EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107995/2020 (V)

Held on 19, 20, 21 and 22 July 2021
(By Cloud Video Platform)

Employment Judge: A Jones
Tribunal Members: Mr A Grant
Mrs E Farrell

Mr V Kodra	**Claimant** **Represented by:** **Mr W McParland – Solicitor**
La Vita (Gordon Street) Limited	**First Respondent** **Represented by:** **Mr M O'Carroll – Counsel** **Instructed by:** **Rradar, Solicitors**
Marco Mario Arcari	**Second Respondent** **Represented by:** **Mr M O'Carroll – Counsel** **Instructed by:** **Rradar, Solicitors**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the unanimous judgment of the Tribunal that:

1. The claimant was wrongfully dismissed by the first respondent and is entitled to compensation of a week's notice pay of £528.77

2. The first respondent unlawfully deducted statutory sick pay to which the claimant was entitled and the first respondent is ordered to pay to the claimant the sum of £137.64.

3. The claimant was subject to harassment on the ground of his race by Mr Robbie Syme, the first respondent is vicariously liable for those actions and is ordered to pay to the claimant the sum of £5000 as injury to feelings and £343.20 in accrued interest.

4. The claimant was not subjected to harassment on the ground of his race by the second respondent.

5. The claimant was automatically unfairly dismissed by the first respondent for having made a protected disclosure and the first respondent is ordered to pay to the claimant compensation for loss of earnings of £4,916.94.

REASONS

Introduction

1. The claimant brought claims of race discrimination, automatically unfair dismissal for having made a protected disclosure, victimisation, harassment on the grounds of race, breach of contract and unlawful deduction from wages. The claims were resisted. A preliminary hearing for the purposes of case management took place in this case on 3rd March 2021 and various orders were made thereafter.

Preliminary matters

2. The claim was initially raised against four respondents as the claimant indicated that he was not sure of the correct identity of his employer. At the commencement of the hearing the claimant withdrew his claim against La Vita (Scotland) Limited and La Vita West End Limited, having determined that his employer during the relevant period was La Vita Gordon Street Limited. The claim also proceeded against Mr Arcari who is the owner and director of the first respondent.

3. Prior to the commencement of evidence in the case, the claimant withdrew his claims under sections 13 and 27 of the Equality Act against the respondents and also withdrew part of his claim of unlawful deduction from wages relating to the alleged non-payment of wages of £350 and payment for the last day of his employment on 6 October. The claimant also accepted that he had been paid all outstanding holiday pay although that payment was not made until three months after the termination of the claimant's employment.

4. An interpreter was present during the proceedings until the conclusion of claimant's evidence to interpret from and into Greek which is the claimant's first language. The claimant indicated that he did not require the interpreter's services in relation to the evidence of the respondent's witnesses.

5. Orders in respect of written witness statements had been made in this case. Written witness statements were exchanged by the parties on 8th July. Shortly before close of business on 16th July (the last working day before the hearing was due to commence), an application was received by the Tribunal from the respondents' agents requesting that the Tribunal should determine that the claimant's written witness statement should be inadmissible. It was said that this statement was in fact a precognition and was inadmissible by virtue of section 2(1) (b) of the Civil Evidence (Scotland) Act 1988. It was said that the statement must have been produced following a set of leading questions from the claimant's solicitor. A written submission was made on behalf of the claimant in response to the application and set out the basis for objection to the granting of the application.

6. The Tribunal heard argument from both parties on the respondent's preliminary application on the morning of 19th July.

7. Counsel for the respondents was asked to set out what practical course of action he envisaged if his application was successful. It was said that one of the options outlined by the claimant's solicitor in his submission, that the claimant's evidence should be taken orally, would be the most logical course of action. The claimant's solicitor had indicated that if this course of action

was followed, then he would require an adjournment to prepare for the change in the procedure which had been ordered by the Tribunal and envisaged by him. Counsel for the respondents indicated that if any adjournment was required then there would be consequences in terms of an expenses application by the respondents and that no adjournment ought to be necessary.

8. The Tribunal adjourned to consider the various arguments. The Tribunal reconvened and explained that during the adjournment the Tribunal had discussed the respondents' application, the claimant's objection and suggested alternative courses of action. The Tribunal had regard in particular to Rule 41 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1. The Tribunal was also mindful that the claimant's statement had been produced following an order of the Tribunal and that the application was being made more than a week after the statements had been exchanged and shortly before close of business on the last working day before the hearing. Counsel for the respondents' position was that there had been no need to make the application any earlier and he could simply have made the application on the morning of the hearing.

9. Having considered matters, the Tribunal was of the view that if the respondents' application was to succeed, it would be in keeping with the overriding objective for the evidence of all witnesses to be taken orally and for the Tribunal order for the production of witness statements to be varied to that effect.

10. The Tribunal's view was communicated to parties who were asked for their comment. Counsel for the respondents indicated that if that was the view of the Tribunal then, subject to the caveat expressed on behalf of the claimant that his witness statement was not a full verbatim account of the claimant's evidence, the application would be withdrawn and the hearing should proceed on the basis of the use of written witness statements.

11. Prior to the commencement of hearing of evidence, the claimant's solicitor sought clarification of the respondent's position on the claimant's remaining

claim of unlawful deduction from wages. It was noted that there was no reference to this claim in the first respondent's ET3 or their witness statements. The Tribunal asked the respondents' Counsel whether in those circumstances the claims were conceded. It was said that they were not and that the position would be set out.

12. After an adjournment, it was said that the first respondent's position was that in relation to the question of unpaid sick pay, the respondent was relying on the terms of the claimant's contract that he had to produce a sickness certificate and he had not done so. It was not being suggested that the respondent had ever made the claimant aware of this requirement. The Tribunal raised the question of an amendment to the respondent's ET3 with Counsel and highlighted that this was a matter for the respondent, but that so far as the Tribunal was concerned no application to amend was before it. The Tribunal raised this issue again during the course of evidence. In the event an application to amend the first respondent's ET3 was made shortly before submissions on the last day of the hearing and after all relevant evidence had been heard. The claimant's representative did not object to the application and in those circumstances, the Tribunal allowed the amendment.

