EMPLOYMENT TRIBUNALS

Claimant: Mr M Malinowski

Respondent: UKCAKE Ltd

Heard at: London South by CVP **On: 27, 28, 29 30 June 2022**

Before: Employment Judge Khalil sitting with members
Ms S Dengate
Mr K Murphy

Appearances

For the claimant: Mr Marczyk and assisted by a Polish Interpreter
For the respondent: Mr Debenko, General Manager

JUDGMENT WITH REASONS

Unanimous Decision:

The claimant claims for Direct Race Discrimination and Direct Sexual Orientation Discrimination and Harassment contrary to S.13 and S.26 Equality Act 2010 are not well founded and the claims fail.

The Tribunal did not have jurisdiction to hear the claim for Unfair Dismissal contrary to S.94/95/98 Employment Rights Act 1996 and thus the claim is dismissed.

The unauthorised deductions claim under S.13/23 Employment Rights Act 1996, the notice pay/breach of contract claim is dismissed upon the claimant's withdrawal of these claims.

Reasons

Claims, appearances and documents

1. This was a claim for Direct Race discrimination, Direct Sexual Orientation Discrimination and Harassment. The unauthorised deductions claim, national minimum wage claim and breach of contract claim were withdrawn on 13 July

2020 by KL Law Ltd acting for the claimant. In respect of the Unfair Dismissal claim, the Tribunal ruled that it did not have jurisdiction to hear the claim as the claimant had not been dismissed at the time his claim was presented and there was no application to amend before the Tribunal.

2. The claimant was assisted by Mr Marczyck and following discussion with the parties on day 1, a Polish Interpreter was booked from day 2 onwards.

3. The Respondent was represented by Mr Sasha Debenko, General Manager. The Tribunal heard evidence from the claimant and Mr Stolarczyk, his partner and also an ex-employee of the respondent. For the respondent, the Tribunal heard from Mr Debenko, Mr Alexander Login, the respondent's co-owner (and a former Director), Mr Artem Login a co-owner and a former Director (and Mr Alexander Login's son),

4. The Tribunal had an E-Bundle running to 281 pages. A hard copy bundle was also produced by the claimant, but it was not clear to what extent, if any, this contained any different documents to those already in the E-Bundle which had been produced by the Respondent.

5. There was a substantial discussion with the parties about various preliminary issues including ascertaining the issues, the need for a Polish interpreter for the claimant, the Tribunal's jurisdiction on the Unfair Dismissal claim, the prospect of a private settlement, the claimant's (medical) fitness for trial and the outstanding Costs application following the postponement of this Hearing at the previous Listing.

6. The original list of issues were at pages 78 to 79. The discrimination claims were further particularised on pages 267-269.

7. The Tribunal resolved as a preliminary issue that it did not have jurisdiction to hear the Unfair Dismissal claim as the claimant was still employed on 20 February 2020 when his claim was presented. No application to amend was made.

8. On day 2 of the Hearing, just after the close of evidence, both parties applied to produce new evidence, namely text exchanges, which they said went to the issue of whether or not the claimant had resigned/been dismissed when his claim was presented in February 2020. The application was refused. This was a second listing of this case. The case had been purportedly ready for trial at the previous listing a year ago. Both parties had previously been legally represented. There were already 2 bundles before the Tribunal. There was a risk of further evidence being required from several witnesses and a real risk of not finishing the case in this sitting. That was not in the overriding interest to save expense and to avoid delay. Neither was it proportionate. There was no good reason for this new evidence not to have been disclosed sooner.

9. The Tribunal took evidence from the claimant, his partner and ex-employee Mr Jan Stolarczyk, Mr Alexander Login and Mr Artem Login on this issue.

10. Although the claimant had purportedly resigned on 19 October 2019, when he had left his hotel in Dubai abruptly following attendance at a work-related event, which he alleged he had reaffirmed at a meeting on 20 January 2020 with Mr Alexander Login, he had submitted sick notes to the respondent up to and including the period to May 2020 (paid on 4 June 2020). Moreover, he had been in receipt of sick pay from the respondent throughout the period from 19 October 2019 to June 2020, inclusive. The claimant said that he had been told by his doctor that he still needed to submit sick certificates even though he had, on his case, resigned. He believed this was a government/legal requirement. There was no evidence/letter from the doctor confirming this. The Tribunal drew on its collective industrial/judicial experience to find that it was extremely unlikely for a doctor to have said this. Further, the claimant said in oral testimony that the payments were received from the respondent directly as the sender on his bank statements. Moreover, the claimant confirmed that he was in receipt of legal advice after his meeting with Mr Login on 20 January 2020 and that he had informed his legal advisers he was in receipt of sick pay (up to May 2020). He did not resist the payments or return the payments. The Tribunal found that the claimant knew or ought to have known, that his conduct in submitting sick notes and receiving pay from the respondent was entirely consistent with employment status.

