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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4101955/2020**

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**Hearings Held via Cloud Video Platform (CVP) on 28-30 June, 1, 2 & 5 July 2021**

**Employment Judge Sangster**

**Tribunal Member Taggart**

**Tribunal Member Doherty**

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**Mr D Weiteska**

**Claimant  
In Person**

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**Bothwell Care Limited**

**Respondent  
Represented by:  
Mr McFarlane  
Consultant**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The unanimous judgment of the Tribunal is that the claimant's claims of direct discrimination because of race, unauthorised deductions from wages and wrongful dismissal do not succeed and are dismissed.

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## REASONS

### Introduction

1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face-to-face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.
2. The claimant presented claims of direct discrimination because of race, unauthorised deductions from wages and wrongful dismissal.
3. The claimant accepted at the outset of the hearing that he had received his notice pay and his contractual entitlements during his sick pay. He indicated that his claim was that he would not have been off sick, or dismissed, but for the discrimination relied upon. Notwithstanding this, he did not seek to withdraw his claims of wrongful dismissal and unauthorised deductions from wages.
4. The respondent denied all claims.
5. The claimant gave evidence on his own behalf and led evidence from his wife, Malgorata Wieteska, and his daughter, Natalia Wieteska.
6. The respondent led evidence from 6 witnesses, as follows:
  - a. Victoria Sim (VS), agency chef;
  - b. Derek Denholm **(DD)**, the respondent's Head Chef/Catering Manager;
  - c. Katherine Bain (KB), former manager of the respondent's Care Home;
  - d. Jackie Weston (JW), Director of Care for the Care Concern Group;
  - e. James Webb (JW2), former Area Manager for the respondent;
  - f. Thomas Johnstone (TJ), Peripatetic Care Home Manager.

7. The parties agreed a joint bundle of documents extending to 158 pages, in advance of the hearing. A further 5 pages were added, by consent, during the hearing.

8. During the hearing, the claimant was assisted by an interpreter.

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**Issues to be Determined**

9. The issues to be determined were agreed at the outset of the hearing.

*Direct discrimination because of disability - s13 Equality Act 2010 (EqA)*

10 10. Did the respondent subject the claimant to the following treatment?

- a. Suspending the claimant;
- b. The way the claimant's grievance was dealt with;
- c. The way the claimant's grievance appeal was dealt with; and
- d. Dismissing the claimant.

15 11. If so, was that treatment *'less favourable treatment'*, i.e. did the respondent treat the claimant less favourably than they treated, or would have treated others ("comparators") in not materially different circumstances? The claimant relied on a hypothetical comparator.

12. If so, was this because the claimant is Polish?

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*Wrongful dismissal & Unauthorised Deductions from Wages*

13. Was the claimant entitled to additional payments from the respondent in  
5 respect either of the following:

a. Notice pay; and/or

b. Sick pay.

14. If so, what sums were due to the claimant?

**Findings in Fact**

10 15. The Tribunal found the following facts, relevant to the issues to be determined,  
to be admitted or proven.

16. The respondent operates the Bothwell Castle Care Home in Bothwell. It is  
part of the Care Concern Group.

15 17. The claimant is Polish. The claimant has qualifications in communicative  
English at SCQF level 2 and can communicate effectively in English at a  
conversational level. The claimant obtained SVQs in Professional Cookery  
and Food & Beverage Service SCQF Level 5 in June 2019.

20 18. In June 2019, the respondent advertised a vacancy for a Kitchen Assistant.  
On 16 June 2019, the claimant applied for the role of Kitchen Assistant with  
the respondent. In summary, the duties of that role included ensuring that the  
kitchen and related areas were maintained in a clean and safe condition at all  
times, observing and maintaining food hygiene standards. The role did not  
involve any cooking. The claimant was interviewed by DD and the  
respondent's Office Manager on 16 June 2019. He was successful in his  
25 application and commenced employment with the respondent, as a kitchen  
assistant, on 5 July 2019.