13. A joint bundle of documents was lodged by the parties and additional documents were lodged by both parties during the course of the hearing, with no objection being made by either side in that regard. The witness statements which were lodged were not signed by the witnesses but were adopted by them (in the case of Mr Arcari junior with amendments).

14. A list of issues was produced by the claimant and this was accepted by the respondents, albeit there was some amendment to the list given the claimant's withdrawal of various aspects of his claim at the commencement of the proceedings.

15. A schedule of loss was produced by the claimant and no counter schedule was lodged, and there was no cross examination on the figures included in the schedule.

Findings in fact

16. Having considered the witnesses statements, additional evidence and cross examination of the witnesses and the documents referred to, the Tribunal found the following facts to have been established:

17. The claimant is Albanian and a Greek citizen. He speaks Greek, Albanian and English, but is not fluent in English and often uses translation tools for written English.

18. The claimant has been in a relationship with Ms Shona McLaren since around April 2020, but they do not live together.

19. The first respondent is a company which operates an Italian restaurant on Gordon Street in Glasgow. It is a family run business and Mr Arcari senior and Mr Arcari junior are directors of the company. They are also directors of a number of other companies which operate in total five Italian restaurants in and around Glasgow. In total, the various companies employ around 180 staff.

20. Staff employed by the respondent come from a number of different countries, including Albania and Romania.

21. The claimant was initially employed at the Byres Road restaurant as a kitchen porter. He was employed between around March 2019 until October 2019. The claimant left his role voluntarily in October 2019 as he was of the view that he was being required to carry out too many duties. He did not have a good relationship with the chef at the restaurant.

22. On 29 November 2019, the claimant contacted Mr Arcari senior by text message “I would like to come back to work for you in la vita. I really enjoy my job there and I think I do good. But I have a problem in Byres Road. I hope maybe you need staff in one restaurant and give me a job again please?’

23. Mr Arcari senior responded to the claimant the following day ‘Call me tonight you can start tomorrow’ and ‘George Square’.

24. The claimant commenced employment at the respondent's Gordon Street restaurant on 3 December. He signed a contract of employment that day and was paid hourly on the national minimum wage. The contract made reference to an Employee Handbook, but this was not provided to the claimant and if a member of staff wished to see the handbook, they were required to ask for access to it.

25. The claimant was issued with a letter on his first day of employment indicating that "Any member of staff seen to be using a mobile phone within the restaurant during working hours will be immediately sent home and dismissed from the company. Also, payment of tips will be withheld".

26. The claimant worked full time and up to 80 hours per week. His average weekly wage was £528.77 gross and £413.30 net.

27. The claimant's contract referred to a discipline and grievance procedure. However, the respondent did not operate any formal policy or procedure in this regard and dealt with any matters which arose in an informal manner. The respondent did not ever take notes of any meetings or discussions which might be disciplinary in nature or arise from a grievance raised by an employee.

28. Mr Arcari senior tended to be responsible for kitchen staff and Mr Arcari junior was responsible for waiting and office staff, although they would both deal with staff issues which arose when they were present in a restaurant.

29. In September 2020, the claimant was involved in an altercation with the chef in the Gordon Street restaurant. The claimant was thereafter transferred to work in the respondent's Byres Road restaurant. The altercation was not the fault of the claimant and the claimant had not behaved aggressively in the altercation.

30. On 25 September 2020, the claimant was working at the respondent's Byres Road restaurant. During his shift he heard the head chef in the restaurant (who was called Robbie Syme) say 'Marco fills his fucking kitchen with fucking Africans, Albanians and Romanians.' The claimant responded by asking why

Robbie had to say that when he was present, to which Robbie responded by saying words to the effect of 'shut the fuck up and get on with your job'.

31. Later that evening on 25 September, Mr Arcari senior telephoned the claimant. Mr Arcari had been informed of the incident between the claimant and the chef (Mr Syme) and took the view that this was the fault of the claimant. The claimant was accused of starting fights and told by Mr Arcari, that if he wanted to keep his job, he should not be starting fights.

32. The following day on 26 September, the claimant did not feel well. However, as a result of what had been said to him by Mr Arcari the previous evening, he felt obliged to attend work.

33. The claimant's temperature was checked a number of times after the claimant arrived for work and the claimant continued to feel unwell. The claimant was then sent home and the first respondent arranged for the claimant to attend for a COVID test that day.

34. The claimant was subsequently advised that he had tested positive for the COVID. He forwarded a copy of the text he received confirming his positive test result to Mr Arcari senior. He remained off work between 26 September and 6 October. He was contacted on a number of occasions during that period by Mr Arcari senior who at no time informed him that in order to be eligible for sick pay, he would have to obtain a certificate from his GP.

35. The claimant returned to work on 6th October. He was concerned that staff on the previous shift had not taken items out of the freezer to assist him in his food preparation for the day. The claimant raised his concern with the chef and asked for direction. Mr Syme, the chef responded with words to the effect of 'Do your fucking job, shut the fuck up and get on with it.' An argument developed between the claimant and Mr Syme and Mr Syme sought to persuade the claimant to go outside with him for a physical fight. Mr Syme was the aggressor in the incident. The incident was in a place which was covered by a CCTV camera.

36. The claimant then phoned his partner Ms McLaren to tell her what had happened and ask for her advice. She advised him to speak to the duty manager and phone the police if necessary. The claimant advised the duty manager Mr Varol that Robbie had been trying to have a fight with him.

37. The claimant returned to the kitchen and a further argument developed during which Mr Syme shouted at the claimant 'fucking Albanian' and 'Albanians are fucking trouble.' Mr Syme then lunged at the claimant and grabbed him by the throat. As a result of this attack, the claimant sustained a scratch to his neck which was seen by Mr Varol.

38. When the incident was over the claimant again called his partner and she advised him to call the police.

39. The claimant went upstairs to the restaurant and informed Mr Varol what had happened and said that he had been subject to a racist attack. The claimant said that he wished to call the police and asked Mr Varol to call the police.