11. The claimant's partner also asserted that he had resigned from his employment with the respondent on 19 October 2019 and ultimately received a P.45 dated 18 November 2019. This was in stark contrast to the evidence before the Tribunal relating to the claimant. Mr Stolarczyk also confirmed he received no further payments beyond 18 November 2019.

12. There was no written resignation. The claimant's evidence was ambiguous in relation to his asserted resignation which he said occurred by words to Ms Hodryieva on 19 October 2019 in Dubai. It was not clear at all why this was communicated to her. The Tribunal rejected the claimant's assertion about her status and importance with the respondent company in the UK. The Tribunal had evidence that she was self-employed and providing services to a respondent group company in Russia. This was not challenged. There was a text sent by Mr Alexander Login on 20 October 2019 in which he expressed his relief that the claimant was safe and well and offered the claimant the opportunity to 'take a break' and to inform him of which decision he took. The message read as an attempt to pacify the claimant against sharing a future work platform with Ms Hodryieva, as she would not be invited back.

13. The subsequent text exchange on 29 November 2019 referred to a discussion about 'outstanding issues' (page 131). It did not mention a resignation. The claimant's witness statement (paragraph 29) said he had meant outstanding wages which he was going to recover in the Tribunal. That was still not a

reference to his purported earlier resignation. Mr Alexander Login believed this was a reference to financial issues such as salary. In relation to the meeting on 20 January 2020 at which the claimant said he had reaffirmed his resignation, Mr Alexander login said the claimant had said 'goodbye' and presented an offer of employment from a competitor, but his interpretation of this meeting was that the claimant was seeking to have financial negotiations. He said he was used to the claimant expressing a desire to leave around twice annually. Mr Artem Login's evidence was similar. Whilst this specific evidence was not in their witness statements, the Tribunal noted that the claimant's own witness statement offered some corroboration of such conduct – paragraphs 15 & 19 and so did the testimony of Mr Stolarczyk. The claimant did not challenge the evidence that he produced an 'offer' letter but did not produce a copy which might have assisted the Tribunal. Certainly, the claimant's evidence was not that he had started other employment shortly thereafter.

14. In the light of the above findings, the Tribunal did not need to determine whether or not the claimant did actually receive payslips after October 2019 to May 2020. The respondent also produced a P.45 with a leave date of 1 March 2021. The claimant denied receiving this. It was not necessary to resolve whether he had received it, but the Tribunal found that the document was authentic and supported the respondent's understanding that the claimant was still employed when his claim was presented.

15. The exchange of emails on 10 August 2020 wherein the respondent had enquired about the on-going absence of the claimant in response to which the claimant stated his last physical day of work was 19 October 2019 and that he had reaffirmed his resignation on 20 January 2020 (pages 276-277) was considered by the Tribunal but rejected as providing evidence or sufficient clear evidence that the claimant had resigned in the face of the compelling evidence to the contrary. The claimant had also asserted that he had been informed that Mr Sebastian Skoczylas had been hired to fill in as a new chef. He said he was told this on 26 October 2019 and he received this information by text from Mr Ryszard Sobon. The text message was not before the Tribunal and Mr Sobon had not been called to give evidence.

16. The ambiguity in relation to the claimant's case was compounded by the claimant's claim form, completed by legal advisers on 20 February 2020, stating the claimant's employment was continuing and there was no reference at all to the meeting on 20 January 2020.

Relevant Findings of fact

17. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during

the hearing, including the documents referred to by them and taking into account the Tribunal's assessment of the witness evidence.

18. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

19. The claimant was employed by the respondent from April 2017 as a Pastry Chef. He was ordinarily based in the UK, but occasionally travelled overseas to Dubai and Oman.

