispute that she had travelled to Scotland for an interview for a new role and returned from that trip, prior to resigning. It had also taken a few days for the trip to be arranged. As a result, the period between Mr Vincent starting as General Manager at the hotel and Ms Thomas taking steps to find a new job, cannot have been any longer than three weeks (at most). The Tribunal does not find this limited period to be consistent with the general wording used in the statement which recorded these events occurred to all foreign national employees all of the time. Further, the evidence presented to the Tribunal was that Mr Vincent had offered the claimant role development and an increase in wages when the potential role in Scotland was discussed. After the return from the interview, Ms Thomas informed the respondent of the salary she would receive in her new job, which was not an offer which Mr Vincent was able to match. The evidence about these conversations that it was not in dispute occurred, in which Ms Thomas remaining was discussed, were found not to be consistent with the broad and significant allegations made in Ms Thomas' statement.

48. On her resignation, Ms Thomas was asked to undertake the shifts for which she had already been rota'd. Ms Thomas refused to do so. Her evidence was *"that wasn't my problem".* It is clear from this that Ms Thomas felt able to stand up to Mr Vincent and able to make decisions in her own interest. In her resignation letter, she made no reference to any of the allegations made in her statement to the Tribunal. That letter was addressed to Mr Vincent personally and included the statement (with the Tribunal's emphasis added) *"I wish <u>you</u> and Langdale Chase all the best for the future".* Whilst this was explained in evidence by Ms Thomas as her being polite, the Tribunal finds the inclusion of a statement wishing Mr Vincent personally all the best in the future was inconsistent with the conduct described in Ms Thomas' statement, that is that she was being shouted at all of the time. Ms Thomas' grasp of English was sufficient to have understood this wording. As a result, the Tribunal does not find the sweeping allegations made in Ms Thomas' statement to be credible.

49. Mr Martinez Corrales' statement notably contained no reference to the issue of language at all, but he did make some very broad allegations about the way that the respondent (and Mr Vincent in particular) treated foreign nationals. When he gave evidence, the Tribunal took the opportunity to ask him for specific examples of the conduct which his statement only addressed in sweeping terms. In answer to those questions, Mr Martinez Corrales did not provide any specific information which would lead the Tribunal to conclude that there had genuinely been any such conduct by Mr Vincent. It was clear to the Tribunal that, as submitted by the respondent, Mr Martinez Corrales clearly had an axe to grind with the respondent and Mr Vincent in particular (for whatever reason). In his evidence, Mr Martinez Corrales provided insufficient specifics for the broad allegations in his statement to be given any weight. He did not identify any issue or event which caused the Tribunal any particular concern or which tended to support his broad allegations of discriminatory conduct by the respondent and/or Mr Vincent.

Language

50. A central issue about which the Tribunal heard evidence was about the use of languages other than English by staff during their employment with the respondent. It was common ground that under the previous owners, staff were encouraged to

speak English in client areas. In fact, it was common ground that this was a standard practice across the industry.

51. Many of the staff, including the claimant (until the start of November 2017), lived in separate staff accommodation. There was no evidence presented to the Tribunal that any employee was ever required to speak English in the staff accommodation.

52. A key part of the evidence appeared to relate to the staff room, which was part of the workplace provided but which was not open to guests.

53. This is an issue upon which there was a fundamental difference between the claimant's evidence and Mr Vincent's evidence. The claimant alleged that the most important factor in his resignation was the fact that Mr Vincent would reprimand staff on the spot and speak to them strongly and aggressively if they were speaking in a language that was not English. His evidence was that this happened on occasions to him. However, when questioned about these occasions, the claimant's evidence lacked any specifics whatsoever. The claimant could not tell the Tribunal when this had happened, or even roughly when it had occurred. He could not tell the Tribunal who else was present when such conversations occurred (which is particularly surprising in the light of the fact that the claimant would have been speaking Polish to another Polish speaking employee). As a result of this lack of specifics, the Tribunal simply does not find that these events occurred as vaguely described by the claimant.