40. Mr Varol then telephoned both Mr Arcari senior and junior and told them that the claimant had told him he had been subject to a racist attack by Mr Syme and that the claimant was asking that the police be called. Mr Arcari junior arrived at the restaurant shortly thereafter and sat with the claimant who told him what had happened. Mr Arcari junior behaved in a sympathetic manner towards the claimant.

41. Mr Arcari senior then arrived in the restaurant. He was angry at the claimant whom he blamed for the incident before speaking to anyone to find out what had actually happened. Mr Arcari senior was aggressive towards the claimant and demanded that he take off his branded top and return it to him. Mr Arcari told the claimant that he was dismissed and was to leave immediately. Mr Arcari was not interested in hearing the claimant's side of the story. Mr Arcari behaved in an aggressive manner towards the claimant and was physical with him, but did not make any comments of a racist nature and did not rip a chef's jacket from the claimant.

42. The claimant was dismissed as Mr Arcari was annoyed with him that he was reporting to him that he had been racially assaulted and abused, and that he wished to involve the police in the matter.

43. The claimant was upset and distressed at how he had been treated by Mr Syme on 25 September and 6 October and the first and second respondent's failure to provide him with any support.

44. Mr Syme was subsequently dismissed by the respondent for his part in the incident on 6 October. He was not immediately dismissed because the respondents were concerned there would not be sufficient cover in the restaurant.

45. The claimant reported allegations that he had been assaulted by Mr Syme and Mr Arcari senior to the police later on 6 October.

46. The respondent had CCTV cameras in operation during the incident between the claimant and Mr Syme which, if viewed, would have shown at least some of the altercation between them. The police attended the Byres Road restaurant on 16 October to view the footage but by that stage the footage had 'dropped off'. Neither Mr Syme, nor Mr Arcari were charged with any offence arising from the events of 6 October.

47. The claimant was not paid statutory sick pay for the period of his absence when he was suffering from COVID. He was never contacted by anyone at the respondent's operations in this regard. He received the holiday pay to which he was entitled on termination of his employment on 22 January 2021.

48. The claimant obtained temporary work with Morrisons supermarket and, for a short period, another restaurant. In June 2021, he obtained employment with another restaurant from which he earns similar wages as he received when working for the respondent.

Observations on the evidence

49. The Tribunal found the claimant to be a generally credible and reliable witness. It accepted the majority of his witness statement to which he adhered

during cross examination. Although the claimant's evidence was confused in some respects, the Tribunal concluded that this was at least in part due to the difficulties of translation, in that he for a period would occasionally seek to answer a question in English or interrupt the interpreter during translation. It was clear that the claimant was very aggrieved at his treatment at the hands of the respondents and the Tribunal concluded that in some respects he had exaggerated in his own mind what had actually happened after the events. Nonetheless, the Tribunal found the claimant to be credible and reliable in relation to the key events in this case other than the allegation that Mr Arcari had used racially abusive language towards him and had ripped his jacket off him when he was dismissed.

50. The Tribunal did not accept the respondents' submission that the statement which was produced to the Tribunal was not in the claimant's own words. Although not expressed in terms by the respondent, the inference made on a number of occasions was that the statement of the claimant contained the words of the claimant's solicitor and not the claimant and was the evidence the solicitor would like the claimant to give rather than the claimant's own evidence. The Tribunal did not accept this allegation. The Tribunal accepted the claimant's evidence that the process of drafting his statement involved a number of telephone calls and emails during which the claimant used an online translating tool in order to express himself accurately. It took a number of hours for the statement to be finalised.

51. In particular the Tribunal accepted the claimant's evidence that he was not aggressive towards colleagues at work and that he left the respondent's employment initially because he no longer wished to work with a colleague who left him to carry out additional duties unaided.

52. The Tribunal found Ms McLaren to be an impressive witness who was open, honest and direct in answering questions. She made concessions at appropriate points in her evidence and remained calm even when it was put to her that she had conspired with the claimant to make allegations which would result in her and the claimant receiving financial benefit.

53. The Tribunal found the evidence of Mr Chabtane to be of limited assistance. He said in his witness statement that the claimant argued with other members of staff a lot. However, he did not give any instances of such arguments and also said that he had little to do with the claimant as he kept himself to himself. His evidence was contradictory in that respect. It was also notable that all witnesses of the respondent used similar language about the claimant, in that they all alleged (generally without evidence to substantiate the allegations) that the claimant was aggressive and would start fights. While it will often be the case that similar evidence from witnesses will result in a Tribunal making findings in fact that the evidence must be accurate, the Tribunal found the evidence of the respondent's witnesses regarding the claimant's alleged aggression entirely unreliable. Other than Mr Thomson alleging that the claimant was the instigator in the incident of 6 October, the witnesses said the claimant was aggressive but could not describe any events which substantiated this allegation. The Tribunal concluded that the respondent's witnesses were relating what they had been told by their employer rather than what they themselves had witnessed.

54. Mr Varol's evidence was similar in this respect. His witness statement said when asked to comment on what the claimant was like to work with 'I cannot comment on this as I was not working with him regularly. I did not have any problems with him personally. I do not know what he was like with other staff members, but he could be argumentative at times.' This seemed contradictory evidence and Mr Varol could not give any examples of the claimant being argumentative. The Tribunal did however find Mr Varol generally credible regarding the events of 6 October. He said that he saw a scratch on the claimant's neck and also that the claimant had told him that Robbie had been racist towards him, had assaulted him and asked him to call the police.

55. Mr Thomson's evidence was similarly contradictory and sought to paint the claimant in the worst possible light. His statement said 'Kodra argued with everyone during every single shift'. He did not give any examples other than his description of the events of 6 October. He said that he had worked around 10 shifts with the claimant.

