EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS: **Mr G Bishop**
Ms N Sandler

CLAIMANT	**RESPONDENTS**
Ms A de Paula	**Kuritake Japanese Restaurant Limited (1)** **Eric Nimalan (2)** **Ian Brinham(3)** **Regi Johnpillai(4)** **Kurumaya Japanese Restaurants Ltd (5)**

ON: **6th and 7th July 2021 by CVP**

Appearances

For the Claimant: **Mr B Jones , counsel**
For the Respondent: **Mr P Stanislas, counsel**

RESERVED JUDGMENT

The Judgment of the Tribunal is that the Claimant was not employed on like work to that of Mr Xistoli.

REASONS

1. The Claimant, Ms A De Paula, worked for the First Respondent 2007 - 2018 (with a break of about 18 months when she returned to Brazil in 2012-2013). The Tribunal heard her claims of harassment related to sex, harassment related to race, and victimisation from 26 October – 4 November 2020. Although that hearing had been listed to deal with all aspects of the Claimant's claim (including equal pay), there was

insufficient time to deal with the equal pay elements of her claim during the first hearing. This hearing was listed to deal with the Claimant's equal pay claim.

2. The Claimant claims that she was employed on the same or broadly similar work to that of Maxsuel Xistoli within the meaning of section 65 (2) of the Equality Act 2010. (The Claimant's claim that she was also employed on the same or broadly similar work to that of Jonathan Bucad was withdrawn.) The Respondent's case is that the Claimant's work and that of Mr Xistoli was not the same or broadly similar. They did not rely on any material factor defence.

3. The Tribunal heard evidence from the Claimant, and on behalf of the Respondent from Mr Xistoli, and Mr Nimalan, a director of the First Respondent. The tribunal was assisted by a Portuguese interpreter to assist both the Claimant and Mr Xistoli, when giving evidence. The tribunal was also assisted by a Tamil interpreter in respect of the evidence of Mr Nimalan.

4. The witness statements prepared by the parties prior to the earlier hearing dealt very briefly with the equal pay issue and we allowed in supplemental witness statements provided by Mr Nimalan and Mr Xistoli as well as allowing additional questions in chief . We had the bundle which had been prepared for the previous hearing, but the reality was there was little or no documentary evidence to assist us in determining the question of whether the Claimant was employed on like work to that of Mr Xistoli.

Relevant law

5. Section 66 of the Equality Act 2010 provides that a sex equality clause is to be implied into every contract of employment. Section 66 applies where a person is employed on work that is equal to the work of her comparator. Section 65(1) of the Equality Act provides that "A's work is equal to that of B if it is "like work". Like work is defined in section 65 (2) as follows:

> (2) A's work is like B's work if—
>
> (a) A's work and B's work are the same or broadly similar, and
>
> (b) such differences as there are between their work are not of practical importance in relation to the terms of their work.
>
> (3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to—
>
> (a) the frequency with which differences between their work occur in practice, and
>
> (b) the nature and extent of the differences.

6. Employment tribunals are required to look at subsections (2)(a) and (b) separately when deciding whether a woman is employed on "like work" with a man (or vice versa). These questions must be considered sequentially. The first question is whether the Claimant and her

comparator are employed on work that is the same or broadly similar. Only if that question is answered in the affirmative does the Tribunal go on to consider the second question as to whether any differences are of practical importance. It is for the Claimant to prove that she does the same work or work of a similar nature to the comparator, but the evidential burden of showing differences of practical importance rests on the employer (Shields v E Coomes (Holdings) Ltd 1978 ICR 1159).

7. It is not necessary for the Claimant's job and that of her comparator to be identical; the work only needs to be broadly similar. The correct approach involves a general consideration of both the work done by the Claimant and the work done by her comparator and the knowledge and skill required to do it. It is not for the tribunal "to get involved in fiddling detail or pernickety examination of differences which, when set against the broad picture, fade into insignificance" (Dance v Dorothy Perkins Ltd 1978 ICR 760.)

Relevant facts

8. The Claimant joined the staff at the Respondent as a kitchen porter in 2007. As kitchen porter the Claimant said that her primary tasks were to cook sushi rice, chop meat, steam gyozas, keep the kitchen clean and do the washing up. In her witness statement she says she was promoted to chef in 2010. A brief contract of employment (dated 2011), and drawn up to help her with housing, which is signed by the Claimant records her position simply as "chef".

