EMPLOYMENT TRIBUNALS

Claimant:	And	**Respondent:**
Mr H Gafaroghlu		Sofra International Ltd

Heard by: CVP

On: 9-12 November 2021
Tribunal in Chambers
15 November 2021

Before: Employment Judge Nicolle
Members: Mr T Robinson
Mr A Adolphus

Representation:

Claimant: Mr R Robison, Solicitor
Respondents: Mr J Munro, Solicitor

JUDGMENT

1. The claim for sex discrimination was withdrawn and is therefore dismissed.

2. The claim for compensation for a failure to provide statutory particulars of employment in accordance with S.1 of the Employment Rights Act 1996 (the ERA) succeeds and under S.38 of the Employment Act 2002 the Claimant is awarded compensation of 4 weeks' pay in the gross sum of £3,717.

3. The claim for unfair dismissal succeeds and the Claimant is awarded a basic award of £1,016 and a compensatory award of £15,930, which has been uplifted by 25% for a failure by the Respondent to comply with the ACAS Code of Conduct on Disciplinary Procedures (the ACAS Code).

4. The claim for an unauthorised deduction from wages succeeds and the Claimant is awarded the gross sum of £4,138.79.

5. The claim for failure to pay accrued holiday entitlement succeeds and the Claimant is awarded the gross sum of £398.25.

6. The total award to the Claimant is therefore £25,200.04 of which the awards for an unauthorised deduction from wages and accrued holiday pay totalling £4,537.04 are subject to the payment of tax by the Claimant.

REASONS

The Hearing

1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

2. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended the hearing.

3. The parties were able to hear what the Tribunal heard.

4. The participants were told that it is an offence to record the proceedings.

5. From a technical perspective, there were no major difficulties.

6. There was an agreed bundle comprising of 217 pages. The Tribunal was also provided with CCTV footage. Both parties provided introductory skeleton arguments.

7. The Claimant gave witness evidence and his wife, Leyla Gafaroghlu (Mrs Gafaroghlu) also gave evidence. Mr Huseyin Ozer, director and owner of the Respondent (Mr Ozer) gave evidence for the Respondent.

8. The Claimant was provided with an Azeri interpreter, Ms S Baghirova. As a result of Ms Baghirova having internet connection issues from her home on 9 November 2021 it was necessary to adjourn the commencement of the evidence until 10 November 2021 so that she could attend and log on from Victory House.

9. It became apparent to the Tribunal on the morning of 10 November 2021 that the interpretation by Ms Baghirova was proving difficult as the Claimant was unable to respond to questions from the Judge as to how he wished to give his evidence i.e. under Oath or by way of affirming. The Claimant's wife confirmed that whilst Ms Baghirova and the Claimant were able to communicate in Azeri the translation from English to Azeri was defective. It was therefore agreed that a replacement interpreter should be sort. The Claimant confirmed that he was able to speak fluently in Turkish and therefore the services of a Turkish interpreter were obtained. Ms S Coverdale was available to enable a start at 12:45 on 10 November 2021. There were no difficulties experienced with her interpretation.

The Issues

10. On 9 November 2021 the Tribunal discussed with the parties the issues to be determined. Mr Robison confirmed that the claim of sex discrimination was withdrawn and should be dismissed.

11. The issues to be determined are as set out in the list of issues appended as Appendix B to the case management order of Employment Judge Mason dated 5

December 2019. It is unnecessary for these to be set out again, but they will be referred to in the Tribunal's conclusions.

12. For the purposes of the direct race discrimination claim it was confirmed that the Claimant's ethnicity/nationality is Azeri and that he is a national of Azerbaijan but was living in Turkey before we came to the UK. Mr Robison confirmed that he was relying on a hypothetical as opposed to an actual comparator.

Findings of Fact

The Respondent

13. The Respondent is a chain of Middle Eastern restaurants. It is owned by Mr Ozer. It has restaurants in St Christopher's Place and Mayfair in London. It employs approximately 20 people across the two restaurants.

The Claimant

14. The Claimant commenced employment with the Respondent on 20 September 2016 at St Christopher's Place. His employment was terminated as result of what the Respondent contends was gross misconduct with effect from 8 February 2019.

15. The Claimant says that he arrived in the UK a week prior to commencing employment with the Respondent. He had a dependent visa and a full time work permit. He had been living in Turkey.

16. The Claimant says that he was initially paid the minimum wage, but this was subsequently increased, at an unspecified date, to his current rate of £14 per hour.

17. The Claimant says that whilst on duty he had a uniform comprising a white chef's jacket, black trousers, apron and kitchen slippers. He was not wearing this outfit in the CCTV footage showing him drinking in the area behind the bar late in the evening of 1 April 2018.

Contract of Employment

18. Mr Munro accepted that the Claimant was not provided with a written contract of employment or the minimum statutory terms and conditions of employment as required by s.1 of the ERA. However, whilst not in his witness statement Mr Ozer claimed during cross examination that the Claimant had been provided with a contract of employment but had destroyed it. The Tribunal did not accept this evidence given that it was not referred to in his witness statement, and no evidence was produced as to any contracts of employment being produced.

The Claimant's salary

19. The Claimant says that he received a gross annual salary, paid weekly, of approximately £50,000. He was not required to sign any opt out from the maximum working week under the Working Time Regulations 1998 (the Regulations). He

contends that he regularly worked hours substantially in excess of the maximum working week of 48 hours under the Regulations.

National composition of the Respondent's workforce

20. The Claimant says that most of the employees are Turkish but there are also a number of Kosovans, Spaniards and Bulgarians. He says that he is the only employee from Azerbaijan or of Azeri heritage.

Parental leave

21. The Claimant says that he requested parental leave on the birth of his second child on 5 March 2018. He says that this was refused. He explains the delay in pursuing this claim on the grounds that his English was poor; he worked very long hours and was not appraised of his legal rights.

Time off for dependants

22. The Claimant says there were two occasions when the Respondent denied his right to take time off work to attend to the needs of his family. He relies on an incident in January 2017 when his wife was admitted to hospital and simultaneously had responsibility for two very small children and an occasion on 9 September 2017 when his daughter was admitted to hospital when she was injured at home in an accident.