20. He had continuous service with the respondent's associated companies from 2010 (Presto Ltd t/a L'ETO').

21. The claimant is Polish and his sexual orientation is gay. His partner, Mr Stolarczyk, also worked for the respondent between October 2010 and 19 October 2019. His first language is Polish, he speaks English at a basic level. He can speak limited Russian. He required an interpreter for these proceedings.

22. Mr Debenko is Russian, who the Tribunal assessed spoke English at an intermediate level. He did not require an interpreter. He can speak limited Polish. He is the General Manager across the cafes and has been employed since 2011. He became the General Manager in 2016. Before then, he was a Manager of the Soho Café. His working hours are essentially 9 to 5. The claimant's shift started at 6.00pm.

23. The language of the workforce in the UK was predominantly English. The Tribunal accepted that Polish and Russian would be spoken on occasions, the Tribunal found this was likely to be occasional and intermittent unless between two employees who both spoken Polish (or Russian) as their first language.

24. Ms Svetlana Hodryieva is a Russian national based in Russia. The Tribunal had documentation before it which supported her self-employment status. Her employment status for UK employment territorial jurisdiction purposes was not being determined in these proceedings. The Tribunal accepted that she travelled overseas to Dubai and the UK. There was no dispute she was in Dubai on 19 October 2019. It was put to Mr Stolarcyzk in cross examination that Ms Hodryieva did not speak any English. He accepted this.

25. The respondent designs and makes cakes which it sells through its various cafe outlets. The claimant worked in the production kitchen initially in Brixton, subsequently in Battersea. The respondent is part of a group of associated companies operating company including Companies overseas, in particular in the Middle East – Dubai, Qatar, Oman, Kuwait and Russia. In the UK it has 4

cafes (previously 5) on Kings Road, Brompton Road, Soho and Belgravia. The Café no longer trading is Mayfair. These Cafés are run by one of the group companies (L'Eto). It is a family run business with the shareholding in the operating companies held by Mr Alexander Login, Mr Artem Login and his mother. The Tribunal accepted that the shareholding of the respondent was held by Mr Artem Login's mother (Mr Alexander Login's wife).

26. Mr Alexander Login and his son Mr Artem Login are both former Directors. Mr Debenko reported into them. The Café Managers reported into Mr Debenko. Although it was not that clear, the Tribunal found the claimant reported into the owners.

27. The respondent employed about 20 employees. The respondent employs a number of Polish pastry workers. Mr Artem Login said all pastry workers were Polish, none were Russian. This evidence was not challenged and was accepted. Although the respondent did not have any employees who they knew to be of gay sexual orientation, Mr Artem Login said they did employ many employees whose sexual orientation was gay employed by some of the other operating (associated companies). This was also stated in paragraph 10 of the statement of Ms Albesko, who was released from giving evidence, without objection from the claimant, because the primary focus of her evidence was about the alleged unfair dismissal claim which the Tribunal had ruled it did not have jurisdiction to hear. The evidence was accepted.

28. The claimant worked alongside other chefs. In the kitchen at any one time there would be up to 3 -4 employees (chefs) working.

29. There was no written record of complaint from the claimant to any of the respondent's employees about race or sexual orientation throughout his tenure of employment. There were no emails or text exchanges before the Tribunal including between the claimant and his partner about alleged ill treatment or with any family or friends. The claimant had asserted that another former employee (Ms Horak), had also left the respondent's employment because of repeated acts of discrimination but there was no evidence before the Tribunal of any specific corroborative evidence from her and she was not called by the claimant. There was a statement at page 275 in the claimant's bundle which referred to Mr Debenko's apparent hostility towards Polish people and a general statement about 'race' but no details of any alleged acts of discrimination were cited. This statement was given extremely limited weight as it could of course not be challenged by the respondent or questioned by the Tribunal. Neither did the Tribunal know of the circumstances of her leaving employment of the respondent in December 2015.