19. The claimant was provided with a Statement of Main Terms and Conditions of Employment and job description on the commencement of his employment with the respondent. He signed the Statement of Main Terms and Conditions of Employment on 19 July 2019. This stated that:

- 5 a. the claimant would be paid £8.75 per hour, in arrears, on every 4<sup>th</sup> Monday;
- b. the claimant would receive statutory sick pay only if he was unable to work due to illness;
- 10 c. his employment was subject to a probationary period of six months; and
- d. during the probationary period, the notice period would be one week by either party.

20. Throughout the claimant's employment, DD was the head chef and ultimately in charge of the kitchen. DD has worked as a chef for 24 years. He obtained an obtained SVQ in Complex Cookery and Management 22 years ago and has 13 years' experience as a kitchen manager. There was also another chef employed by the respondent at that time, David Lennon (**DL**). The claimant's job description confirmed that the claimant was responsible to DD, but accountable to the Care Home Manger, KB.

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20 21. DD and the claimant initially got on relatively well. DD was aware that the claimant wished to develop his cooking abilities/responsibilities and that he intended to continue with his SVQ qualifications at college, while working for the respondent. As a result, on one or two occasions, DD allowed the claimant to bake bread in the kitchen, notwithstanding the fact that it did not fall within the claimant's remit to do so. The claimant felt that, due to his qualifications, he was at least as able, if not more so, than DD and DL to undertake the role of chef for the respondent. He disagreed with the menus compiled for the residents of the Care Home by DD and DL and quickly formed the opinion that the standard of the food prepared by DD and DL was poor. He also felt that the levels of food wastage were too high. He began, surreptitiously, taking

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5 photographs of the food being prepared in the kitchen, and of the food  
wastage. He felt that, on completion of his SVQ in professional cookery at  
SCQF level 6, which he was due to commence shortly after the  
commencement of his employment with the respondent, he would be more  
qualified than DD and DL and would automatically be promoted from the role  
of Kitchen Assistant to Head Chef, with DD and DL being demoted. He felt  
this due to his belief that a person with a lower level of qualification could not  
be the manager of someone with a higher level of qualification, and his view  
that he would be more qualified than DD and DL on obtaining his SVQ in  
10 professional cookery at SCQF level 6 (albeit that he did not know what level  
of qualifications or experience DD had). In the meantime, his strongly held  
view was that he should be allowed to cook for the respondent,  
notwithstanding the fact that he had applied for and was offered the role of  
Kitchen Assistant. He felt that he could do a better job than DD and DL. He  
15 did not consider it fair or appropriate that he remained in/was relegated to the  
role of Kitchen Assistant.

22. On 24 August 2019, the claimant started work at 8am. At around 10am he  
went to the cooking side of the kitchen, going into the fridge and taking out  
apples and carrots. DD asked the claimant what he was doing. The claimant  
20 replied that he was making a recipe for one of the residents. This did not fall  
within the remit of his role as a Kitchen Assistant. DD asked him to stop what  
he was doing and go back to his duties. The claimant refused to do so and  
matters quickly became heated, with the claimant adopting an angry and  
aggressive physical demeanour towards DD, while speak in an animated  
25 manner in Polish, which DD could not understand. DD tried to calm the  
situation down, but was unable to achieve this by speaking to the claimant in  
the kitchen. Instead, he asked the claimant to go with him to the laundry, with  
another employee who was Polish and could interpret, if necessary. The  
claimant agreed to this. When at the laundry, DD tried to diffuse the situation  
and to explain to the claimant that he should not be cooking, as that was not  
30 part of his role. The claimant remained very agitated however and would not  
engage in the conversation. Instead, he went back to the kitchen. Thereafter,  
for the rest of the day, the claimant remained angry at the situation. He did

not engage with DD at all. He would not speak to DD or follow any instructions from DD.

23. DD would normally have spoken to the Care Home Manager, KB, in relation to any such difficulties, to get advice on how best to handle the situation. KB was however on annual leave at the time, so he was unable to do so. He was unsure of what action to take, but was very concerned that the claimant was not following any instructions from him and that the kitchen was close to the residents' lounge and they would hear any raised voices, if matters escalated again. At the end of the shift, as there had been no improvement in the situation, DD asked the claimant to take a period of leave, as he did not feel it was appropriate for the claimant to continue working within the kitchen. He felt this was the best course of action, until he was able to speak to KB.