CCTV evidence

23. The Tribunal was shown a CCTV recording from 23:14 on 1 April 2019. This showed the area behind the bar at St Christopher's Place. The Claimant, in non work attire, could be seen consuming a small glass of beer and opening a further beer. Various other individuals could be seen coming and going but the Claimant was unable to identify them. The Claimant says that he had completed his shift and that the consumption of alcohol was not seen as a problem by the Respondent. He says that he had been working since 7am that day and his shift had concluded at 11pm. He says that whilst on occasion he was required to work beyond this to clean the premises, in the absence of the normal cleaners, that on the day in question he was no longer on duty.

Emails of 12 and 13 November 2018

24. In an email of 2:24pm on 12 November 2018 the Claimant was informed that he was being issued with an official warning as result of his having removed, without authorisation, notices on the walls at St Christopher's Place. These notices stated:

> "It is strictly forbidden for the staff to drink alcohol and soft drinks (e.g. coke), otherwise, you will be fired!"

25. The Claimant says that he removed these notices as he regarded them as inappropriate given that he says that Mr Ozer, together with other managers and waiters, were openly drinking in the premises.

26. In an email of 10:57am on 13 November 2018 the Claimant complained that he had been deprived of any rest breaks, despite working from 6am to midnight, and had been subject to verbal and psychological abuse. Further, he complained about not receiving overtime pay.

Email of 16 November 2018

27. In an email of 16 November 2018 from Huriye Guven, Head of Manager (Mr Guven) to “Dear Sir/Madam” he confirmed the Claimant’s annual income is an average of £50,000. He went on to state that the Claimant is a reliable individual with great financial responsibilities. This email was a reference for the Claimant seeking to rent property.

Signed complaints regarding the Claimant’s conduct from various employees dated 6 January 2019

28. The bundle (at pages 69, 74-76) contains a document which in the opening preamble refers to the Claimant having a “serious drinking problem” and having made “racist” remarks. The Claimant says that the signatories of this document were all illegal workers who were placed under duress to provide the statements and/or were paid inducements of between £50 and £100 by the Respondent to do so. He says that this is in accordance with the normal practice of Mr Ozer in that where there is an employee he wishes to get rid of he pressurises other employees to produce false evidence against them.

29. The statements appear to have been translated by a certified interpreter on 5 February 2019. However, it is not entirely clear as to exactly when, and in what form, the statements were given as the Tribunal was not provided with original handwritten or typed statements from the individual signatories. Therefore, it is not clear how the statements were made and whether they were written independently by the individuals named.

30. Relevant extracts from the statements are as follows:

Haci (bar staff)

- he was very rude
- he was coming to the bar and getting a drink without asking me
- he was swearing at me in Turkish
- sometimes he had a drink at 7am in the morning
- he was very rude to everyone
- I think he has serious psychological problems and needs to stay in the hospital

Huseyin (waiter)

- he broke coffee cups
- he was yelling at me in front of everyone in the kitchen and swearing

Seniha (waiter)

- I think he always drinks beer
- he was swearing on everyone
- he made me cry
- he turned off the camera; drank 15 bottles of beer. He went to the bathroom and vomited; then he was drinking again
- he was always shirking from work
- he has been drinking for a year, yelling at people all the time, fighting
- he had an argument with Mario. He said "come, lets fight"
- he said, "you suck"
- he was coming to work while he is drunk
- he was yelling: "dickheads! No one can send me from here, I won't go from here"

Luc (waiter)

- he was being very aggressive
- he was pissed and screaming
- he tried to hit me one day
- he was hitting the table

Sabi (bellboy)

- I saw the Claimant while he was drinking champagne

Mario (waiter)

- he was swearing: "fuck off"
- his breath smells of alcohol. He was drunk and dangerous
- he was swearing at me like "pimp" and "fuck you"
- he was trying to fight with me
- he was drunk and dangerous
- he had psychological problems

Murat (waiter)

- he screamed at Kamila and made her cry. He was saying "fuck you" to her.

The Claimant's suspension

31. The Claimant was advised in a letter from Ali Doldur, Accountant (Mr Doldur) dated 7 January 2019 that he was suspended on contractual pay to enable an investigation that he had been using alcohol whilst at work and arguing with other employees.

32. The Claimant responded in an email of 9:03 on 7 January 2019 to say that he believed his suspension had arisen as a result of a Second Head Chef having recently arrived. He said that Mr Murad treats his kitchen colleagues to beer and champagne.

33. In an email of 17 January 2019 Nihat Celik, a member of the kitchen staff, gave a reference on the Claimant's behalf. He stated that the Claimant had no alcohol issues.

He went on to say that Mr Murad and Mr Anil openly drink alcohol at the premises and encourage others to do so by distributing beer and champagne to staff.

Claimant's disciplinary hearing on 18 January 2019

34. The hearing was conducted by Mr Doldur. The Claimant's wife attended as his interpreter. He was represented by Margaret Healy, trade union representative. Mr Bekim Krasniqi also attended on the Respondent's behalf.

35. The Claimant made the following points:

- he denied the allegations about having a drinking issue.
- he uses alcohol for cooking as an ingredient. In evidence he said that it forms part of a sauce served with fish and chips.
- he said that he had pictures of Mr Baylan, Floor Manager and Mr Aysun Hodzhev, floor employee drinking multiple beers on the premises.
- he says that over Christmas champagne was distributed by Mr Ozer and that Mr Anil and Mr Murat gave beers to staff.
- he said that Mr Ozer had planned his suspension and then dismissal as he had brought in a replacement head chef.
- Mr Krasniqi said that whilst the Claimant would use beers in the cooking that he would take six cans then use four for the cooking and put two in the fridge to drink. He says that this can been seen from the CCTV.

The CCTV evidence

36. The Tribunal was shown CCTV footage taken at approximately 11:15 PM on 1 April 2018 which shows the Claimant drinking a small beer in the area behind the bar. He is in casual clothes and not his work attire. He says he was off duty. There is no evidence that he was inebriated.

The Claimant's dismissal

37. In a letter from Mr Murat Baylan of 8 February 2018 (actually 2019) the Claimant was advised that he had been dismissed for gross misconduct as a result of alcohol abuse in the workplace, hostile behaviour towards staff and serious insubordination. He referred to various CCTV footage and numerous witness statements. He also referred to the Claimant ripping down the notices in November 2018 prohibiting staff from consuming alcohol on the premises.