30. The claimant's allegations of Race and Sexual Orientation discrimination were as follows:

- The claimant (and his partner) being called ‘fucking Polish faggots’ by Mr Debenko on 22 March 2014 – in the kitchen

- The claimant being called a ‘fucking Polish dog’ by Mr Debenko on 3 April 2014 – in the kitchen

- The claimant (and his partner) being called ‘Polish faggots’ and ‘trash’ by Mr Debenko on 19 December 2016 – in a cafe

- The claimant (and his partner) being called ‘fucking Polish faggots’ by Mr Debenko on 2 January 2017 – in the kitchen

- The claimant being called a ‘fucking Polish faggot’ by Mr Debenko on 10 December 2018 – in a cafe

- The claimant being called a ‘fucking Polish dog’ by Ms Hodyrieva on 18 October 2019 – in Dubai

31. The claimant had asserted that he had kept diary entries of at least 3 incidents in relation to the alleged discrimination (paragraphs, 11, 13 and 14 of his witness statement corresponding to the first allegation in 2014 and the allegations in 2016 and 2017. However, despite the cross references in the bundle, the diary entries were not produced. It was said that these existed but were held by the claimant’s former legal advisers and that there was an outstanding dispute between the claimant and the firm. This was only made known to the Tribunal on day 3 of this Hearing and no written evidence was produced about that dispute. It was not clear whether and if so why, it was said the firm held the original diary records. This could have been fairly significant evidence for the claimant as purportedly the only piece of written contemporaneous and corroborative evidence.

32. There was a dispute between the parties about whether or not the claimant and his partner were asked to undertake inspections of the cafes they made their cakes for on behalf of the owners. The claimant’s evidence was that these inspections were food hygiene inspections. The evidence of Mr Artem Login was that these were carried out by himself and his father, informally. He accepted he was not qualified to do these on a food standards qualified basis but that Mr Debenko was. Mr Alexander Login and Mr Debenko said these were outsourced. Under cross examination, Mr Stolarcyck, when asked to describe some of these activities, referred to keeping an eye on the café, tasting food and ordering something from the a-la-carte menu. The Tribunal found it was more likely than not that the claimant and his partner were undertaking informal tasks closer to food tasting matters rather than official food hygiene and health and safety checks and further, that this was not done during or part of working time. Moreover, there was a complete absence of the nature of the concerns alleged to have been raised. No detail appeared in the witness statements or

elsewhere in writing. Neither did anything emerge in testimony. This was important as the claimant's case in respect of many of the allegations appeared to lay a 'motive' foundation before the subsequent alleged discriminatory comments. The Tribunal found there was no motive.

33. The claimant alleged there was a 'conciliatory' meeting in February 2017. This was alleged to have been attended by the claimant, Mr Alexander Login, Mr Artem Login, Mr Debenko and Mr Kozian. Each of the respondent's witnesses denied any such meeting took place. Their evidence was thus corroborated. Mr Artem Login said he was in Dubai between January 2017 and April 2017 for the opening of a new business and Mr Debenko said Mr Kozian, the former GM in Dubai, was in Dubai. There was no diary entry from the claimant about this meeting or any evidence of a call made to the claimant's partner before or after this meeting or any text/message exchange. It was agreed that the claimant's partner was not at this meeting. The Tribunal was not satisfied that this meeting occurred as alleged.

34. Although the claimant has withdrawn his money claims before the Tribunal, he has a Civil claim in County or High Court valued at £500,000 by the claimant.

Applicable Law

S.13 (1) Equality Act 2010 ('EqA') provides:

Direct discrimination

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

S. 26 EqA provides:

Harassment

A person (A) harasses another (B) if:

A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of:
violating B's dignity, or

creating an intimidating, hostile, degrading, humiliating or offensive environment for B

35. The general burden of proof is set out in S.136 EqA. This provides:

"If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."

36. S 136 (3) provides that S. 136 (2) does not apply if A shows that A did not contravene the provision.

37. The guidance in ***Igen Ltd v Wong 2005 ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205 EAT*** provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the respondent has committed an act of discrimination. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent. The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in S.136.

38. In ***Laing v Manchester City Council 2006 ICR 1519 EAT***, the EAT stated that its interpretation of Igen was that a Tribunal can at stage one have regard to facts adduced by the employer.

39. In ***Madarassy v Nomura International PLC 2007 ICR 867 CA***, the Court of Appeal stated:

"*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination"*

Conclusions and analysis

40. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal and by applying the applicable law. Those findings will not be cross-referenced in every conclusion below, unless the Tribunal considers it necessary to do so for emphasis or otherwise.

41. The Tribunal concluded that it was proportionate in this case to adopt a collective approach rather than individual approach to each of the allegations, the reasons for which will become apparent.

42. In respect of each allegation of race and sexual orientation discrimination the Tribunal rejected that the incidents of abuse occurred as alleged.