24. DD sought advice over the course of the next few days, in KB's continued absence. He was advised that the claimant should not be required to take annual leave, but should in fact be suspended. The claimant was accordingly informed, by letter dated 28 August 2019, that he was suspended on full pay, rather than being on annual leave.

25. When KB returned to work following her holiday, she was informed that the claimant had been sent home and then suspended. KB commenced an investigation into the claimant's alleged conduct on 24 August 2019. She asked DD to prepare a written statement setting out what happened on 24 August 2019. He did so on 2 September 2019 and passed it to KB. She then investigated the issue and took advice from the respondent's HR department.

26. Having done so, she concluded that the allegation in relation to the claimant's conduct on 24 August 2019 would not merit taking disciplinary action against the claimant. She was however conscious that the claimant was still in his probationary period and felt it would be appropriate to discuss standards of acceptable conduct as part of his probationary review meeting, as well as seeking to agree a way forward in relation to his return. She was also aware that there appeared to be difficulties developing in the relationship between

the claimant and the two chefs and wanted to discuss and agree a way forward in relation to this too.

5 27. KB invited the claimant to a probationary review meeting by letter dated 9 September 2019. The claimant requested clarification of the date, which had  
10 been erroneously stated in the letter of 9 September 2019. In a further letter dated 13 September 2019, KB clarified the date and stated, *It is not my intention to proceed with any disciplinary action against you, however this incident has highlighted issues which we must discuss, some of which have been raised previously and reiterated to your daughter by the chef when she attended the home with yourself.* '

28. The claimant attended a probationary review meeting with KB on 17 September 2019. The client was accompanied by his wife. At the start of the meeting the claimant handed a letter to KB raising several concerns, summarised as follows:

- 15 a. That he was required to take annual leave against his will;
- b. That DD and DL not allowing him to cook, when he had the qualifications to do so, amounted to discrimination;
- c. That DL was stealing from the respondent by taking food from the kitchen; and
- 20 d. That DD & DL are incompetent as chefs and cause significant levels of food wastage.

29. The claimant expected to discuss the terms of the letter with KB at the meeting. From KB's perspective however, the meeting was a probationary review meeting and she wished to address with the claimant issues arising in  
25 that context, as well as arrangements for his return to work and how best to address the relationship difficulties. She therefore informed the claimant that that was the purpose of the meeting. She indicated that she would not be looking at or addressing the terms of the claimant's letter during the meeting. The claimant was unhappy at this as he wished to discuss the terms of the



letter with KB during the meeting. The meeting ended abruptly when the claimant showed KB a message he had typed on his phone which stated 'Do you like your job. Do you want to keep your job' or words to that effect. JW felt that this was threatening and opened the door of her office and asked the claimant and his wife to leave.

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30. The respondent expected the claimant to return to work on/after 17 September 2019, and for arrangements for his return to be agreed at the meeting that day. He was no longer suspended at that point. He did not however return to work.

10 31. By letter dated 26 September 2019, which was received by the respondent on 7 October 2019, the claimant submitted a complaint in relation to KB as he stated that she *'refused to accept the letter discriminating against me and opened an investigation'* and stated that he would be *'filing a lawsuit for discrimination in violation of my rights as an immigrant by [DD] and [KB]'*

15 32. The issues raised by the claimant in the letter handed to KB on 17 September 2019 and his letter dated 26 September 2019 were, together, taken as a grievance. JW was appointed to investigate the claimant's grievance. She wrote to him on 8 October 2019, inviting him to a grievance meeting. His grievance was taken to be the issues raised in the letter handed to KB on 17  
20 September, as well as the issues raised in his letter dated 26 September 2019. JW met with the claimant to discuss his grievance on 14 October 2019. JW was accompanied by the respondent's Office Manager, who took minutes. The claimant was accompanied by Eva Daly, who translated for the claimant, when required.

25 33. At the start of the grievance meeting the claimant was asked to confirm if the main concerns and the reasons for him raising a grievance were as follows:

- a. His qualifications were being overlooked;
- b. The quality of food prepared and served to residents at the Care Home; and
- c. Food wastage at the Care Home.