56. It seemed to the Tribunal that had the claimant argued with everyone every shift, then the witnesses would have been able to give some specific examples of the arguments and the claimant would not have continued to be employed by the respondent. The Tribunal concluded that the respondents' witnesses sought to portray the claimant in the worst possible light by embellishing the truth and fabricating their evidence rather than simply tell the truth of what they had seen and heard. The Tribunal accepted that the kitchen of a busy restaurant was likely to be noisy and arguments would occur. The respondent's witnesses all accepted this fact. However, it concluded that the claimant did not behave in any manner different from other employees in this regard.

57. The Tribunal was also concerned that a number of the respondent's witnesses gave evidence with Mr Arcari senior (who was present during the majority of the proceedings) standing over their shoulder in the same room. The Tribunal expressed its concern at the inappropriateness of these arrangements and its surprise that the respondent's agents had not taken steps to ensure that proper arrangements were made for the witnesses to give evidence. The Tribunal was therefore extremely surprised that having expressed its concern in this regard, when Mr Arcari junior came to give evidence, he was prepared to give his evidence with his father standing behind him. The Tribunal had to request that the respondent's agent took steps for Mr Arcari senior to move to a different room and use a different device to give his evidence. The Tribunal did not attach any blame to the witnesses in this regard but were concerned that they had not been advised that it would be inappropriate for them to give evidence in this manner.

58. The Tribunal did not find Mr Arcari junior to be a credible or reliable witness. The Tribunal was extremely surprised at his evidence that he had not read his witness statement before this was submitted to the Tribunal. He said he 'missed the email.' This was not brought to the Tribunal's attention until a question from the Tribunal itself. Mr Arcari sought to amend the statement which had been submitted to the Tribunal in order explain a material difference between the content of his statement and evidence which had been

led from Ms McLaren before adopting the statement as his evidence in chief. This did not improve the Tribunal's view of his credibility.

59. In particular, Mr Arcari's statement which was lodged the Tribunal in referring to the CCTV footage of the day of 6 October stated 'I spoke to the police afterwards (that is after the police had viewed the footage which was available) and they told me that they **could see an argument between Robbie and Vasilous but could not see anything physical between them**'. Mr Arcari said that this should be altered from '**could see**' to '**were looking for'**. The Tribunal was mindful that between Mr Arcari's statement being lodged with the Tribunal and his evidence before it, an email exchange between Ms McLaren and the police officer who was involved in investigating the claimant's allegations was produced to the respondents and the Tribunal where the police officer stated 'I did speak with multiple staff after attempting to view the CCTV. None were willing or able to provide any detail on what had occurred. For the sake of clarity I never saw any incident as the footage was unavailable so there is no reason for anyone to say I had seen an argument, that much is certainly not true.'

60. The Tribunal concluded that Mr Arcari, having become aware of what the police officer had said, sought to alter his evidence. His altered evidence however did not make sense and was not consistent with what the police officer had informed Ms McLaren. The Tribunal did not think it likely that the police would discuss an ongoing investigation with a potential witness in the first place. Further the evidence simply did not ring true to the Tribunal. The Tribunal concluded that this was an attempt by Mr Arcari junior to persuade the Tribunal that the claimant was lying about the altercation with Mr Syme and that this attempt had rather backfired on him.

61. In addition, Mr Arcari junior sought to suggest that the claimant was 'angry, aggressive and threatening. He knows that he has a temper problem however is unable to control it.' He went on to say that the claimant would say things like 'I will take you outside and cut you up'. Mr Arcari could not explain when or to whom the claimant had made this threat and it seemed as though he

was suggesting he may have made it on 6 October and only once. The Tribunal found it incredible that the respondent would continue to employ a member of staff who said such things or was known to be unable to control his temper. The Tribunal concluded that Mr Arcari junior was not telling the truth about the claimant and was embellishing his evidence in a manner he thought would persuade the Tribunal that the claimant had caused any incident which lead to his dismissal.

62. The Tribunal had similar concerns about the evidence of Mr Arcari senior. The Tribunal found his evidence to be exaggerated and in parts simply incredible. He said that he had dismissed the claimant on a number of occasions because of his conduct, which had not been put to the claimant or mentioned in the ET3. He said that a female head chef in one restaurant was too afraid to work with the claimant, yet when pressed on why he would allow such a state of affairs to continue, he said that he meant she didn't like the atmosphere when the claimant worked with her.

63. The Tribunal concluded that the claimant had only been involved in one incident other than on 6 October, which was in Gordon St involving a head chef, where the Tribunal did not accept that the claimant was to blame for the incident. The Tribunal could not accept that the respondent would immediately re-employ and continue to employ a member of staff who, according to it, made threats against people regularly including threatening to stab them. The Tribunal did not accept Mr Arcari senior's evidence that the claimant had promised him that he would 'be good' and would mend his ways prior to his re-employment. Indeed, there was no evidence that any formal proceedings were ever instigated against the claimant or recorded in writing. The respondent sought to suggest that the claimant 'was spoken to' on a number of occasions, but that there was no record of any such discussion. The Tribunal did not accept this evidence. Rather, the Tribunal concluded that allegations of the claimant's aggression and threats he had made were entirely made up by the respondent in an effort to paint the claimant as the aggressor in the events of 6 October.

64. The Tribunal also did not accept Mr Arcari's evidence that the reason the claimant was not paid statutory sick pay was because he did not submit a doctor's certificate. It was clear from Mr Arcari's own evidence that the respondent did not follow its own policies; while he was aware that there was a staff handbook, he could not say whether it had an equal opportunities policy or a harassment policy. It seemed to the Tribunal that the respondent was cavalier in relation to its obligations as an employer of a large number of staff and only decided to withhold the SSP of the claimant because it had decided to dismiss him in any event.

65. Mr Aracari also sought to suggest that there would have been lots of restaurant jobs the claimant could have obtained in the period between October 2020 and June 2021. The Tribunal was aware of the limitations imposed on hospitality establishments during the government restrictions, and while the Tribunal accepted that restaurants may now have difficulties in obtaining staff, it did not accept that was the case during the period the claimant was seeking a permanent job. Had this been the case, then the Tribunal would have expected the respondent to provide documentary evidence of suitable vacancies.