9. At the First Respondent the chefs were categorised as different types in an informal hierarchy. There were Sushi chefs at the top, who worked at the sushi stations. In the downstairs kitchen there was a Head chef, a second chef , and 2 other chefs . These were not referred to as "junior chefs" (as set out in Mr Nimalan and Mr Xistoli's statements), but there was generally a chef who was designated the "Tempura chef" and one as the "grill chef". All staff at the First Respondent understood that from about 2013 the Claimant was employed as the "Tempura chef".

10. The Claimant worked a regular shift from 7a.m.-14.30, Mondays to Fridays. In 2014 she volunteered to work, in addition, 2 evenings a week from 18.00 to 22.00, for which she was paid cash in hand.

11. As we set out in our earlier judgment, the restaurant engaged some sushi chefs working at the sushi counters in the body of the restaurant and additional chefs in the kitchen downstairs. The daytime shift was busier than the evening shift.

12. For the daytime shift there were generally 4 chefs and a kitchen porter working in the downstairs kitchen. There was the head chef, who at the relevant time was Mr Alappu, Mr Xistoli, who was described as the second chef, the Claimant who was described as the Tempura chef and Mr Bucad who was generally described as the grill chef.

13. During the day the Claimant worked from the tempura station. The work she undertook was

    a. To make the tempura batter
    b. To prepare the sauce for the softshell crab
    c. To prepare the vegetables, fish and shellfish for the tempura dishes
    d. To fry the tempura and soft shell crab
    e. To fry chicken and pork for the katzus
    f. To grill the gyozos for the takeaways
    g. To add Tempura dishes and spinach to Bento boxes
    h. To help in preparing the Teriyaki dishes by cutting the chicken, adding the sauce to the chicken and putting the rice in a bowl
    i. To make the desserts – fruit salad, chocolate mousse and crème caramel
    j. To check the presentation of the hot food being served as it left the kitchen
    k. To do any other tasks assigned to her under the direction of the head chef.

14. If Mr Xistoli was away, on holiday or otherwise, then the Claimant provided cover and would undertake all the jobs that Mr Xistoli was required to do as set out below . We do not accept the contention of the Respondent that the Claimant was not sufficiently competent to carry out those tasks .

15. From about 2014 the Claimant began to work two evening shifts a week. It was common ground that the restaurant was less busy in the evening. It was the Claimant's case that she frequently worked alone in the downstairs kitchen, with only the assistance of a kitchen porter. The Respondent's case is that there were always two chefs working in the kitchen in the evening (as well as a kitchen porter) as it was not possible to service the customers with only one chef. On balance, we find that for the most part there would be two chefs in the kitchen in the evening but on occasions there might only be one chef and a kitchen porter.

16. If the Claimant was working on her own in the kitchen in the evening, she would prepare all the dishes on the menu. We accept that she had been taught these dishes by the Head Chef. If there were two chefs working in the kitchen in the evening then the two chefs would divide up the work between them. In the evening the Claimant was not solely working at her tempura station as she was in the morning, but was sharing all the work with the other chef.

17. Mr Xistoli was first employed by the Respondent as a kitchen porter in 2005. He worked as a kitchen porter for 3 years until 2008 when he became the Tempura Chef. Subsequently he worked as the grill chef, and then in or around 2011 became the Second Chef, behind the Head Chef Mr Alappu.

18. The Head chef and the Second Chef, Mr Xistoli, were not based at a particular station but moved around the kitchen. Mr Xistoli's role was to cook the different hot dishes and to make the sauces. He would make teriyaki sauce, ginger sauce, ouda sauce, chicken ramen sauce, and donburi sauce. The Tribunal had a copy of the menu from the Respondent which provided an extensive menu. Excluding the sushi, sashimi and Maki dishes, he and the Head Chef prepared the robata dishes, à la carte dishes, Teppanyaki dishes, Bento boxes and Domburi. The Claimant would not do this unless she was providing cover, when Mr Xistoli was away.

19. Mr Xistoli also worked in the evenings. He had reduced the number of evenings which he worked over time, but the evidence as to how many evenings he worked and over which periods was very unclear. In any event the tribunal accepts that the Claimant sometimes worked on her own in the kitchen in the evenings and sometimes worked with another chef. When two chefs worked together in the evening they would divide the tasks between them, using sauces that had been prepared in the morning.