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The claimant indicated that *7 don't know the main reason for my suspension. I don't know why. I started saying about the wastage of food and how it is prepared. I said these complaints to the head chef after I saw the two chefs taking food home and the wastage in the kitchen. People don't like my comments. I started to say this could be done differently but this was when they weren't happy with me... the standard is disgraceful. I am suspended for this. I have a right to complain. He doesn't like my comments.'* The claimant went on to say that he was upset and angry that the head chef did not take his advice. JW asked if this was making the claimant angry how this was coming across to the chefs? The claimant responded *'That's how I react, he doesn't like my comments that's why he suspended me. He wants rid of me, he wants someone quiet.'*

34. The claimant was given the opportunity to explain his grievances during the hearing. He also explained that he felt that he hadn't been listened to by KB at the probationary review meeting on 17 September 2019. JW then investigated the concerns raised.

35. JW wrote to the claimant on 17 October 2019, to inform him of the outcome of her investigation. In summary, the outcome in relation to each point was as follows:

a. **His qualifications being overlooked.** This was not upheld, on the basis that the claimant was employed as a Kitchen Assistant and there was no requirement in that role for cookery skills.

b. **Food wastage and the quality of food prepared and served to residents at the Care Home.** This was not upheld following investigation of food costs, quality indicators, stakeholder feedback and consideration of positive feedback from a recent inspection by external regulators.

c. **Requiring the claimant to take annual leave and then suspending him.** This element of the claimant's grievance was partially upheld. It was acknowledged that *'the company policy and*

5 procedure was not followed appropriately in the absence of the care home manager, who was on holiday at the time. The management team understand that the decision to request that you take holidays and then later to suspend you was incorrect and not in line with company policy. I understood that this decision made you feel that you have been discriminated against. I have viewed evidence to support that [DD] felt physically threatened by behaviours you were demonstrating towards him within the workplace. [DD] accepts that at the time, he did not understand the correct course of action to take, and took the immediate decision to request your suspension to protect himself from your behaviour. '

15 d. **KB not listening to the claimant when he attended the probationary review meeting on 17 September 2019.** This was not upheld. It was noted that the claimant attended the meeting and insisted that the focus be on his grievance, rather than his return to work. JW explained that her conclusion, following investigation, was that the meeting terminated abruptly when the claimant presented a typed message on his mobile phone, which KB considered threatening.

20 36. The letter informed the claimant of his right to appeal. The claimant appealed by letter dated 20 October 2019. His appeal focused on the actions of DD, in asking him to take any leave and then suspending him.

25 37. On 23 October 2019, the respondent wrote to the claimant highlighting that he had been absent from work since 17 September 2019 and they had not received any notification of the reason for the claimant's absence. The claimant subsequently provided a Statement of Fitness for Work, certifying him as unfit to work for 21 days from 1 October 2019, due to work related stress. Further certificates were subsequently provided, certifying him as unfit to work for the same reason, until 1 December 2019. The claimant was paid statutory sick pay (SSP) during his absence.

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38. JW2 was appointed to hear the claimant's appeal. He wrote to the claimant on 4 November 2019 inviting him to a meeting to discuss matters on 14 November 2019. This was subsequently rearranged to 13 December 2019, because of the claimant's ongoing absence from work due to ill health.

5 39. On 2 December 2019 the claimant wrote to KB asking for a date/time he could recommence working. He stated *'if / cannot start work, I want the reason behind it. Am I still suspended from work? I demand an answer in the next 3 days.'* KB received that letter on 4 December 2019 and responded the following day. She stated that the claimant had not been suspended since her  
10 letter of 13 September 2019 and that, if he was fit to resume work, he should attend for his shift on Monday 9 December 2019, at 8am.

40. The claimant attended work on 9 December 2019. A return-to-work interview was conducted by TJ, as JW was on annual leave. The claimant completed his shifts on 9 & 11 December 2019. He was then certified as unfit to work  
15 due to anxiousness by his GP on 12 December 2019, for a period of one month. The medical certificate stated that the claimant would be fit to work, provided it was not with DD. The respondent had no alternative work for the claimant to undertake, where he would not come into contact with DD. The claimant accordingly remained off and received SSP during his absence.