The Claimant's appeal

38. In an email of 18 February 2019, the Claimant appealed against his dismissal. In summary his grounds of appeal were as follows:

- the reasons given were not true.
- he needed to see the CCTV footage relied upon.
- he needed to see copies of the evidence relied upon.

- he complained that he had been subject to verbal abuse and degradation and had been required to work from 7am to midnight every day without holiday.
- he said that there was an ulterior motivation for his dismissal. He complained that the Respondent conducted its business in a corrupt fashion by:
    - (i) engaging illegal workers who did not have the required work permits
    - (ii) encouraging staff who worked full time hours to show their hours as part-timers to reduce tax payments
    - (iii) paying staff in cash and not declaring their wages to HMRC
    - (iv) he also complained that he had been subject to abuse from Mr Ozer to include being called "a man without honour" that "Azeri were pimps" and that "Azerbaijanis are all without honour".

39. In a letter of 26 February 2019 from the Respondent the Claimant was advised that the appeal hearing would be a full rehearing of the original decision. The letter said that it enclosed CCTV footage and written statements. The Claimant says that he did not receive these.

40. In a further email from the Respondent of 19 March 2019 the Claimant was advised that he had been sent the following documents:

WhatsApp exchanges in Turkish
A pdf translation of the witness statements
A pdf of the witness statements as noted down in Turkish
CCTV footage

<u>Alleged abusive behaviour from Mr Ozer</u>

41. The Claimant was unable to specify exactly when he says that Mr Ozer made abusive remarks. In effect he says that this was constant and whenever Mr Ozer attended the premises. He claims that Mr Ozer said "Azeri are all dishonest people, Azeri have no character" and "Azeri are pimps". He says that these remarks were made between June 2018 and February 2019.

<u>Claimant's allegations of disreputable conduct of the Respondent's business</u>

42. The Claimant says that between 2 October 2018 and 23 October 2018 he discovered what he believed to be the Respondent operating a tax evasion scheme. He says that he started to find void receipts for tables. He says that he witnessed Mr Anil take money from the safe in his General Manager's black bag. He says that over the Christmas period of 2018/2019 that Mr Anil collected about £130,000 in cash one night. He refers to this as being a money laundering scheme.

43. The Claimant says that the Respondent's business was extremely lucrative with revenue of circa £20,000 per day. He says that after his shift he had personal responsibility for ordering from suppliers which could involve spending between £18,000 and £19,000 per week.

44. He says that he was paid additional money in his last three months employment to keep quiet regarding illegal workers. He says that half of this was in cash and half to his bank account. However, it is not clear from his payslips, or any other evidence, that such payments were made.

45. The Claimant says that the Respondent was producing void receipts where customers had made cash payments.

Unauthorised deductions from wages

46. Payments of salary are made to staff two weeks in arrears.

47. There was considerable uncertainty as to the exact basis upon which the Claimant was paid. His P60 for the tax year ending 5 April 2017 had a gross pay figure of £48,548.66. However, it is clear from the weekly payslips provided for the period from 9 April 2018 until 4 February 2019 that the amount of the Claimant's pay varied to reflect the number of hours he worked. It is apparent, and was agreed, that he was paid at the rate of £14 per hour worked.

48. The Claimant confirmed in evidence that there were no shortfalls in payments made to him up to 31 August 2018 but that he had not received his full pay for hours worked from 1 September 2018 until the termination of his employment on 8 February 2019.

49. He says that by comparing his weekly payslips with his timesheets the adverse differential can be calculated.

50. The Claimant says that he was part paid in cash from September 2018 onwards. He says that these payments were to keep him quiet. Mr Ozer says that no payments were made to the Claimant or any other employee in cash.

51. The Employment Judge questioned why the Claimant's weekly rate of pay appeared to increase during the period of his suspension. He received weekly gross payments of £1,288, £1,358, £1,358 and £1,288 for the pay weeks of 7, 14, 21, 28 of January and 4 February 2019. Mr Ozer confirmed that this was as a result of the Respondent's payroll manager agreeing to treat the Claimant more generously than was required given that he had not worked any hours during this period.

52. Mr Robison accepted that the shortfall in payment for the Claimant's period of suspension was four days for 5, 6, 7 and 6 February 2019.

Holiday Pay

53. Mr Robison accepted that the Claimant had received payment for his full holiday entitlement for 2018 and therefore there was no further claim in respect of this period. However, he says that the Claimant received no holiday entitlement from 1 January 2019 until his dismissal on 8 February 2019.

The Claimant's Wife

54. Mrs Gafaroghlu says that the Claimant was typically away from their home from 6am to after midnight. She says that she visited his work premises on approximately four occasions during his employment with the Respondent.

55. She referred to an occasion when she visited the Claimant's workplace and witnessed a conversation between him and Mr Anil and observed Mr Anil carrying a black backpack and referring to how much money he was laundering with it. She recollected that this conversation would have taken place between 22 June 2018 and her travelling to Turkey on 29 August 2018 from where she did not return until 10 January 2019.

56. Mrs Gafaroghlu says that she wrote to HMRC on 5 February 2019 regarding the Respondent making "under payments" and avoiding tax by cash payments to employees. She said that she did not receive a response.

Mr Ozer

57. Mr Ozer says that the Claimant had been provided with a contract of employment, but it had subsequently disappeared. He suggested that the Claimant may have been involved in its disappearance.

58. He says that the Claimant started as a member of the kitchen staff on the minimum wage before progressing to the position of Head Chef. He was not able to provide an exact date as to when the Claimant was promoted to Head Chef, but it would appear to have been in early 2018.

59. He says that he apportions his time between the St Christopher's Place and Mayfair restaurants. He typically visits both restaurants most days and will be in attendance until approximately 9:30pm.

60. He says that the Claimant's claim to have been denied requests to take parental leave, emergency dependent leave and holiday are a complete lie. He says that the Claimant was always encouraged to take his leave when needed or due.

61. He disputes the Claimant's evidence that he worked extremely long hours. He claims that the Claimant's time entries on the documents which appear between pages 165-204 in the bundle are fraudulent as they show him working much longer hours than he says was the case. He says that the Claimant typically worked from 7am to 4pm.