66. It seemed to the Tribunal that the respondents' witnesses were willing to embellish their evidence and make up evidence where they thought that it might assist their defence of the claimant's claims. Therefore, regrettably, the Tribunal could not accept any of the evidence of Mr Arcari senior or junior as being reliable or credible.

Issues to determine

67. As outlined above a list of issues had been agreed between the parties. By the conclusion of the hearing, these had been narrowed to the following issues:

68. Was the claimant subjected to harassment in terms of section 26 Equality Act 2010 on the basis of the protected characteristic of race

1. By Mr Robbie Syme on 25 September and/or 6 October, and/or

2. By Mr Marco Arcari on 6 October?

69. Did the first respondent make an unlawful deduction from the claimant's wages by failing him to pay Statutory Sick Pay for his absence between 26 September and 6 October?

70. Did the claimant make a protected disclosure in terms of section 43B of the Employment Rights Act 1996?

71. If the claimant did make a protected disclosure, was it the reason or principal reason for his dismissal in terms of section 103A Employment Rights Act 1996?

72. Was the claimant wrongfully dismissed?

73. What compensation, if any, should be awarded to the claimant if successful in any of his claims and did the claimant fail to mitigate his losses.

Relevant Law

Was the claimant harassed on the basis of a protected characteristic?

74. Section 26(1) of the Equality Act 2010 ('EqA') provides that a person (A) harasses another (B) if:

75. A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and 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 — S.26(1)(b).

76. In terms of section 9 EqA one of the protected characteristics is race and this includes nationality (s.9(1)(b) and ethnic or national origins (s.9(1)(c)).

77. Therefore, in order for the claimant to succeed in terms of s.26, the Tribunal must be satisfied that there was unwanted conduct, that the conduct had the

proscribed purpose or effect, and that it related to a relevant protected characteristic.

Did the respondent make an unlawful deduction from the claimant's wages?

78. Section 13 of ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision in the worker's contract. Statutory sick pay is included in the definition of wages set out in ERA 1996 s 27(1) An Employment Tribunal however will only have jurisdiction *if the amount of the employee's entitlement is uncontested*: (*Taylor Gordon & Co Ltd v Timmons [2004] IRLR 180)*. The tribunal has no jurisdiction to determine disputes as to the *amount* of SSP owed. Instead, such disputes can only be determined by the Inland Revenue (now HMRC). In this case there was no dispute about the amount of SSP which was due.

Was the claimant wrongfully dismissed?

79. In order to determine this question, the Tribunal must consider whether the respondent dismissed the claimant for gross misconduct in circumstances which warranted summary dismissal.?

Did the claimant make a protected disclosure and if so, was that the reason or principal reason for his dismissal?

s.103A ERA 1996 provides that:

"An employee who is dismissed shall be regarded … as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure'

80. What amounts to a protected disclosure is set out in ss 43B-J of ERA. There must be a disclosure of information, which in the reasonable belief of the worker making the disclosure is in the public interest and tends to show one or more of the matters set out in section 43B(1) ERA. This includes:

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that the health and safety of any individual has been, is being or is likely to be endangered,

83. A qualifying disclosure will be made if it is made to a worker's employer.

Submissions

84. Both parties helpfully provided written submissions and spoke to those submissions.

85. It was said on behalf of the claimant that the text sent by him to Mr Arcari showing that he had tested positive for COVID. Reference was made to s.151 Social Security and Administration Act 1992. It was said that it could not be the case that the provision in the claimant's contract requiring him to provide a doctor's certificate, particularly during a pandemic could trump the 1992 legislation and regulations which had been introduced to make changes to entitlement to sick pay during this period. It was said that the suggestion from Marco Arcari that payment had not been made because a sickness certificate was not provided from the claimant's GP and that the company was not able to reclaim the sick pay without it was not convincing.

86. Mr McParland pointed out that CCTV footage of the incident between the claimant and Mr Syme would have been useful to the Tribunal. Further had the respondents checked the footage at the time and found that it didn't support what the claimant had said, then they would have been in a better position to defend the claim. It was also highlighted that it was inconceivable that the claimant would report a crime which he knew to be covered by footage if he was not telling the truth.

87. The lack of documents which might be expected to have been produced by an employer with the resources of the respondents was also highlighted. In particular, although the respondent had said that there was a staff handbook, none of the relevant sections had been produced and it was suggested that it was just lying in an office somewhere. The respondent's evidence that there had been no staff training on the handbook or its contents was also highlighted. The lack of any personnel file for the claimant which would be expected to include warnings if the respondent's evidence was to be accepted was also said to be instructive.

88. It was said that the claimant had set out a prima facie case of discrimination and it was for the respondent to show a non-discriminatory reason for his treatment. The claimant did not accept that his dismissal had been because of unacceptable behaviour on his part. The respondent's witnesses' evidence where they made serious and personal allegations against the claimant without any documentary evidence was highlighted. It was said that the suggestion that the claimant had made threats and the respondent didn't do anything about that was stretching credibility beyond breaking point.

89. It was also said that Mr Thomson's evidence undermined the evidence of Mr Arcari junior.

90. Further it was said that even if the Tribunal found the claimant to be difficult and argumentative, that did not deprive the claimant of protection under the Equality Act.

91. It was said that the evidence and witness statements of the respondent's witnesses went beyond discrepancies and were completely contradictory. Mr McParland said that it was difficult to see how the respondent could suggest that its witnesses gave truthful evidence.

92. Reference was made to the text messages between the claimant and Mr Arcari senior.

93. Counsel for the respondents then highlighted a number of aspects of his written submission. He pointed out that if the Tribunal did not accept that racial

epithets had been used by either Mr Syme or Mr Arcari, then s.26 would not apply as there was no other evidence to demonstrate that the treatment of the claimant was related to a protected characteristic. All that would be left would be a common assault, shouting and workplace unpleasantness. Counsel highlighted that the only direct source of evidence that any racial epithet was used was the claimant himself. He said that the claimant should not be believed on this as he was guilty of a number of untruths in his evidence.

94. While it was accepted that Ms McLaren's evidence had been clear, she had only given evidence on what had been said to her by the claimant.