20 41. The appeal meeting took place on 13 December 2019. JW2 was accompanied by the Office Manager. The claimant was again accompanied by Eva Daly, who interpreted for the claimant, where required. The claimant explained that his grievance related to his suspension. When JW2 stated that that part of the grievance had already been upheld and that it was agreed that  
25 the process adopted was not correct, the claimant stated that he was not aware of that. When the claimant was asked to expand on his allegation of racism, and informed that this was an extremely serious allegation, the claimant stated *'Ok, maybe I feel occasions I have been too strong to say he is racist.'*

42. The appeal outcome was provided to the claimant by letter dated 13 January 2020. JW2 confirmed in the letter that the claimant's initial grievance in relation to being required to take annual leave and suspension had been upheld by JW and that he fully supported the decision which JW made. He did not uphold any other element of the claimant's appeal however. In relation to relationships in the workplace, he noted that the claimant had been offered the opportunity to attend mediation with DD, which the claimant had refused. In relation to the claimant's assertion that his ability as a chef had not been utilised to its full potential, JW2 noted that the claimant was employed as a Kitchen Assistant and that the main duties within that role were not to work as a cook, but to support the chef in ensuring that the home operates effectively. JW2 concluded by stating he had thoroughly investigated the allegations made and that he had found no evidence to support the claimant's assertion that employees within the respondent's workplace were racist.
43. The claimant returned to work on 15 January 2020. A return-to-work interview was conducted by TJ.
44. On 17 January 2020, the claimant was working in the kitchen. VS was working as a chef in the kitchen that day, via an agency, as DD and DL were off. She had been making scrambled eggs, overcooked them and had burnt the pot. She placed the pot in the sink area and continued working. When the claimant arrived for work, he saw that VS had burnt the pot and he was angry at this. He demonstrated that he was angry with his body language and said in an aggressive and angry manner 'kurwa'. VS heard the claimant say this, understood it to be directed at her as a result of burning the pot and understood that this was polish for 'whore'. She was very upset and offended at this and raised a complaint about this with TJ, who was the Care Home Manager at the time. She felt intimidated and scared, given the aggression with which it was said and considered not returning to work with the respondent as a result. TJ asked VS to prepare a written statement, which she did. TJ noted VS's considerable distress and believed her account.

45. TJ then attempted to discuss this with the claimant. He stated the purpose of the meeting to the claimant, but the claimant would not engage in the discussion and instead repeatedly referenced Scots law and Scottish people acting in a racist manner towards Polish people. Having attempted to discuss the matter three times, TJ took the view that he would not be able to have a meaningful discussion with the claimant about the allegations as he wished, he noted that the claimant was still within his probationary period and took the decision that the claimant's employment should be terminated on the grounds that he had not successfully completed that, given his conduct towards VS. He informed the claimant of this, and that he would receive a week's notice paid in lieu.

46. A letter was sent to the claimant the following day, confirming that his conduct was being monitored in his probationary period and the company had taken the decision to terminate his employment due to unacceptable conduct towards a fellow colleague.

47. The claimant's employment terminated on 26 January 2020.

48. On 17 February 2020, together with outstanding wages, the claimant received one week's pay in lieu of notice and a payment in respect of accrued but outstanding holidays.

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#### **Respondent's submissions**

49. In summary, Mr McFarlane, for the respondent, submitted as follows:

a. The claimant accepted that he received a payment in lieu of notice. This is clear also from the evidence. The claimant also received the sick pay contractually due to him.

b. Whilst the respondent accepts, and accepted in the grievance and grievance appeal outcome, that asking the claimant to take annual leave and then suspending him was not the correct process,

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unreasonable behaviour does not necessarily amount to discrimination. In this case, there was a reason for the respondent's actions which were not discriminatory, namely the claimant's conduct. During the grievance meeting the claimant himself put forward reasons for DD's actions which were unrelated to the claimant's race.