62. He says that the Claimant was in cahoots with, whom he described as the "office girl", to fabricate the time entries. Further, he says that the Claimant together with the "office girl" would regularly disappear during the afternoon on unnecessary or fabricated errands e.g. to purchase items for the kitchen which could have been otherwise ordered.

63. He does not have any direct involvement in the submission and review of timesheets, the processing of the payroll or the hours to be worked by individual members of staff. He says all of these matters were delegated by him to appropriate members of his staff.

64. He denies that the Claimant, or any other member of staff, were paid in cash.

65. He says that other staff members were fearful of attack from the Claimant whilst he was drunk. He referred to one unnamed employee who kept a large knife concealed in the kitchen for self-defence.

66. Mr Ozer referred to the Claimant as being a “dangerous drinker”. He had never seen the Claimant drunk or consuming alcohol.

67. He referred to the Claimant as being involved with the “Turkish mafia” or more frequently what he described as the “North London mafia”.

68. He denies the allegations that he made racist remarks to the Claimant regarding his Azeri nationality. He says that he himself is of Azeri heritage.

69. He says that it was his decision to dismiss the Claimant notwithstanding that he did not conduct the disciplinary hearing on 18 January 2019, nor did he write the letter confirming the Claimant’s dismissal dated 8 February 2019.

70. When asked by the Employment Judge as to what the reasons were for the Claimant’s dismissal he said that it was as a result of a fear of being responsible for his criminal behaviour, his attempting to have fights, being verbally and potentially physically aggressive to other members of staff and swearing at staff and verbally abusing their family members. He did not specifically mention drinking but when asked by way of re-examination he says the concerns regarding the Claimant’s drinking was 50% of the reason for his dismissal. He says that his drinking was a cause of his concern regarding the risk of a fight involving the Claimant.

71. He says that there was no formal appeal hearing involving the Claimant. He made reference to a meeting in the Respondent’s solicitors offices which lasted for about 15 minutes. However, this clearly did not constitute a formal appeal hearing. He says he would have been responsible for any such appeal hearing.

The Law

Time limits

72. Different tests apply for the exercise of discretion to extend time under the Employment Rights Act 1996 (the “ERA”) and the Equality Act 2010 (the “EQA”).

The test under s.111 ERA has two stages:

- first, was it reasonably practicable to present the claim within the primary time limit?

- secondly, if yes, was the claim presented in such further period as is reasonable?

The test under s.123 of the EQA is more generous in that it enables a tribunal to exercise its discretion where it is “just and equitable” to do so.

The ERA

73. The prevailing test is that set out by Brandon LJ in Wall's Meat Co Ltd v Khan [1979] ICR 52, 60-61. This test looks to the objective state of mind of the claimant: is there some impediment which reasonably prevents, or interferes with, or inhibits, presenting the claim on time? Brandon LJ refers to mental impediments as being the state of mind of the claimant "in the form of ignorance of, or mistaken belief with regard to, essential matter." The ignorance or mistaken belief must itself be reasonable.

The EQA

74. S123 provides:

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

75. For acts extending over a period, it is relevant to consider whether a discriminatory regime, rule, practice or principle, which had a clear and adverse effect on a complainant, existed. There is a distinction between a continuing state of affairs and a one-off act with ongoing consequences.

76. Guidance was provided in analysing what constitutes conduct extending over a period in Hendricks v. Metropolitan Police Commissioner [2003] IRLR 96 to include per Mummery LJ in the Court of Appeal at paragraph 48:

"the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs, by the concept of an act extending over a period".

Deductions from wages

77. If the employer reduces salary in breach of contract the relevant legislation is Sections 13 and 27 of the ERA.

(1) An employer shall not make a deduction from wages of a worker employed by him unless

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

S.27 Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.

Unfair dismissal

78. Under section 98(1)(b) of the ERA the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. This is the set of facts known or beliefs in the mind of the year decision-maker at the time of the dismissal which causes him or her to dismiss the employee Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

79. Under s98(4) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient

reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

80. In considering whether the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in British Home Stores v Burchell [1980] ICR 303, and the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09.

81. In considering the fairness of the dismissal, a tribunal must have regard to Iceland Frozen Foods v Jones [1982] IRLR 439 and the approach summarised in that case. The starting point should be the wording of section 98(4) of the ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

82. The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.

83. A tribunal is entitled to find that was outside the band of reasonable responses without being accused of placing itself in the position of the employer: Newbound v Thames Water Utilities [2015] IRLR 735, CA, per Bean LJ at paragraph 61. It is not necessary, according to Court of Appeal in *Shrestha v Genesis Housing Association Ltd* [2015] EWCA Civ 94 extensively to investigate each line of defence advanced by an employee. That would be too narrow an approach and would add an *"unwanted gloss"* to the Burchill test. What is important is the reasonableness of the investigation as a whole.

84. Further, when considering the extent of the investigation required, it is important to have regard to the extent to which underlying matters are not in dispute.

85. The Court of Appeal held in London Ambulance Service NHS Trust v Small [2009] IRLR 563 that a tribunal's focus in a complaint of unfair dismissal is not on the employee's guilt or innocence. Instead, the tribunal should confine itself to reviewing the reasonableness of the respondent's decision. In Small the tribunal had, according to the Court of Appeal, seriously strayed from its path of reviewing the fairness of the employer's handling of the dismissal. Instead, the tribunal had retried certain factual

issues, substituted its own view of the facts relating to Mr Small's conduct and ultimately concluded that there were not reasonable grounds for believing that Mr Small was guilty of misconduct.

86. It is also important for the tribunal to keep in mind when considering the reasonableness of the disciplinary and dismissal process that procedural issues do not sit in a vacuum, but they must be considered together with the reason for dismissal: Taylor v OCS Group Ltd [2006] IRLR 613 (CA) and Sharkey v Lloyds Bank Plc [2015 UKEAT/0005/15]. The tribunal must consider the context and gravity of any procedural flaw identified and it is only those faults which have a meaningful impact on the decision to dismiss that are likely to affect the reasonableness of the procedure

ACAS Code on Disciplinary and Grievance Procedures (the Code)

87. In reaching their decision, tribunals must also consider the Code. By virtue of s.207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence, and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be considered in determining that question.

88. The Code includes the following:

Establish the facts of each case

89. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases, this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

a) In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.
b) If there is an investigatory meeting this should not by itself result in any disciplinary action.
c) In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.