95. Counsel also highlighted that the claimant's dismissal could not be a detriment and also amount to a breach of section 103A of ERA.

96. Counsel was critical of the claimant's evidence and the interpreter (in that there were noises from her dog and her waving papers in the heat) and indicated that he had not insisted on every witness giving parole evidence as that would have slowed down proceedings particularly if the interpreter had been required and would not have been conducive to the smooth running of the hearing.

97. The claimant was criticised specifically for his claim, which was withdrawn, where he alleged that monies on a wage slip provided to him had not been paid. It was said that this was aggravated as the allegation was not just untrue but cast aspersions on the integrity of the wage slip.

98. Counsel also indicated that he was staggered by the amount of time taken up with evidence about the COVID situation of the claimant, particularly given that there was no allegation of any protected disclosure in this regard.

99. In response to a question from the Tribunal regarding the question of SSP, it was said that the contractual provision of the claimant's contract trumped any statutory provision. Counsel was asked for any authority for the proposition in his submission, that "Without the relevant certificate, the respondents could not claim back the SSP from the Government which is the reason for the clause in the first place. This is the position irrespective of Covid Regulations.

They operate in order to permit SSP entitlement from day 1 of absence instead of the usual waiting days. A certificate was still required. In the absence of a certificate, the respondents were not obliged to pay SSP which is why they did not do so." Counsel did not refer to any specific provision. The Tribunal highlighted to him that it seemed that the Government guidance which had been issued in relation to COVID absences specifically stated that there was no need to provide a fit note to an employer in order to be entitled to SSP. Counsel indicated that his instructions were to maintain his submission of the primacy of the contract.

100. Counsel was also asked to comment on the evidence of Mr Arcari junior that he had not read his statement before it was submitted to the Tribunal as this was a matter of concern to the Tribunal. It was said that the witness had made changes to the statement that it was a statement submitted to the Tribunal further to an order and that the witness adopted the amended statement after taking the oath.

Discussion and decision

Unlawful deduction from wages

101. The Tribunal had no hesitation in concluding that the withholding of sick pay from the claimant was an unauthorised deduction from wages. There was no dispute on the amount due to the claimant and therefore the Tribunal had jurisdiction to consider the claim. The Tribunal had regard to the provisions of the Social Security Contributions and Benefits Act 1992 and in particular, s.151. The Tribunal could find no basis on which the respondent was entitled to withhold the SSP to which the claimant was entitled. The Tribunal did not accept the respondent's submission that a contractual requirement 'trumped' the statutory framework for entitlement to SSP.

102. In any event, the Tribunal was of the view that sending a text with confirmation that the claimant had tested positive for COVID was sufficient to entitle him to payment of SSP within the terms of his contract.

103. Further, the Tribunal did not accept the respondent's evidence that the monies had been withheld because of a failure to provide a medical certificate. The Tribunal was mindful that there was no reference to this in the first respondent's ET3 or their witness statements. An amendment was only made on the last day of the hearing to the ET3 in this regard. The Tribunal concluded that the respondent did not pay these sums to the claimant because they dismissed him and did not wish to pay him any further sums. It was also notable that the respondent did not pay the claimant the holiday pay to which he was entitled until four months after his dismissal and after he had commenced early conciliation proceedings. At no stage did the respondent ever contact the claimant during or after his period of absence to inform him that they could not pay his SSP without a certificate. Therefore, the respondent is required to pay the claimant the sum of £137.64 in this regard.

Wrongful dismissal

104. The Tribunal concluded that the claimant had been wrongfully dismissed. He was not dismissed for gross misconduct but because he had made a protected disclosure. Even if the claimant had not established that the reason for his dismissal was that he had made a protected disclosure, the Tribunal was of the view that the first respondent was not entitled to summarily dismiss the claimant. The claimant was dismissed by Mr Arcari senior. There was no suggestion that Mr Arcari senior spoke to anyone else to find out what had happened to the claimant before dismissing him. There was no investigation. Mr Arcari senior arrived at the restaurant and was angry with the claimant for seeking to involve in the police and for him having made an allegation that he had been racially assaulted. He was not interested in establishing the facts of what had occurred and simply wanted what he viewed as a problem off his premises. Therefore, the claimant is entitled to receive a week's notice pay of £528.77.

Harassment

105. The Tribunal accepted the claimant's evidence that on 25 September Mr Syme said in the presence of the claimant *"Marco fills his fucking kitchen with fucking Africans, Albanians and Romanians."*

106. The Tribunal considered whether this was unwanted conduct on the part of the claimant and concluded that it was. The Tribunal concluded that such a comment would create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

107. The Tribunal accepted that that the environment of a busy kitchen would no doubt become fraught from time to time and accepted evidence of witnesses that there would be bad language used and arguments from time to time when tempers became frayed. However, this did not excuse the use of racist language. The Tribunal was mindful that the respondent said that it had a harassment policy but that there was no training for staff on its application. The respondent sought to persuade the Tribunal that the respondent's operation was a 'United Nations' in that the staff were from many different countries. That may very well be true, but it did not seem to the Tribunal that the respondents properly understood what might amount to harassment on the ground of race. The respondents' witnesses all said that the restaurant was not a racist place. It seemed to the Tribunal that both Mr Arcaris seemed to see racism as binary, in that either their restaurant was a racist place or it was not. They did not seem to appreciate that staff may well not be racist in a general sense but may say things which amounted to harassment on the ground of race. The Tribunal was of the view that the fact that the staff complement was made up of so many nationalities made it all the more important that there should be at least the most basic of training as to the standards expected of its staff in dealing with each other.

108. The Tribunal also accepted that Mr Arcari senior was aware that the claimant was concerned that he had been subject to racist abuse by Mr Syme. The Tribunal accepted the claimant's evidence that Mr Arcari senior telephoned the claimant that evening and blamed him for any disruption in the kitchen,

without seeking to find out what had actually happened. It seemed to the Tribunal that this was representative of Mr Arcari senior's general approach to the claimant. The claimant was not willing to be silent about bad behaviour directed towards him by other members of staff. Instead of dealing with any concerns which were raised, Mr Arcari's approach was to blame the person complaining.