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c. There is no evidence to support any finding that the grievance outcome or grievance appeal outcome were reached because of the claimant's race

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d. The claimant was dismissed because of his conduct. Not because of his race.

e. In his evidence and questioning, the claimant engaged in wild hyperbole.

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f. Any claims upheld are time-barred. It is not just and equitable to extend time.

### **Claimants submissions**

50. In summary, the claimant submitted that:

a. The respondent should have reported any acts of aggression to the police. They did not do so

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b. The respondent failed to interview all the individuals who were present on 24 August 2019 and 17 January 2020. Internal procedures and rules were not followed. Evidence has been falsified.

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c. Parties present at meetings should sign documents to say they are accurate. The documents submitted as evidence are not signed or dated. They are accordingly not valid.

d. VS's evidence was completely fabricated. DD's body language when he was giving evidence demonstrated that he was lying.



- e. The claimant was treated the way he was because he was an immigrant. DD thought he could do whatever he wanted as a result.

## Relevant Law

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### *Direct Discrimination*

51. Section 13(1) EqA provides that:

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

10 52. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In ***Amnesty International/ v Ahmed*** [2009] IRLR 884 the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council*** [1990] IRLR 288 and (ii) in ***Nagaragan v London Regional Transport*** 15 [1999] IRLR 572. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan***, the act complained of is not inherently discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to 20 act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another*** [2009] UKSC 15.

25 53. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions), as explained in the Court of Appeal case of ***Anya v University of Oxford*** [2001] IRLR 377.



54. In ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, a House of Lords authority, Lord Nichols said that it was not always necessary to adopt a sequential approach to the questions of whether the claimant had been treated less favourably than the comparator and, if so, why. Instead, they may wish to concentrate initially on why the claimant was treated as they were, leaving the less favourable treatment issue until after they have decided on the reason why the claimant was treated as they were. What was the employer's conscious or subconscious reason for the treatment? Was it because of a protected characteristic, or was it for some other reason?
55. The ***EHRC: Code of Practice on Employment (2011)*** states, at paragraph 3.5 that *'The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to have been treated differently from the way the employer treated - or would have treated - another person.'*
56. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment *'but does not need to be the only or even the main cause'* (paragraph 3.11, ***EHRC: Code of Practice on Employment (2011)***). The protected characteristic does however require to have a *'significant influence on the outcome'* (***Nagarajan v London Regional Transport*** 1999 ICR 877).

#### *Burden of proof*

57. Section 136 EqA provides:
- 'If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.'*

58. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of *Wong v Gen* [2005] IRLR 258, and *Madarassy v Nomura International Pic* [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish a first  
5 base or prima facie case of discrimination or harassment by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the Tribunal to conclude that the  
10 complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

59. In *Madarassy*, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only  
15 indicate the possibility of discrimination. They are not of themselves sufficient material on which the Tribunal could conclude that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination. The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard  
20 to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in *Laing v Manchester City Council* [2006] IRLR 748, an EAT authority approved by the Court of Appeal in *Madarassy*.

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#### *Unauthorised Deductions from Wages*

60. S13 ERA provides that an employer shall not make a deduction from a worker's wages unless:  
a. The deduction is required or authorised by statute or a provision in  
30 the worker's contract; or

b. The worker has given their prior written consent to the deduction.

61. A deduction occurs where the total wages paid on any occasion by an employer to a worker is less than the net amount of the wages properly payable on that occasion. Wages are properly payable where a worker has a contractual or legal entitlement to them (***New Century Cleaning Co Limited v Church [2000] IRLR 27***).

#### *Wrongful Dismissal*

62. Wrongful dismissal is a claim for breach of contract - specifically for failure to provide the proper notice provided for by statute or the contract (if more).

### **Discussion & Decision**

#### *Unauthorised Deductions from Wages*

63. The claimant was paid statutory sick pay when he was unable to work due to illness. This was in accordance with his contractual and statutory entitlement. As he received all sums to which he was legally entitled, any claim for unauthorised deductions from wages in respect of that period must fail.

#### *Wrongful Dismissal*

64. The claimant received a payment in lieu of his contractual entitlement to notice on the termination of his employment, which accorded with his statutory entitlement. As he received all sums due to him in respect of notice, his claim for wrongful dismissal must fail.