Inform the employee of the problem

90. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

Hold a meeting with the employee to discuss the problem.

91. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case. At the meeting, the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses.

Polkey reduction

92. In Software 2000 v Andrews [2007] ICR 825, EAT, Elias P summarised (at paragraph 54) the authorities on "Polkey" reductions and made the following observations:

(a) in assessing compensation for unfair dismissal, the tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;

(b) if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);

(c) there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;

(d) however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence; and

(e) a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e., that employment might have been terminated earlier) is so scant that it can effectively be ignored.

Contributory conduct and the compensatory award

93. When considering a reduction to the compensatory award, under S.123(6) ERA, the tribunal should: identify the impugned conduct, consider whether it was blameworthy, and decide, if so, whether it caused or contributed to the dismissal.

94. The conduct must have been known at the time of the dismissal: Optikinetics Ltd v Whooley [1999] ICR 984, EAT, per HHJ Peter Clark at 989A-C. It is for the tribunal alone to determine, as a matter of fact, whether the employee committed the impugned conduct and, if so, how wrongful it was: Steen v ASP Packaging [2014] ICR 56, EAT, per Langstaff P at paragraph 12.

There are four questions for the tribunal to consider as set out in Steen:

(a) what was the conduct which is said to give rise to possible contributory fault?

(b) was that conduct blameworthy, irrespective of the employer's view of the matter?

(c) did the blameworthy conduct cause or contribute to the dismissal?

(d) if so, to what extent should the award be reduced and to what extent would it be just and equitable to reduce it?

Contributory conduct and the basic award

95. Under s.122 (2) of the ERA where a tribunal considers that any conduct of a claimant before the dismissal was such that it would be just and equitable to reduce, or further reduce, the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

Race and the burden of proof

96. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

97. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the Respondent's explanation for the alleged discrimination in determining whether the Claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.) The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. race) and a difference in treatment. LJ Mummery stated at paragraph 56:

> "Those bare facts 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."

98. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR870.

> "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Harassment

99. Under s26, EQA, a person harasses the claimant if he or she engages in unwanted conduct related to age, and the conduct has 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. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

100. In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336, EAT, where Mr Justice Underhill (as he then was) gave this guidance:
101. "An employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

102. General Municipal and Boilermakers Union v Henderson [2015] IRLR 451 provides that a single incident is unlikely to be sufficient to create an environment sufficient to give rise to an offence of harassment.

Time off for Dependants

103. The relevant statutory provisions are in the ERA:

S.57A Time off for dependants

(1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary:

(a) to provide assistance on an occasion when a dependant falls ill,
(b) to make arrangements for the provision of care for a dependant who is ill,
(d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or
(e) to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him

(2) Subsection (1) does not apply unless the employee

(a) tells his employer the reason for his absence as soon as reasonably practicable, and

(b) except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent.

(3) Subject to subsections (4) and (5), for the purposes of this section "dependant" includes, in relation to an employee—

(b) a child.

S57B Complaint to Employment Tribunal

(1) An employee may present a complaint to an employment tribunal that his employer has unreasonably refused to permit him to take time off as required by s.57A.
(3) Where an employment tribunal finds a complaint under subsection (1) well-founded, it—

(a) shall make a declaration to that effect, and
(b) may make an award of compensation to be paid by the employer to the employee.

(4) The amount of compensation shall be such as the tribunal considers just and equitable in all
the circumstances having regard to—

(a) the employer's default in refusing to permit time off to be taken by the employee, and

(b) any loss sustained by the employee which is attributable to the matters complained of.

104. The right is intended to cover unforeseen matters and would not cover, for example, a parent taking a child to a hospital appointment. If employees know in

advance that they are going to need time off, they may be able to arrange with their employer to take annual leave.

105. In all cases, the right will be limited to the amount of time which is reasonable in the circumstances of a particular case.

106. In Qua v John Ford Morrison 2003 ICR 482, EAT, the Appeal Tribunal considered how employment tribunals should approach the question of whether it was necessary for an employee to take time off in any given situation. The EAT held that factors to be taken into account include the nature of the incident which has occurred, the relationship between the employee and the dependant in question, and the extent to which anybody else can provide assistance.

107. Whether or not the employee has complied with the notice requirements is a matter for the employment tribunal to decide on the facts of each case.

108. In Qua, the EAT held that an employment tribunal should ask itself four questions in order to determine whether an employee has been automatically unfairly dismissed for taking time off for dependants:

Question 1

Did the employee take time off or seek to take time off from work during his working hours? If so, on how many occasions and when?

Question 2

If so, on each of those occasions did the employee:

- as soon as reasonably practicable inform the employer of the reason for the absence, and
- tell the employer how long he or she expected to be absent?
- If not, were the circumstances such that the employee could not inform the employer of the reason until after he or she had returned to work?

If on the facts the tribunal finds that the employee did not comply with these requirements of s.57A(2) then the right to take time off work under subsection (1) does not apply. The absences would then be unauthorised and the dismissal would not be automatically unfair.

Question 3

If the employee did comply with the above requirements, then the following questions arise:

(a) did the employee take or seek to take time off work in order to take action which was necessary to deal with one or more of the five situations listed at paras (a) to (e) of S.57A(1), and

(b) if so, was the amount of time off taken or sought to be taken reasonable in the circumstances?

Question 4

If the employee satisfies questions 3(a) and (b), was the reason or principal reason for his dismissal that he had taken or sought to take that time off work?

If the answer to the final question is in the affirmative, then the employee is entitled to a finding of automatic unfair dismissal.

<u>Entitlement to parental leave</u>

109. This arises pursuant to s.76 of the ERA. Section 76(3) provides for an entitlement to a parent to take parental leave in respect of a child for whom he or she is responsible for a total period of leave of at least three months.