Submissions

For the Respondent, Mr Stanislas submitted that the Claimant was not a clear or credible witness. It was not credible that in the evenings she would work on her own or that she would make all the dishes or prepare the sauces. He submitted that she was neither experienced nor competent enough to create the dishes that Mr Xistoli was able to create. There was a clear difference between her role as tempura chef and Mr Xistoli's role as the second chef in that his work was to create much more elaborate, substantial and varied dishes.

20. For the Claimant, Mr Jones submitted that in the mornings the Claimant's work was the same or broadly similar to Mr Xistoli's work. In the evening the Tribunal should accept the Claimant's evidence that she worked often on her own doing all the dishes that were on the menu. The Tribunal should not descend into the minutiae of the job, but look at the broad overall picture as there were always bound to be some differences between jobs. He submitted that the evidence of Mr Xistoli was unreliable and that it was not the case that he was the only one to do the full range of dishes.

Conclusions

21. We find that the Respondent operated hierarchy amongst those working at the restaurant. Many individuals who began working at the restaurant began as a porter. This is how the Claimant, her husband and Mr Xistoli had begun their employment. The kitchen porter undertook some basic food preparation. The tempura chef and the grill chef were based at a fixed point in the kitchen and undertook limited tasks. Progression within the restaurant was generally from kitchen porter, to grill or tempura chef and then to second chef and then to head chef. This progression reflected the

perception of those running the restaurant that the tasks of the second chef and the head chef required more skill and experience than the tasks of the other chefs.

22. The issue for the Tribunal was whether (whatever the perception of those running the restaurant) the Claimant's work was the same or broadly similar to that of Mr Xistoli. This does not mean that the Claimant had to show that the tasks she undertook were the same as those of Mr Xistoli, but she had to show that the work she did was broadly similar, particularly in terms of the knowledge and skill required to do it.

23. The tasks the Claimant undertook in the morning have been outlined above. Mr Xistoli's tasks encompassed all the tasks that the Claimant and the grill chef did not do. We accept that the knowledge and skill required to make the sauces and to cook the variety of dishes on the Respondents menu (excluding the sushi dishes) was greater than the knowledge and skill required to undertake the tasks allocated to the Claimant in the mornings; and that many of the dishes that Mr Xistoli prepared required more elaborate preparation than was required for the tasks that the Claimant undertook. The Claimant accepted in cross examination that Mr Xistoli had a higher position than her in the restaurant, both as regards experience and responsibility. We find that the hierarchy within the Respondents kitchen fairly reflected the knowledge and skills required for each job.

24. It was accepted that when Mr Xistoli was away the Claimant would cover for him. She had the skill and knowledge to undertake the tasks that Mr Xistoli undertook when required, and she did so when required to cover, but the main part of her work did not require those skills or knowledge.

25. In the evenings, however, the Claimant's tasks were broadly similar to those of Mr Xistoli and Mr Alappu. Mr Xistoli said that in the evenings if it was not busy the Claimant would do the tempura and he would work in the kitchen, but that if it was very busy then she would also assist with the other hot food. We accept that occasionally in the evenings she might be the only chef in the kitchen, and would therefore prepare all the hot food, and that even if there were two chefs, the work that they did in the evening was largely interchangeable.

26. In comparing the Claimant's job with Mr Xistoli's work the tribunal is required to take into account the whole job. We must look at what she did overall looking at both the mornings and the evenings. The major part of the Claimant's work was in the mornings and, taking a broad and pragmatic approach, we find that her work was not broadly similar to the work of Mr Xistoli, as it required less skill or experience than his work.

27. Having arrived at that conclusion it was not strictly necessary to consider whether or not any differences between Mr Xistoli's work and that of the Claimant were of practical importance in relation to the terms and conditions of employment. However, we would add that even if the work of

the Claimant and Mr Xistoli could be said to be broadly similar, the difference in skill required to undertake the work of Mr Xistoli compared to the work of the Claimant would amount to a difference of practical importance (within the terms of section 65(2)(b), such that her work would not be like work with Mr Xistoli's. In Capper Pass Limited v Allan 1980 ICR 194 the EAT found that if there are differences between jobs that justify differences in grading, those differences would prevent the two jobs from being regarded as like work. We consider that the difference in the skill set required to do the two jobs would, in a bigger more organised kitchen, justify a difference in grading such that the two jobs could not be considered to be like work for the purposes of the equal pay provisions.

28. The claim for like work is dismissed.

Employment Judge Spencer
7th July 2021
(reissued with a certificate of correction on 22 July 2019)

JUDGMENT SENT TO THE PARTIES ON

22/07/2021.

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FOR THE TRIBUNAL OFFICE