43. There were a number of reasons for this conclusion:

44. First, there was no written trail of evidence to support directly or indirectly the making of such comments. There were no emails, no texts/WhatsApp exchanges either between the claimant and any employee of the respondent or between the claimant and his partner or other family and friends on any single occasion. This was in respect of a number of individual incidents spanning over a number of years and alleged abuse outside of these incidents. It was more likely than not that something would have been said at some point, even indirectly, to support the discrimination remarks or hostility towards Polish or gay people. Quite bizarrely, the claimant had said he had deleted all text messages with Mr Debenko, which the Tribunal rejected as being completely implausible. In addition, it was alleged that Mr Debenko had a known dislike for Polish employees and Ms Horak had also been a victim of several acts of discrimination, yet she was not called to give evidence. Nothing had been said about her unavailability until day 3 of the Hearing. In any event, her written statement, did not detail any incidents – no dates, particulars or who was responsible. She referenced discussions about the claimant's private life but that was unspecific. The Tribunal did not know the circumstances surrounding her leaving the respondent's employment. She was not an employee in December 2016 when she said she was present in one of the cafes and heard a comment. The Tribunal noted that in 2014/2015 the claimant had himself given a written statement for other proceedings, thus he would have known of the formality of doing something similar.

45. Second and perhaps the most compelling issue for the Tribunal, was the absence of the diary entries in which the claim said he had recorded at least 3 occasions when the comments were made. The explanation for the diary entries not being available in either bundle and/or when the case was trial ready last year, was frankly unbelievable. There was no supporting evidence to support that they existed and were in the possession of the claimant's former legal advisers or why they possessed the original (s). This was the only contemporaneous record and would have provided the corroboration to at least shift the burden of proof. In addition, two of the alleged comments occurred at a time when Mr Debenko was not even the General Manager such that he would not have any reason to visit the kitchen. The Tribunal also had some regard to the claimant's hours of work unlikely to overlap with those of Mr Debenko.

46. Third, whilst the Tribunal noted that the claimant's assertions appeared to be corroborated by his partner, also an ex-employee of a number of years, his evidence was not independent and moreover appeared almost a verbatim repetition of what the claimant had asserted rather than a genuine independent account. In addition, their evidence was not entirely consistent. The claimant alleged other individuals who knew about the discrimination were fearful of giving evidence, whereas Mr Stolarczyk said Mr Debenko said things so others would not hear. Ms Hodryieva was alleged to have used the exact same phrase

as Mr Debenko on 18 October 2019. It was unchallenged that she did not speak English. The Tribunal found it implausible that she would use a derogatory phrase commonly used in Western English speaking countries. It was more likely than not any slur about a Polish person would be expressed in her first language. On day 4 of the Hearing, the claimant said, for the first time, that in fact this statement was said in Russian. This was an application to essentially change what had been clearly stated otherwise in the claimant's statement upon which cross examination had already occurred and it must have been apparent that the language issue was a central aspect of the allegation. It was not proportionate to permit an amendment to this evidence, essentially just before the evidence in the case was coming to a close.

47. Fourth, the Tribunal noted that all of the respondent's pastry workers were Polish. The sexual orientation of many employees in the wider group of companies was gay. The former GM in Dubai was also Polish. This was not consistent with a culture or environment of a respondent or its management team being anti-Polish or anti-gay. The Tribunal had some regard to Mr Debenko's submissions about having some Polish heritage too. The Tribunal stopped short of being drawn in to any generalised historical or political backdrop to relations between Russia and Poland. That in itself would be a stereotype and would do an injustice to evaluating this case on the facts and evidence before it.

48. Fifth, although the Tribunal has rejected the remark of Ms Hodryieva on 18 October 2019 was made, the respondent was highly unlikely to have been vicariously liable for that remark as she was not an employee of the respondent. No positive case was advanced by the claimant, for example under S.109 (2) EqA that she was acting as agent of the respondent. As such, all of the other claims were, prima facie, out of time and the claimant did not submit why it would have been just and equitable to hear the claims out of time.

49. Sixth, it was a matter of some mystery why, the claimant, in the face of regular abuse about being Polish and/or gay would remain employed, especially where, on the claimant's own case, 2 days after the alleged conciliatory meeting, he was abused and mocked again. This did not require any sophisticated knowledge or understanding of how to complain, a simple message in any format would have been enough.

50. The burden of proof to prove a prima facie case did not shift. The claim fails.

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Employment Judge Khalil

01 August 2022