<u>Conclusions</u>

<u>Failure to provide a statement of terms and conditions of employment under s.1 or the ERA</u>

110. The Respondent accepts that the Claimant was not provided with a contract of employment and did not receive a statement of the statutory required terms and conditions of employment pursuant to s.1 of the ERA. This claim therefore succeeds. The only question the Tribunal therefore needs to consider is whether the Claimant should be awarded the minimum amount equal to two weeks' pay or that it would be just and equitable in all the circumstances to award the higher amount equal to four weeks' pay in accordance s.38 of the Employment Act 2002. We consider it be appropriate to award four weeks' pay and we reach this decision for the following reasons:

(a) the Claimant had been employed for over 2 years without receiving a s.1 statement of terms and conditions of employment;

(b) there was considerable uncertainty regarding the Claimant's core terms to include the basis of his renumeration, working hours, holiday entitlement and any applicable benefits; and

(c) the Claimant's evidence, which we accept, was that the Respondent does not provide contracts of employment for any of its employees and therefore this would appear to represent a systemic practice rather than a one off inadvertent oversight. We did not accept Mr Ozer's evidence, which was not in his witness statement, that the Claimant had destroyed his and other contracts of employment.

Declaration as to s.1 ERA terms and conditions of employment

111. Given that the Claimant did not have written terms and conditions of employment it is necessary for us to make a declaration as to those terms which are relevant to the issues we need to determine.

112. We find that the Claimant was entitled to the following:

(a) Annual holiday entitlement in accordance with the minimum pursuant to the Working Time Regulations 1998 i.e. 28 days.

(b) A weekly wage calculated at the rate of £14 per hour worked

(c) Notice to reflect the statutory minimum i.e. given that he had two years' continuous employment a two week minimum notice period.

(d) We find that the Claimant had no normal working hours albeit there was an expectation that he would be in attendance from approximately 7am until late in the evening.

Time off for dependants

113. The Claimant relies on what he says was the Respondent's failure to allow him to take time off for the care of his family members as result of incidents in January 2017 and 9 September 2017. The Claimant acknowledges that these claims are substantially out of time.

114. Given that it was not until 26 March 2019 that the Claimant notified ACAS, and an early conciliation certificate was issued by ACAS on 29 March 2019, any acts or omissions relied upon before 9 November 2019 are out of time. Therefore, the only question for us to consider is whether it would be reasonable to exercise our discretion to extend time on the basis that it was not reasonably practicable for the claims to have been commenced in time. We find that it would not for the following reasons:

(a) a very substantial period of time has elapsed; and

(b) the failure to provide time off for the care of dependants under s.57 of the ERA constituted individual acts or omissions and not a continuing course of conduct. Therefore, the latest date from which time started to run was that of the second incident on 9 September 2017 and therefore at the time the Claimant commenced ACAS early conciliation the claim was over 14 months out of time.

115. Whilst we have taken account of the reasons given by the Claimant for his delay in that his English was poor, he did not understand his legal rights and was working extremely long hours we do not consider that these in themselves provide sufficient justification for us to find that it was not reasonably practicable for him to commence proceedings. It is also relevant that there is no evidence that the Claimant raised a grievance in relation to these matters.

116. In reaching this decision we are mindful of the importance of finality and that if the Claimant's grounds for asking the Tribunal to exercise its discretion to extend time were to be accepted it would potentially provide all claimants whose English is poor, were unfamiliar with their legal rights and worked long hours to have an in effect indefinite ability to issue proceedings in respect of events which had become stale.

Failure to provide parental leave under s. 76 of the ERA

117. This relates to the birth of the Claimant's second child on 5 March 2018. Once again the Claimant accepts that this claim is significantly out of time and for the reasons we have set out above, in relation to time off for dependants, we do not consider it appropriate to exercise our discretion to extend time on the basis that it was not reasonably practicable for the claim to be submitted in time.

Unfair dismissal

Has the Respondent shown that the reason or the principal reason for the Claimant's dismissal was his conduct?

118. We find it has not. We reach this decision for the following reasons. We consider that the Respondent had an ulterior motive for this dismissal. We find that the real reason for his dismissal was as a result of the Claimant raising concerns in late 2018 regarding the conduct of the Respondent's business to include its use of illegal workers, payment of part of employee/worker salaries or wages in cash with a view to minimising tax and national insurance contributions and the use of fake receipts with a view to minimising revenue and consequential tax/VAT liabilities. We reach this finding for the following reasons:

(a) Up until 16 November 2018, the date of the reference provided for the Claimant on his seeking to rent property, he was regarded as an excellent employee.

(b) No issues had been raised regarding his performance at any point prior to his suspension save for the informal warning given to him in an email of 12 November 2018 regarding him ripping down the "do not drink" notices. Nevertheless, we accept the Claimant's explanation that he regarded these notices as hypocritical given that members of the management were consuming alcohol.

(c) We question the credibility of the Respondent's evidence to justify the Claimant's dismissal on the notional grounds of conduct. In particular, the reliance which was placed on CCTV footage outside normal working hours as long back as 1 April 2018 is wholly inconsistent with the Respondent's case that the Claimant was an habitual heavy drinker during working hours.

119. The evidence given by Mr Ozer as to the reasons for the Claimant's dismissal did not include drinking during working hours. We found his evidence on this, and many other points to lack credibility. It was also inconsistent with his own witness statement and contained many matters not put to the Claimant during cross examination.

120. Notwithstanding our finding above that the reason for the claimant's dismissal was not a potentially fair one under S 98 (2) of the ERA we will nevertheless go on to consider, for completeness, whether a dismissal for conduct, had this been the reason for the dismissal, would have otherwise been fair.

121. First, did the Respondent have reasonable grounds to dismiss the Claimant based on reasonable suspicions as to his conduct? We find that they did not. We reach this finding for the following reasons:

(a) Mr Ozer was not able to provide any evidence from his time at St Christopher's Place as to the Claimant's alleged alcohol consumption and inebriation. Given that he is a regular presence at the restaurant, had the Claimant been behaving as alleged i.e. drinking large quantities of alcohol, being under the influence of alcohol and behaving in a verbally and potentially physically aggressive manner, we consider it highly probable that this would have been observed by Mr Ozer or directly reported to him by concerned members of staff. There is no evidence of this taking place.

(b) Given that the statements from staff members refer to prolonged and very excessive alcohol and behavioural issues involving the Claimant over an extended period of time we consider it very surprising that the only evidence provided was a CCTV clip at 23:15 on 1 April 2018. Whilst the Claimant was drinking there is no evidence that he was inebriated nor that he was behaving in a verbally or physically aggressive manner towards staff. It is apparent that

he was off duty as he was not wearing his uniform. This was not disputed by the Respondent. Further, this was six months prior to the Respondent putting up notices prohibiting the consumption of alcohol on the premises.