109. The claimant's description of the events of 25 September was convincing to the Tribunal. They were detailed and specific. Mr Arcari senior said he definitely didn't have a telephone conversation with the claimant on 25 September. The Tribunal could not understand how Mr Arcari could be so definite about this, he gave no explanation as to why he wouldn't have had a telephone conversation that evening irrespective of the content of the call. This was a consistent aspect of Mr Arcari senior's evidence. The Tribunal formed the view that he simply said what he thought was the best thing to say to rebut the claimant's claims, rather than tell the truth.

110. The Tribunal was mindful that it only had the evidence of the claimant himself in support of his allegation. However, it was satisfied that his account of the events was credible and preferred his evidence to that of the respondents' witnesses in this regard.

111. The Tribunal also accepted the claimant's evidence regarding the alleged assault by Mr Syme on him on 6 October 2020. The Tribunal was of the view that Mr Syme shouted at the claimant when he raised concerns about the failure of a previous shift to have taken steps to allow him to carry out his duties efficiently. Mr Syme's response, which the Tribunal found was to the effect of "Just get on with your fucking job" had to be seen in the context of the previous comment made by Mr Syme on the claimant's last working day before referring to "Marco filling his kitchen with fucking Albanians". Further, the Tribunal was satisfied that during his outburst towards the claimant, he referred to 'fucking Albanians'. The Tribunal found this was consistent with what Mr Syme had said in the claimant's presence on 25 September.

112. The Tribunal was also satisfied that Mr Syme physically attacked the claimant subsequent to this argument and that as a result the claimant had a scratch to his neck. While the only direct evidence in relation to this allegation again came from the claimant, the Tribunal heard evidence from Mr Varol, that the claimant had told him that he had been racially abused shortly after the incident and from Ms McLaren that the claimant had contacted her and told her about what had happened. Further the claimant reported the matter to the police and his version of events set out in his statement was consistent with the evidence given to the Tribunal. The Tribunal did consider that the claimant did not make specific reference to a racial element to the incident with Mr Syme in his statement. However, the Tribunal concluded that the claimant may well have been more concerned at reporting the alleged assault rather than the racial element to it. The Tribunal was satisfied that the incidents on 25 September and 6 October amounted to a course of conduct on the part of Mr Syme which was related to the claimant's nationality and/or race, was unwanted conduct on the part of the claimant and created an intimidating and hostile environment for him.

113. There was no suggestion made by the respondent that the respondent was not vicariously liable for the actions of Mr Syme or that it had taken reasonable steps to prevent any discriminatory treatment for having occurred.

114. However, the Tribunal did not accept that the claimant was subject to harassment on the ground of his race by Mr Arcari senior. The Tribunal accepted that Mr Arcari senior was angry at the claimant when he arrived at the restaurant on 6 October and that he shouted at him and was aggressive towards him. However, the Tribunal did not accept that he referred to the claimant as 'Albanian' or that his treatment towards the claimant amounted to harassment on the grounds of his race. While the Tribunal was of the view that Mr Arcari's treatment of the claimant was related to the incident of racial harassment the claimant had reported, the tribunal was also mindful that the claimant had withdrawn his claim of victimisation in terms of s.28 of the Equality Act 2010.

115. Therefore, while the Tribunal had no doubt that the claimant was upset by the conduct of Mr Arcari in this respect, as it did not accept that Mr Arcari had referred to the claimant's race when shouting at him, it was not satisfied that the conduct related to the relevant protected characteristic.

116. While the Tribunal did not necessarily accept the respondent's submission that the provisions of s.26 would not be engaged if the Tribunal was not satisfied that racial epithets were used towards the claimant, it concluded that Mr Arcari's treatment of the claimant on his arrival at the restaurant was not related to his race, but his annoyance at the allegations of a racial assault made by the claimant against another member of staff and the potential difficulties posed in that regard in relation to the staffing of the restaurant and potential police involvement.

117. It follows that the Tribunal was not satisfied that the dismissal of the claimant was an act of harassment on the ground of the claimant's race.

118. The Tribunal then went on to consider whether the claimant had made a protected disclosure in terms of s.43B of ERA, and if so, if that had been the reason or principal reason for his dismissal by the first respondent.

119. The claimant alleged that the events leading up to his dismissal amounted to detriments for having made a protected disclosure. However, the Tribunal was of the view that the way in which the claimant was treated by Mr Arcari senior in the period after he arrived at the restaurant and up until his dismissal did not amount to a detriment. Rather, the Tribunal concluded that the treatment of the claimant was part of his dismissal. If the claimant had not been dismissed, then it may be that the claimant would have been subjected to a detriment in relation to this treatment, but the Tribunal formed the view that the treatment crystallised in the dismissal of the claimant rather than being a separate matter altogether.

120. The Tribunal considered whether the claimant's allegation that he informed the manager Mr Varol that he had been subject to a racist attack, both verbal

and physical and that he was going to call the police as a result amounted to a protected disclosure.

121. In the first instance, the Tribunal accepted that the claimant did make the disclosure as alleged. Mr Varol accepted that the claimant told him that he had been subject to racist abuse and that Mr Syme had attacked him.

122. The Tribunal then considered whether this amounted to a disclosure of information rather than simply an allegation. The Tribunal considered the authorities to which it was referred in this regard, in particular *Kilraine v London Borough of Wandsworth* [2018] ICR 1850.

123. The Tribunal was satisfied that in disclosing to his line manager that he had been subject to racist abuse and an assault, the claimant was disclosing information to Mr Varol. He was disclosing information that in his reasonable belief, a criminal offence had been committed. The Tribunal was mindful that ultimately it is a matter for the Tribunal in considering the particular facts of a case whether the provisions of s.43B(1) are made out. The Tribunal was satisfied that they were. It was clear to the Tribunal that the claimant was disclosing to Mr Varol that a criminal offence had been committed. That is why the claimant wished to involve the police. On that basis the Tribunal was satisfied that the provisions of s.43B(1)(a) were met. In addition, however, the Tribunal was satisfied that disclosure fell with the provisions of s.43B(1)(d), in that the claimant was disclosing to Mr Varol that he was concerned about his own health and safety and that it had been put at risk by the respondent failing to properly address the issues which the claimant had previously raised with them regarding the conduct of Mr Syme. In any event, the incident also stood alone on the basis that the claimant's disclosure was that the conduct of Mr Syme on 6 October put his health and safety at risk and would continue to put his health and safety at risk.