54. Mr Vincent's own evidence was that he did ask all employees to speak English in the guest areas of the hotel only. The reason for the request was that he thought it would have a positive impact on the experience of the guests, and ensure that all guests received the best possible service. He stated that the claimant was not singled out in this request, it was an expectation of all employees, as guests can find it impolite if staff talk amongst themselves and they do not understand what is being said. In his evidence he emphasised that it was simply a request and there was no policy which prohibited the claimant or others from speaking their preferred language.

55. Ms Kosianska's evidence was that she spoke Polish all the time to other Polish employees in the hotel and was unaware of any rule about speaking English. That evidence is entirely inconsistent with the evidence given and presented by the claimant and Ms Thomas. For reasons explained above, the Tribunal found Ms Kosianska's evidence to be persuasive and accepts her evidence in this respect.

56. Ms Thomas' evidence broadly supported the claimant's evidence. Ms Thomas did not give evidence that she had seen Mr Vincent reprimanding the claimant. However, she did give evidence about occasions when herself and other colleagues were speaking Spanish in the staff room and had been told not to do so. Her statement describes this as occurring *"on several occasions"* and she says that staff were banned from speaking Spanish in the hotel. As explained above, there is a very limited time frame during which Ms Thomas worked with Mr Vincent (as General Manager) in the hotel. For the reasons given the Tribunal does not give any weight to Ms Thomas' evidence on this issue.

57. The Tribunal noted that whilst Mr Martinez Corrales made various allegations in his statement, he gave no evidence of any conversations with him about language in the workplace. The Tribunal therefore find that this supports the respondent's case, because had conversations taken place with Mr Martinez Corrales about him speaking Spanish he undoubtedly would have included them in his statement.

58. In his submissions the claimant emphasised that this was a rule which he said applied to Spanish people, Polish people and French people, it was not something which was imposed upon him due to his race and/or upon Polish speakers or people who were Polish in particular.

59. The Tribunal prefers the evidence in relation to this issue of Mr Vincent and Ms Kosianska and does not find that staff were told that they needed to speak English in the staff room or in any area of the hotel which was not a client area. In his evidence Mr Vincent accepted that it was common in the industry to expect team members to converse where they could in English in client areas. However, he accepted that there were some circumstances where it was not possible and his focus was on getting the job done, that was not seen as an issue. The Tribunal accepts his evidence. Even though the respondent and Mr Vincent had a preference for English being spoken in client areas, it was accepted that there would be circumstances when staff would speak in a language other than English. Ms Kosianska's evidence appears to support the fact that staff did converse in their own language even in staff areas. Mr Vincent's evidence was, *"There was no rule. It was never something which overly worried me, it was only a problem if it was felt a problem in front of guests".*

Resignation

60. The claimant resigned from his employment after he had obtained alternative employment. He had already left the accommodation provided by the respondent by the start of November. On 8 November 2017 he resigned by letter stating that he would leave on 20 November 2017 (98), accordingly giving less than the contractually required period of notice. The first resignation letter, addressed to Mr Vincent, stated *"Thank you for all your help".* The claimant subsequently agreed to work until 25 November 2017 and also provided a revised letter of resignation (99). He started a new job very shortly after leaving the respondent. It was accepted in evidence that he had been offered the job before resigning. He was paid for his new role on 11 December 2017.

61. Shortly after leaving, the claimant raised a letter of complaint on 17 January 2018 (111). That letter led with the issue of tips and non-payment of sick pay Ms Szuch-Tomys for an injury. The letter contained some reference to not being allowed to speak Polish during breaks, but it is notably point 4 of 11 in the letter.