*Direct Discrimination*

65. The Tribunal considered each allegation of direct discrimination, considering whether the alleged treatment occurred, whether it amounted to less favourable treatment and if so, what the reason for that treatment was: was it because of race? The Tribunal reached the following findings in relation to each alleged act of direct discrimination.

10 a. **Suspension.** The Tribunal found that the claimant was asked to take annual leave and then suspended. The Tribunal was accordingly satisfied that the treatment alleged occurred. The Tribunal accepted that the claimant's suspension was not handled appropriately and in accordance with the respondent's internal procedures, as the respondent acknowledged in the grievance and grievance appeal outcomes. The Tribunal found however that the reason for the treatment was the claimant's conduct on 24 August 2019 and DD's lack of familiarity with the respondent's internal procedures, in KB's absence. This was entirely unrelated to the fact that the claimant was Polish. The treatment of the claimant was accordingly not because of the protected characteristic of race.

15 b. **The claimant's grievance.** The Tribunal concluded that the process adopted by the respondent to investigate the claimant's grievance, and the time taken to do so, was appropriate. They were satisfied that the claimant was given a full opportunity at the grievance hearing to explain the grounds for his grievance. This was then investigated thoroughly and a detailed, reasoned, outcome provided, which was appropriate in the circumstances. The Tribunal did not accept that the way the respondent addressed the claimant's grievance amounted to less favourable treatment: any grievance raised would have been addressed in the same manner. The way the respondent addressed the grievance, and the outcome reached,

was entirely unrelated to the fact the claimant is Polish. The treatment accordingly did not amount to direct discrimination on the grounds of race.

5 c. **The claimants grievance appeal.** The Tribunal concluded that the process adopted by the respondent to investigate the claimant's grievance appeal, and the time taken to do so, was appropriate. They were satisfied that the claimant was given a full opportunity at the grievance appeal hearing to explain the grounds for his appeal. This was then investigated thoroughly and a detailed, reasoned, 10 outcome provided, which was appropriate in the circumstances. The Tribunal did not accept that the way the respondent addressed the claimant's grievance appeal amounted to less favourable treatment: any grievance appeal would have been addressed in the same manner. The way the respondent addressed the grievance 15 appeal, and the outcome reached, was entirely unrelated to the fact the claimant is Polish. The treatment accordingly did not amount to direct discrimination on the grounds of race.

20 d. **Dismissal.** The Tribunal accepted VS's evidence as credible. The claimant accepted that he said the word 'kurwa', albeit that he claimed it was not stated in an angry or aggressive manner or context. The Tribunal did not accept this to be the case. The Tribunal reached this conclusion against the backdrop of the claimant believing that he should be permitted to cook given his qualifications, notwithstanding that he applied for and was 25 employed in the role of Kitchen Assistant. The Tribunal concluded that the claimant felt aggrieved when an agency chef was brought in, in DD and DL's absence, rather than him being given the opportunity to take on the role in their absence. The Tribunal was also mindful of the fact that the claimant had already raised a 30 detailed grievance in relation to standards in the kitchen, which included food being burnt, and food wastage. Which he stated made him upset and angry. In light of this, the Tribunal found that,

5 when he discovered that VS, the agency chef brought in, had burnt scrambled eggs he became angry and aggressively stated to her 'kurwa'. She understood this to mean 'whore' and was upset by this. The claimant was dismissed solely as a result of this. The Tribunal noted that no fair procedure followed in relation to the claimant's dismissal, but noted that the claimant was still within his probationary period and the claim was not one of unfair dismissal. The Tribunal was satisfied that the reason for the claimant's 10 dismissal was his conduct on 17 January 2020. It was entirely unrelated to the fact that he is Polish. The treatment accordingly did not amount to direct discrimination on the grounds of race.

66. In light of the above, the claimant's claims of direct discrimination because of race do not succeed and are dismissed.

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Employment Judge: M Sangster  
Date of Judgment: 26 July 2021  
Entered in register: 2 August 2021  
and copied to parties

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