124. The Tribunal did not understand the claimant's allegation that he wanted to phone the police to be the protected disclosure. It was *why* he wanted to involve the police which was relevant. The claimant was making clear that a criminal offence had been committed. The Tribunal was of the view that the

respondent's submission which focussed on whether it was the claimant who wished to call the police or whether the claimant wished for Mr Varol to call the police rather missed the point that it was why the claimant wished the police to be involved which was the crucial issue.

125. The Tribunal also considered whether the disclosure was made in the public interest. It was satisfied that it was. It seemed to the Tribunal that a disclosure that a criminal offence had been committed which amounted to an assault would be in the public interest. The Tribunal was also of the view that disclosing information about the health and safety of staff in a restaurant kitchen which was inevitably a place where there was a risk to staff through the availability of knives and cooking equipment would be in the public interest.

126. The Tribunal then considered whether the reason or principal reason for the claimant's dismissal was that he had made the protected disclosure. The Tribunal was satisfied that it was. The Tribunal accepted the claimant's evidence, which was supported by other witnesses, that Mr Arcari senior was angry when he arrived at the restaurant. The Tribunal concluded that he was angry at the claimant for, in his view, creating a problem. The claimant had alleged a criminal offence had been committed on the respondent's premises. He wanted the police to be involved. The Tribunal could understand why Mr Arcari would have concerns at the impact the incident and the potential involvement of the police would have on the restaurant's ability to function that day. Indeed, Mr Arcari's evidence was that Mr Syme was dismissed for his part in the incident but not until sometime later because of the respondent's concern that it did not have anyone else to carry out Mr Syme's duties. Therefore, the Tribunal concluded that Mr Arcari thought that the claimant was a troublemaker for bringing his complaint to the attention of Mr Varol, who then thought it necessary to involve both Mr Arcari junior and senior.

127. The Tribunal was of the view that Mr Arcari senior simply saw the claimant as a problem which he wanted rid of as soon as possible and that in dismissing

him, he would avoid being required to deal with the underlying disclosure. The Tribunal came to this view on the basis that neither respondent ever sought to determine what had actually happened between the claimant and Mr Syme. It did not view the CCTV footage. It did not carry out any investigations. While Mr Syme was subsequently dismissed, there was no suggestion made in evidence that this had been following a process. Indeed, the Tribunal noted that08.21 Mr Syme was initially listed as a witness for the respondent, but the respondent did not seek to call him.

128. The respondent had suggested that the claimant had been dismissed was for gross misconduct and that the claimant had caused the incident with Mr Syme. However, the claimant was dismissed without any investigation being carried out at all and indeed a short period after Mr Arcari senior arrived at the restaurant. While the Tribunal was conscious that the test which had to be applied was whether the reason or principal reason for dismissal had been that the claimant had made a protected disclosure, it inevitably took into account that it did not accept the reason proffered by the respondent as the reason for dismissal. While that of itself would of course not be sufficient to find that the real reason was that the claimant had made a protected disclosure, the Tribunal took into account that it found the respondents' evidence to be neither credible nor reliable in all material respects.

129. The Tribunal therefore concluded, as a matter of fact, that the principal reason for the claimant's dismissal was that he had made a protected disclosure and that therefore his dismissal was automatically unfair in terms of s.103A ERA.

Remedy

130. The Tribunal then went on to consider the question of remedy, both in relation to its findings that the claimant had been subjected to harassment contrary to s.26 EqA and his dismissal in terms of s.103A.

131. In relation to the harassment to which the claimant was subject, the Tribunal took into account that this was over two days, that the claimant had felt humiliated as a result of the conduct and that he suffered minor injury as a

result of the assault. In the circumstances, the Tribunal concluded that an award of £5000 in respect of injury to feelings would be appropriate. Interest, at the judicial rate will accrue from the date of the first act of harassment, 26th September 2020 to the calculation date at a daily rate of £1.10 (312 days at 8%) is a total amount of interest of £343.20.

132. Turning to the claimant's dismissal, the claimant lodged a schedule of loss. No counter schedule was lodged and the claimant was not cross examined on the schedule or the calculation of the sums sought. The respondents' only argument in this regard was that the claimant had failed to mitigate his losses in that there were jobs available in the hospitality sector he could have obtained between October 2020 and June 2021, from when he had no ongoing losses. The Tribunal did not accept this submission for reasons set out above. No information about any vacancies which were said to have been available was produced by the respondent, and the Tribunal was of the view that there was nothing in the first respondent's argument that the claimant had failed to mitigate his losses. He obtained a part time temporary job in Morrisons supermarket and worked for a brief period in a takeaway restaurant.

133. The claimant's losses were from 13 October 2020 to 4 June 2021. His net weekly wage was £413.30 per week, which is a total loss of £13,638.90. He received income during the period of £8,721.96 and therefore his net loss is £4,916.94. While the respondent argued that the claimant had failed to mitigate his loss in general, no further arguments were made as to why any compensation should be reduced and there were no submissions made on injury to feelings or the question of interest. No arguments were made by the respondents that this sum should be reduced. Therefore, the Tribunal orders that the respondent pay to the claimant a compensatory award in respect of his loss of income.

134. In summary, the respondents are ordered to pay to the claimant

SSP	-	£137.64
Notice pay	-	£528.77

Injury to feelings	-	£5,000
Interest		£343.20
Loss of income	-	£4,916.94
Total	-	£10,926.55

Employment Judge: Amanda Jones
Date of Judgment: 05 August 2021
Entered in register: 11 August 2021
and copied to parties