62. The respondent's People Adviser responded to the claimant in a letter dated 13 February 2018 (116): confirming that the payments for tips had been made in December 2017; providing an explanation of the respondent's practice in relation to language which applied to guest areas only; and explaining that the claimant had informed Mr Vincent when he left that the reasons for him leaving work were that the job had got harder (listing coffee machines to clean, bath robes and the stress caused by the need to clean these in a domestic washing machine).

63. The issue regarding the claimant's use of the respondent's company vehicle was not something which was relevant to the Tribunal's decision nor did it need to be taken into account. Similarly, the issues relating to the claimant's departure and what happened on his last day were also not considered to be relevant. The Tribunal acknowledges that the respondent clearly had a significant staff turnover in the period in question, but that is also not a relevant factor in the decision reached by the Tribunal.

The Law

Discrimination

64. The claimant claims direct discrimination because of the protected characteristic of race. He relies upon his nationality, that is he says he was discriminated against because he was Polish. No actual comparators were identified by the claimant, and accordingly his claim must be considered based upon a hypothetical comparator.

65. Section 13 of the Equality Act 2010 provides that:

> **"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."**

66. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur, which includes the employer subjecting the employee to any other detriment.

67. In this case, the respondent will have subjected the claimant to direct discrimination if, because of his race, it treated him less favourably than it treated or would have treated others. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case.

68. Section 212 of the Equality Act 2010 provides that:

> "**detriment does not…include conduct which amounts to harassment"**

69. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

70. In short, a two-stage approach is envisaged:

i. at the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that he has been treated less favourably than his hypothetical comparator and that there is a difference of race between them; there must be some more.

ii. The second stage is reached where a claimant has succeeded in making out a prima facie case. In that event, there is a reversal of the burden of proof: it shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

71. In **Shamoon v Chief Constable of the RUC [2003] IRLR 285** the House of Lords said the following:

> **"Employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as [he] was, and after postponing the less favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason?"**

72. In **Johal v Commission for Equality and Human Rights UKEAT/0541/09** the EAT summarised the question as follows:

> **"Thus, the critical question we think in the present case is the reason why posed by Lord Nicholls: "Why was the claimant treated in the manner complained of?""**

73. Following **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867**, in order for the burden of proof to shift in a case of direct race discrimination it is not enough for a claimant to show that there is a difference in race and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation. In **Madarassy v Nomura International PLC [2007] ICR 867** Mummery LJ said:

> **"The court in *Igen v Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.**

> **'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it…The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."**

Harassment

74. The claimant alleges harassment on the grounds of race.

75. Section 26(1) of the Equality Act 2010 says:

> **"A person (A) harasses another (B) if – (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of – (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."**
>
> **"In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account – (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."**

76. The EAT in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for him; (c) on the prohibited grounds (here of race). Although many cases will involve considerable overlap between the three elements, the EAT held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

77. The alternative bases in element (b) of purpose or effect must be respected so that, for example, a respondent can be liable for effects, even if they were not its purpose (and vice versa).

78. In each case even if the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the claimant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element.

79. In ***Nazir and Aslam v Asim and Nottinghamshire Black Partnership [2010] ICR 1225***, the EAT gave particular emphasis to the last element of the

question, i.e. whether the conduct related to one of the prohibited grounds. HHJ Richardson said:

> **"And finally, was the conduct "on the grounds" of her race and sex, as she alleged? We wish to emphasise this last question. The provisions to which we have referred find their place in legislation concerned with equality. It is not the purpose of such legislation to address all forms of bullying or anti-social behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law – such as a person's race and gender. In our judgment, when a Tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of sex or race, it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of sex or race. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of sex or race. The Tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed."**

Indirect discrimination

80. Indirect discrimination is prohibited by section 19 of the Equality Act 2010 which reads as follows:

> **"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic;**
>
> **(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;**
>
> **(c) It puts, or would put, B at that disadvantage; and**
>
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**"

81. In **MacCulloch v ICI [2008] IRLR 846** the EAT set out the following legal principles with regard to justification:

> **"(1) The burden of proof is on the respondent to establish justification: see *Starmer v British Airways [2005]IRLR 862* at [31].**

> **(2) The classic test was set out in *Bilka-Kaufhaus GmbH v Weber Von Hartz* (case 170/84) *[1984] IRLR 317* in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see *Rainey v Greater Glasgow Health Board* (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.**
>
> **(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].**
>
> **(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: *Hardys & Hansons plc v Lax [2005] IRLR 726, CA*."**

82. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. The more serious the disparate adverse impact on a protected group, the more cogent must be the justification for it.