(c) If, as alleged, it had been the case that the Claimant was consuming large quantities of alcohol throughout the working day, and given the fact that the Respondent has multiple CCTV cameras at St Christopher's Place, we consider it would have been inevitable that further evidence would have been provided showing the Claimant drinking. Absent this evidence there are genuine grounds to question whether the Claimant's alleged drinking was the real, or principal, reason for his dismissal. We find that it was not.

(d) We also consider that there is considerable grounds for scepticism as to the veracity of the statements provided by a series of employees as contained in the bundle. We consider that they have a remarkably high level of similarity. We also question whether these statements were in effect orchestrated given that they were all provided at the same time. We consider that it would have been more probable that individual employees would have sent emails or notes, or otherwise raised orally, their concerns on an ad hoc basis. The fact that such a large number of employees produced statements on or about 6 January 2019 raises the possibility that this was an orchestrated attempt to produce evidence against the Claimant. The Claimant says that these individuals were not necessarily signing the statements by the names he knew them and also that the Respondent made payments to them in return for their statements. He also says that these individuals were in effect under a degree of duress as they were working in the UK illegally and therefore had reason to be concerned about possible retaliatory action from the Respondent if they did not comply with any requests made by or on behalf of Mr Ozer.

(e) We also find it very significant that Mr Ozer when asked by the Employment Judge as to the reasons for the Claimant's dismissal referred to matters other than his drinking. The Claimant was not ostensibly dismissed for the concern that he was verbally and potentially physically aggressive. His dismissal was a result of concerns that he was drinking during working hours, ripped down the notices prohibiting the consumption of alcohol and was hostile to staff and his superiors.

<u>Did the Respondent undertake a reasonable investigation?</u>

122. We find that it did not. We reach this finding for the following reasons.

(a) There is no evidence of a full investigation being undertaken. Mr Ozer says that it was his decision to dismiss. He set out various reasons.

(b) The Claimant was not provided with an appropriate opportunity to consider any investigation report. There was none.

(c) He was also not provided with the opportunity to challenge the statements from the witnesses. Further, he was not fully aware as to their exact identities.

There is no evidence that he was necessarily even provided with a set of the statements provided from those witnesses.

(d) There is no evidence that a full review was undertaken as to the CCTV footage from the kitchen and bar.

(e) There was no evidence provided as to the hours worked by the Claimant and whether he was, as alleged by Mr Ozer, frequently leaving the premises and finishing work at 4pm. Had this been properly investigated it could have been resolved. The fact that these matters were being raised by Mr Ozer for the first time during evidence further supports our conclusion that there was no proper investigation.

Was a fair procedure followed?

123. We find that it was not. We reach this finding for the following reasons.

(a) Mr Ozer says that it was his decision to dismiss. Therefore, it was wholly unfair that the disciplinary hearing was notionally conducted by Mr Doldur. This was then compounded by the fact that the letter notifying the Claimant of his dismissal dated 8 February 2019 was from Mr Baylan.

(b) The note from the disciplinary hearing of 18 January 2019 is palpably inadequate. Whilst the hearing apparently lasted from 1pm to 2:20pm the note of the hearing runs for a page. It is significant that the Claimant was only asked questions regarding the issues about drinking whilst at work and removing notices in the premises. He was not asked any questions about alleged verbally or physically aggressive behaviour towards other staff members.

(c) Also the document clearly refers to drinking whilst at work. We therefore consider it was significant that the only CCTV evidence provided was of the Claimant drinking in the area behind the bar at a time when he was clearly not on duty.

ACAS uplift

124. We find that the Respondent failed to comply the Code in relation to the Claimant's dismissal.

125. We consider that given the serious procedural shortcomings in the Respondent's disciplinary and appeal process as set out above that there should be an uplift at the maximum figure of 25% for a failure to follow the Code. We reach this finding for the following reasons but also referring to the reasons set out above and not repeated in full to avoid repetition:

(a) There was no independence in the conduct of the disciplinary hearing. Mr Ozer in effect made the decision. He then would have been responsible for any appeal.

(b) The Claimant was not provided with full notification as to the potential grounds of concern regarding his conduct. Many matters were referred to by Mr Ozer in evidence which were not put to the Claimant in advance of the disciplinary hearing.

<u>If the Tribunal finds that the Claimant's dismissal was unfair, applying Polkey, would the Claimant have been dismissed fairly in any event?</u>

126. We do not consider it appropriate to make any reduction to the compensatory award for unfair dismissal under Polkey. Given our findings regarding the reason for dismissal and the process followed we find that the Respondent had an ulterior motivation for dismissing the Claimant. We do not consider that any fair process would have resulted in his dismissal.

<u>If the Claimant was unfairly dismissed, was his dismissal to any extent caused or contributed to by any action by him?</u>

127. We consider that no grounds exist for a reduction in the compensatory award on account of the Claimant's contributory conduct. We find that there was none. Whilst it is possible that he may have been drinking whilst at work, and being verbally abusive to other staff members, we do not find that this has been appropriately evidenced. It would have been open to the Respondent to call witnesses to this effect. They failed to do so.

<u>Wrongful dismissal</u>

128. We find that the Claimant was dismissed in circumstances where the Respondent did not have grounds to terminate his employment on the basis of gross misconduct. We have found that the Claimant was dismissed as a result of Mr Ozer, on behalf of the Respondent having ulterior motives i.e. his concern that the Claimant was raising issues regarding illegality in the Respondent's business to include money laundering, the employment of illegal workers and the evasion of tax. We therefore award him the sum of £1,858.50 in respect of his statutory notice period of two weeks. This has been calculated based on his average pay over the last 12 weeks of his employment as set out below. However, given that the claimant has been awarded compensation for unfair dismissal for the same period there is no double recovery and this sum does not therefore form a separate part of the compensation.

<u>Harassment under s.26 of the Equality Act on the Grounds of Race/Nationality</u>

129. Given that the Claimant has not specified the dates upon which the alleged comments made by Mr Ozer, which he contends constitute harassment on account of his race were made, there is a question as to whether these claims are in time. We find that any such comments would have constituted a continuing course of conduct had they been made and therefore we find that this claim has been brought in time.