Language restrictions

83. The Equality and Human Rights Commission Code of Practice on Employment has a section on language in the workplace, to which the Tribunal has had regard. That provides (at 17.47-17.49):

> "**An employer might also wish to impose a requirement on workers to communicate in a common language – generally English. There is a clear business interest in having a common language in the workplace, to avoid misunderstandings, whether legal, financial or in relation to health and safety. It is also conducive to good working relations to avoid excluding workers from conversations that might concern them. However, employers should make sure that any requirement involving the use of a particular language during or outside working hours, for example during work breaks, does not amount to unlawful discrimination. Blanket rules involving the use of a particular language may not be objectively justifiable as a proportionate means of achieving a legitimate aim. An employer who prohibits workers from talking casually to each other in a language they do not share with all colleagues, or uses occasions when this happens to trigger disciplinary or capability procedures or to impede workers' career progress, may be considered to be acting disproportionately. English is generally the**

> **language of business in Britain and is likely to be the preferred means of communication in most workplaces, unless other languages are required for specific business reasons. There may be some circumstances where using a different language might be more practical for a line manager dealing with a particular group of workers with limited English language skills.**"

84. In their submissions neither party made reference to any authority (save for the respondent mentioning **Igen v Wong**) and no case law was relied upon. The Tribunal has however noted two EAT authorities on the issue of instructions not to speak a particular language in the workplace: **Dziedziak v Future Electronics Ltd UKEAT/0270/11**; and **Kelly v Covance Laboratories Limited UKEAT/0186/15.** An instruction not to speak a particular language when at work can give rise to a direct discrimination or harassment claim. However, for a direct discrimination claim the Tribunal needs to identify a hypothetical comparator in the same circumstances as the claimant. For harassment, the Tribunal needs to determine whether any such instruction was related to the person's race. In the **Kelly** case Eady HHJ said (with reference to **Dziedziak**):

> "**An instruction to only speak a particular language in the workplace might generally amount to a provision, criterion or practice of apparently neutral application, potentially giving rise to issues of indirect rather than direct race discrimination. Where, however, the instruction is linked to the employee's race or national origins, that may give rise to less favourable treatment because of something intrinsically linked with their nationality, thus giving rise to a potential case of direct race discrimination (see Dziedziak)"**

Unfair dismissal

85. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. Section 95(1)(c) provides that an employee is dismissed by his employer if:

> **"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

86. The principles behind such a constructive dismissal were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] ICR 221**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

87. Lord Denning said in that case (at 226B):

> "**the conduct must … be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the**

> **conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded to have elected to affirm the contract.**"

88. One term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

89. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

90. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

91. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust.

92. If an individual delays to long in resigning, they will have affirmed the contract and waived the breach. In **W. E. Cox Toner (International) Ltd v Crook [1981] ICR 823** Browne-Wilkinson LJ in his Judgment emphasised that continued performance of the employment contract is evidence of affirmation. He summarised the position by saying:

> "**there must be some limit to the length of time during which an employee can continue to be employed and receive his salary at the same time as keeping open his right to say that the employer has repudiated the contract under which he is being paid**"

The Submissions

93. In considering its decision the Tribunal took into account the submissions made by each of the parties and all matters referred to within them, without reproducing them here.

Discussion and decision

94. The Tribunal first considered the claimant's discrimination claims before moving on to his claims for constructive unfair dismissal.

Direct discrimination

95. In relation to the matters complained of (see paragraph 5) the Tribunal finds that:

(1) As explained above, the Tribunal did not find that Mr Vincent denied the claimant the right to speak Polish when not on duty and not in the presence of guests;

(2) The Tribunal did not find that Mr Vincent unduly pressured the claimant into signing a new contract, albeit that more than one request was made (with the contract being amended before being signed);

(3) The reason for the claimant not being paid tips in November was a clerical error and in any event was not Mr Vincent but Mr Wood;

(4) The Tribunal did not find that Mr Vincent ignored the claimant in the workplace, nor was this in fact put to Mr Vincent;

(5) The Tribunal did not find that Mr Vincent refused to attend meetings with the claimant;

(6) The Tribunal also did not find that Mr Vincent responded aggressively when the claimant repeated a request for such meetings, on the basis that such a repeated request was not made but, in any event, there was no aggressive response;

(7) The Tribunal did not find that Mr Vincent instructed the claimant aggressively and abusively not to speak other than English, as alleged; and

(8) As explained in more detail in relation to the constructive unfair dismissal claim below, the claimant was not dismissed.

96. As a result, the Tribunal does not find that the claimant was treated in the manner alleged as part of his direct discrimination complaint.

97. In any event, in respect of the claimant's claim in relation to language, in submissions the claimant accepted that this was a requirement which he was alleging applied to all irrespective of their race. The Tribunal found no evidence that the reason for any policy being applied (whether to the claimant or otherwise) was because of the claimant's race. Even had the Tribunal concluded that Mr Vincent spoke to the claimant in the way suggested and/or alleged, the claimant did not evidence that this was direct discrimination because of his race.

98. The Tribunal has taken into account the burden of proof, albeit in fact it has taken the approach outlined in **Shamoon** and **Johal** (see paragraphs 71 and 72). In the light of the Tribunal's findings, the Tribunal did not identify the "something more"

required to shift the burden of proof. The Tribunal's finding is that the claimant was not less favourably treated and that, even if he had been, the reason for such treatment was not the claimant's race (as was the case, for example, with the requests to sign the new contract).

99. In relation to the tips, the claimant himself provided no evidence of why he believed these were on the grounds of race, indeed it was not even clear that he himself did so. The Tribunal does not find that there was any connection between the claimant's race and the respondent's payment of tips (or delay in paying).

100. With regard to the signing of the new contract, the claimant's concerns were shared by other employees. The new contract and the approach taken was consistent for all employees. Any pressure applied to sign the new contract was not because of the claimant's race.

Harassment

101. With regard to the allegations of harassment on the grounds of race, the Tribunal also finds that the allegations were not made out, and repeats the same findings as explained at paragraph 95 above. In any event, and in particular in relation to the allegation at paragraph 7(a)(ii), what occurred was not on the grounds of race – all employees were treated in the same way. As the claimant's harassment complaints do not succeed for these reasons, the Tribunal did not need to consider the elements of the test outlined at paragraphs 7(b) and 7(c) above.

Indirect discrimination

102. The Tribunal carefully considered the claimant's indirect race discrimination allegation. As evidenced by Mr Vincent in his own witness statement, the respondent did have a practice of encouraging all employees to use English in public facing parts of the hotel. As confirmed in the findings, that was a practice which was expressed as a preference and softly applied, limited to guest areas. The Tribunal finds that this was not applied in the staff room.

103. The Tribunal does find that such a practice put those for whom English is not their first language at a disadvantage when compared to others, because they may be better able to communicate with other people in their own language, where English is not their first language. Whilst identifying this, the Tribunal does emphasise the finding of fact made above, which is that it is found that some of the respondent's employees did communicate in their own language in any event.

104. The claimant submitted that he was put at a disadvantage. The respondent submitted that the claimant's use of good English language in the Tribunal hearing demonstrated that he was not personally put at a disadvantage by any such practice. In his submissions the claimant referred to the fact that the events were three years ago and his English has since improved. The Tribunal accepts that the claimant was put at a disadvantage, by the practice identified, when he wished to communicate with other Polish speaking employees.

105. When questioned, the claimant himself accepted that guests having a good experience and receiving a good service at the hotel was a legitimate aim, and the Tribunal agrees that it is a legitimate aim.

106. In considering the proportionality of the respondent's approach to achieving this legitimate aim, the Tribunal has in particular taken into account the EHRC guidance cited above which notably acknowledges the potential benefits of having a requirement on workers to communicate in a common language. The Tribunal finds that the respondent's approach, and that of Mr Vincent, was a proportionate means of achieving a legitimate aim. That finding on proportionality is on the basis of the findings of fact above about how the policy was applied and the approach the respondent operated. It also takes account of the fact that the Tribunal finds that the approach was not to stop the use of languages other than English in the staff room. The Tribunal would add that, had it found that the respondent banned the use of languages other than English in the staff room (that is part of the workplace but in a non-client facing area), that would not have been found to have been a proportionate means of achieving a legitimate aim.

107. As the practice found to have been adopted by the respondent, that is of encouraging all employees to use English in public facing parts of the hotel, has been found to be a proportionate means of achieving a legitimate aim, the claimant does not succeed in his claim of indirect race discrimination.

Constructive unfair dismissal

108. The Tribunal finds the following:

(1) As recorded above, there was no rule that the claimant needed to speak English in areas which were not guest areas;

(2) The claimant was not pressured to sign the contract of employment;

(3) The claimant did not resign in response to non-payment of tips as he did not know about it at the time of his resignation (which he confirmed in his own evidence); and

(4) Mr Vincent did not ignore the claimant, refused him meetings or responded aggressively as alleged.

109. As a result, the Tribunal does not find that the claimant's contract was fundamentally breached. The Tribunal does not find that the respondent conducted itself in any way which breached the implied term of trust and confidence.

110. The Tribunal also notes (based upon the findings made) that the claimant did not raise any of these matters in complaints with his line manager, nor did he raise a grievance. This both suggests that any issues were not so serious as to amount to a fundamental breach and, even if they were, the respondent was provided with no opportunity to remedy any issues identified.

111. Even had the Tribunal found that any pressure applied relating to the new contract was a fundamental breach (which is not what was found) the Tribunal would also have found that the claimant in any event waived any such breach of contract by signing the new contract and/or thereafter in delaying in resigning. The new contract of employment was signed in August, when the claimant accepted the terms (as amended), and the claimant only resigned on 6 November 2017. For the other alleged breaches as the Tribunal has not found a fundamental breach, it is not

possible to determine whether the claimant would have waived any such breach, however the Tribunal does find that there was some significant delay (which might have amounted to a waiver of the breach) between the claimant deciding that he was leaving employment and doing so - the claimant sought to find new accommodation, moved out of the accommodation provided by the respondent, and found a new job, before resigning.

112. The claimant's constructive dismissal claim cannot succeed unless a fundamental breach is established. The Tribunal has considered why the claimant in fact resigned, but does not need to determine why he did so. There is inconsistent evidence in this respect. The claimant's witness statement says that the primary issue was in relation to language. The conversation between the claimant and Mr Vincent, immediately following his resignation, suggests that the resignation was due to workload and in particular the issues arising from the respondent's moves to change from a three to four star hotel. The complaint sent following the claimant's resignation and the order in which complaints are raised in it, suggest that the language issue was not the primary issue which the claimant was concerned about. The claimant did not resign in response to a fundamental breach of contract.

Conclusions

113. For the reasons outlined above, the claimant's claims for constructive unfair dismissal, race discrimination and harassment on the grounds of race, are not successful.

Employment Judge Phil Allen
16 October 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
23 October 2020

FOR THE TRIBUNAL OFFICE