130. We found that there was insufficient evidence to create an inference of discriminatory conduct sufficient for the burden of proof to revert to the Respondent. We reach this finding for the following reasons.

(a) The alleged discriminatory remarks were not corroborated by any other member of the restaurant staff. Given that the Claimant contends that the remarks were made on a continuing basis we would have expected that at least some of them would have been within earshot of other employees and they could have potentially provided corroborative evidence to support the Claimant's assertions.

(b) The Claimant was unable to provide any specific dates or context for the alleged remarks. Whilst perhaps understandable in circumstances where he was referring to a continuing course of conduct, we would nevertheless have expected some incidences to have been given an approximate time scale as in when I was preparing dinner on a night in November 2018 at approximately 7pm Mr Ozer came into the kitchen and without prior notice referred to "Azeri as pimps".

(c) The failure of the Claimant to contemporaneously record his concerns regarding such remarks.

(d) Whilst we took account of the Claimant's email of 10:57am on 13 November 2018, we consider it significant that this was in direct response to the Respondent's email of 12 November 2018 giving him an official warning for ripping down the notices. It would also appear, given the English language used that the Claimant had assistance from his wife, or possibly legal representation, in the drafting of his email. Whilst it refers to "indirect verbal and phycological abuses and discriminations" and "discriminatory behaviours" it gave no specific details of the alleged remarks. It was not until the Claimant's appeal against his dismissal in his email of 18 February 2019 that he made specific reference to the alleged discriminatory remarks.

<u>Remedy</u>

<u>S1 of the ERA</u>

131. The Claimant is awarded the sum of £3,717 which is equivalent to four weeks' pay for the failure to provide him with s.1 ERA statement of terms and conditions of employment.

Basic award for unfair dismissal

132. The maximum week's pay for a basic award as at the date of the Claimant's dismissal on 8 February 2019 was £508. Given that the Claimant had two years' continuous employment he is therefore entitled to a basic award of £1,016.

Compensatory award for unfair dismissal

133. Given our finding that the Claimant had no normal working hours, albeit there was an expectation that he would be in attendance from approximately 7am until late in the evening, we find that it appropriate to calculate his pay in accordance with s.224 of the ERA for the period of 12 weeks up to the termination date of 8 February 2019. This gives an average weekly pay figure of £929.25 (the calculation of which is set out below). It is therefore this figure that we have used in calculating the compensatory award.

134. The Claimant was unemployed for a total of 96 days between 9 February 2019 and 15 May 2019. At a gross daily rate of £132.75 this therefore gives a total of £12,744 as the compensatory award.

ACAS uplift

135. We have applied an uplift of 25% to the compensatory award as a result of a failure by the Respondent to comply with the Code and this thereby giving a total gross figure of £15,930.

Unlawful deduction from wages

136. Whilst the evidence between Mr Ozer and the Claimant is contradictory as to whether the Claimant was part paid in cash from 1 September to 31 December 2018 we have approached the assessment of deductions on the basis of Mr Ozer's unequivocal evidence that no cash payments were made to the Claimant nor any other employee. In any event, it would have been a very problematic task to have attempted to assess which credit payments of cash to the Claimant's bank account constituted wages as opposed to cash from other sources.

137. We have reviewed the updated schedule of loss provided by Mr Robison. We have, however, undertaken our own calculations as we consider that there is a minor discrepancy in the basis of his calculations in so far as they relate to complete weeks

worked given the Respondent's two weeks in arrears basis of paying salaries. On the basis of our calculations we assess the losses as follows:

3 September 2018 (week 36)

138. 98 hours worked = £1,372

Payslip for the week of 24 September 2018 shows 49 hours worked which equates to £558.93. Therefore, there is a shortfall of £813.07.

24 September 2018 (week 39)

139. 97 hours worked = £1,358

Payslip for week of 15 October 2018 shows 48.5 hours worked which equates to £555.73. Therefore there is a shortfall of £802.27.

15 October 2018 (week 42)

140. 98 hours worked = £1,372

Payslip for week of 5 November 2018 shows 64 hours worked which equates to £655.19. Therefore there is a shortfall of £716.81

22 October 2018 (week 43)

141. 88 hours worked = £1,232

Payslip for 12 November 2018 shows 44 worked which equates to £527.01. Therefore there is a shortfall of £704.99

29 October (week 44)

142. 80 hours worked = £1,120

Payslip for 19 November 2018 shows 47.5 hours worked which equates to £549.35. Therefore there is a shortfall of £570.65.

143. The total shortfall is therefore a gross figure of £3.607.79.

Claimant's average weekly pay

144. There is no normal pay therefore it is necessary to calculate the average weekly pay for the last 12 weeks of the Claimant's employment. The gross figures in reverse order for the last 12 weeks are as follows:

£1.288
£1,358
£1,358
£1,288
£1,288
£ 560
£ 651
£ 574
£ 581
£ 546
£ 539
£1,120

145. Total £11,151 and weekly average of £929.25.

Non payment for the full period of suspension

146. The Claimant was not paid for days of 5-8 February 2019 and this gives rise to a further unauthorised deduction from wages in the gross figure of £531.

Holiday pay

147. Whilst it is apparent that the Claimant always worked at least 60 hours per week in those weeks for which we have his payslips he nevertheless received holiday pay at £700 per week which would have equated to 50 hours. However, Mr Robison confirmed that no claim was being brought for holiday pay in 2018.

148. The Claimant was entitled to three days' accrued holiday on the basis of a minimum annual holiday entitlement of 28 days under the Regulations for 2019. This being calculated on the basis of 39/365x28 and giving a figure of £398.25.

149. The total award to the Claimant is therefore £25,200.04.

Tax treatment of the payments

150. Those payments made to the Claimant in respect of deductions from wages and holiday pay totalling £4,537.04 are subject to the payment of tax by the Claimant. Those payments made to him for the basic award, compensatory award and failure to provide a s.1 ERA statement and terms of conditions of employment are paid gross without a requirement for him to account for tax.

Recoupment Regulations

151. Mr Robison confirms that the Claimant had not received any benefits to which the recoupment regulations apply in the period 9 February until 15 May 2019.

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Employment Judge Nicolle

19 November 2021

Sent to the parties on:

22 November 2021

For the Tribunal: