EMPLOYMENT TRIBUNALS

Claimant: Mr K S Perera

Respondent: Stonegate Pub Company Ltd

Heard at: Watford **On:** 5, 6, 7 and 8 December 2022
24 February 2023

Before: Employment Judge Maxwell
Mr Kaltz
Miss Hamill

Appearances
For the claimant: in person
For the respondent: Mr Bignell, Counsel

JUDGMENT

1. The Claimant's claim of unlawful deductions succeeds. He is entitled to **£1,462.11**.

2. The Claimant was not issued with an initial statement of written particulars of employment. He is awarded **£908.91**.

3. The Claimant's claim of harassment related to race is not well founded and is dismissed.

4. The Claimant's claim of harassment related to religion is not well-founded and is dismissed.

REASONS

Claim

1. By a claim form presented on 8 September 2020, the Claimant complained of:

   1.1 unlawful deductions;

   1.2 harassment related to race.

2. The Claimant's claims were clarified in the course of two preliminary hearings for case management.

Evidence and Documents

3. We heard evidence from:

   3.1 Kesarajith Perera, the Claimant;

   3.2 Hesham Badra, General Manager;

   3.3 Thameera Bandara, Team Leader.

4. The Claimant, whose first language is Sinhalese, gave evidence and participated in these proceedings with the assistance of a translator. Having lived in the UK for some time the Claimant has a good grasp of written and spoken English. Nonetheless, in order to ensure a full understanding on his part, much of what was said during the hearing was fully translated.

5. We were provided with a bundle of documents prepared by the Respondent running to 471 pages. Rather than referring to pages in this bundle, the Claimant attached much of the same material to his witness statement in the form of exhibits. At the direction of the Tribunal, the Respondent prepared a key so that we might easily cross refer between the Claimant's exhibits and copies of the same document in the paginated bundle. The Respondent also produced a skeleton argument and a schedule relating to the hours worked by the Claimant.

Issues

6. Save in one respect, we adopted the list of issues as set out in the case management order made by EJ Cowen, dated 13 March 2022. The point on which we took a different approach was the relevant period for the Claimant's unlawful deductions claim. Whilst the identification of a first deduction (the hourly rate point) and a second deduction (the hours worked point) reflected the Claimant's claim, the dates at paragraph 5.2 (20 January 2020 to 9 March 2020) did not. Quite plainly, both in the Claimant's original claim form and in the later further and better particulars prepared by his solicitor, he complains not only about an underpayment during the period from January to March 2020, but also the use of those incorrect figures to calculate his furlough pay in the period thereafter. When we explored this matter with the parties, Mr Bignell argued, quite properly, that the Claimant had been legally represented at this earlier hearing and no objection had been made subsequently on his behalf to the way in which EJ Cowen had identified the issues. Nonetheless, Mr Bignell, who had been present at the hearing, could not explain how it was that the Claimant's apparent claim for the period after March 2020 came not to be reflected in the list of issues. Certainly, the claim for that later period was not expressly disavowed or dismissed upon withdrawal. It appears to us, this was an oversight. Whilst we are always slow to depart from a list of issues, especially where that appears to have been arrived at with the agreement of legally represented parties, in this case we think it appropriate to do so. Beyond the unwanted and unexpected requirement of having to address the Claimant's complaint about this later period, Mr Bignell did not say there was any prejudice to the

Respondent in facing it now. There was no additional evidence which could have been adduced. The relevant witness testimony and documents were already before us. The parties had the opportunity to make submissions on the question of whether the Claimant had received less than was properly payable in this later period by reason of his furlough pay being miscalculated.

Facts

Generally

7. The fact finding exercise in this case was a difficult one. None of the witnesses were entirely satisfactory and the Respondent's records contained a surprising number of inconsistencies.

8. The Claimant said the witness statement in his name prepared for this hearing was not approved by him. Indeed, he went further and alleged that his solicitors were conspiring with the Respondent. This seemed to us an unlikely proposition and there was no evidence to support it beyond his assertion. Furthermore, when we gave the Claimant an opportunity to read the statement carefully before deciding whether or not to adopt it as his evidence (he should not have needed this, he should have read it before the hearing) he told us that the content was true, albeit some things had been missed out. Given that what was there was true according to the Claimant, it must have been based on his instructions. His willingness to allege an unlikely conspiracy was, unfortunately, consistent with a general tendency on his part to jump to conclusions. The Claimant was also prone to giving very long answers, which frequently failed to address the question asked. He was repeatedly encouraged by the Judge to give shorter answers, not least so that the task faced by the interpreter would be less challenging. Whilst questions asked on behalf of the Respondent explored the matters identified in the list of issues, the Claimant gave answers which seemed intended to establish more broadly that the Respondent was engaged in "dodgy" practices. He was reminded the Tribunal was required to make a determination of his specific claims and not, to assess in general terms how the Respondent conducted its business. Despite this, when the Claimant came to cross examine the Respondent's witnesses, once again he spent much time on matters which seemed irrelevant to his claims, such as whether various documents correctly recorded the job title of his colleagues and managers. The Claimant stated repeatedly that he had been referred to the Respondent by a "broker" who received a commission for doing so. It then transpired, this person was a friend, or at least had been at the time (they have since fallen out). This was not one of the Claimant's claims, evidence about it did not appear in his witness statement, nor was it referred to in any of the contemporaneous correspondence. This was not an issue for us. We were played part of a covert recording made by the Claimant. During this, in a rather casual way as though this were something he was then accustomed to, Mr Badra could be heard saying to the Claimant that he was probably recording the conversation. The Claimant immediately denied doing so. Asked about this denial during the hearing, the Claimant said that he started lying to the Respondent after he became concerned about "dodgy" business practices. None of these factors commended the Claimant to the Tribunal as a reliable witness.

9. The Respondent's witnesses were also unsatisfactory. The records put forward by the Respondent, to confirm the receipt of training, the attendance at shifts, hours worked and duties undertaken, contained multiple inconsistencies. What was purportedly the Claimant's signature in certain documents, varied considerably. In the same document the handwriting put forward as being that of the Claimant and that of another employee who had entered his information immediately before, seemed remarkably similar. The records of hours worked conflicted in a number of instances with contemporaneous messages passing between the Claimant and his managers. Mr Badra gave a number of unrealistic answers to questions about these inconsistencies. He insisted that dissimilar signatures appeared to him to be the same. Asked about a message from the Claimant explaining why he left work earlier that day and would not be in on the next day, Mr Badra insisted the Respondent's records (showing the Claimant working full shifts on both days) were accurate and he sought to explain this apparent inconsistency by saying the Claimant had a tendency to say he would not be at work and then attend. There was no other evidence to this effect and it was something that came out for the first time in answer to questions from the Tribunal. We were not persuaded. Indeed, even Mr Bignell for the Respondent did not seek to uphold the records for those two days as being accurate. Mr Badra's willingness to seek to defend inconsistent and unsatisfactory records undermined our confidence in him more generally. Nor did Mr Bandara's evidence inspire much confidence. Having denied that the Claimant was issued with shoes by the company, Mr Bandara was asked about a passage in his witness statement which referred to "shoes issued by Stonegate". He gave evasive answers and then eventually said he had not read his statement before signing it. Nor could he offer a satisfactory explanation for his statement in an agreed transcript that he had given the Claimant the "day off" on 23 January 2020, when it was also said the Claimant had not then yet worked any shifts for the Respondent.

Commencement of Employment

10. The Claimant came to work for the Respondent at the George pub in Harrow when he was introduced to Mr Bandara by someone who was then a friend (they were both musicians and their children were friends). A factor in this connection being made was all three men being of Sri Lankan ethnic origin. The Claimant had referred us to a job advertisement in connection with what he said was the hourly rate advertised for the job he accepted. In the course of his evidence, however, it became apparent that the Claimant had been introduced to the Respondent and had not found this employment by responding to an advert. The advert produced postdated the Claimant's recruitment.

11. On 17 January 2020, the Claimant's friend brought him to the George, where he met Mr Bandara and was interviewed by the Respondent's General Manager, Mr Badra. The Claimant was offered employment as a Kitchen Team Member. After his interview, Mr Bandara made the Claimant a meal.

12. The Claimant was not provided with an initial statement of written particulars of employment. We did not accept the evidence of Mr Badra that this had been provided. No signed copy or even an unsigned document, which had been particularised for the Claimant, was produced into evidence. For reasons about

which we will say more, the Respondent's approach to documents and records was far from satisfactory.

Hourly Rate

13. The hourly rate offered to the Claimant was £8.31, being the national minimum wage rate at this time. We do not accept he was offered £9. A number of the more junior employees at this pub were also paid at the same rate, £8.31. We can see no basis for the Claimant being offered a higher rate than his peers. He was not, for example, being recruited because he had a great deal of relevant experience or taking on a management role. Additionally, in one of his handwritten schedules when seeking to calculate the loss he had suffered by reason of not being paid for all of the hours worked, he used the rate of £8.31. Had he believed he was entitled to £9, he would instead have used this rate. Furthermore, when writing to HR complaining about not being paid properly, the Claimant did not then raise his hourly rate and it is inconceivable that he would not have done this if it had reflected his belief at the time. It follows, therefore, the Claimant's belief that he had agreed a higher rate of pay is a more recent one, emerging only in the course of this litigation.

Start Date

14. There is a dispute about when the Claimant began to work for the Respondent. The evidence from witnesses on both sides was, in some respects, unsatisfactory and this made our fact-finding exercise more difficult. On balance, it appears to us more likely the Claimant did start work as he suggests on 17 January 2020. Whilst the Respondent argued the Claimant was not employed until the 20th and did no work until the 28th, this seems to us to be unlikely given the commencement of his employment by way of a referral, his completion of online training at the Respondent's premises and Mr Bandara in a later conversation (which was recorded) saying he had given the Claimant the "day off" on the 23rd. Notwithstanding that the Respondent's standard procedures required a formal offer to be made to the Claimant and his successful completion of 73% of online induction training before he could begin work, we find that he started immediately on the 17th. This was a busy day for the Respondent and a willing worker was put to the task. The online 'paperwork' was completed after the Claimant started working and not before. We were not persuaded by Mr Badra's denials that this could ever happen.

Days / Hours Worked & Payments Made

15. The Claimant worked 5 hours on 17 January 2020 and another 5 hours on 18 January 2020. He was told this was "training", with respect to which he was offered and accepted a total of only 5 hours pay for the 10 he was at work.

16. The first relevant payroll cut-off date was 19 January 2020. On the basis of what had been agreed (there is no national minimum wage claim before us) the Claimant should have been paid 5 hours @ £8.31 = £41.55. Because the Claimant was not 'on the books' no payslip was generated and no payment made. Accordingly, there was **underpayment of £41.55**.

17. The online 'paperwork' for the Claimant's employment took some days to complete. Part of the onboarding process was the completion of online induction training which involved a quiz that the Claimant had to complete and obtain a score of 73%. As at 20 January 2020, the Claimant had attained a score of 53%.

18. We are also satisfied the Claimant worked on 20 January 2020. A determination of the hours that day has been difficult because the evidence pulls in different directions. The Claimant's schedules have conflicting entries. It appears to us the most reliable evidence is the conversation recorded between the Claimant and Mr Bandara, when they were seeking to reconcile his hours, and both then agreed the Claimant had worked an 8 hour shift with a one hour break, meaning he was due to be paid for 7 hours work.

19. The Claimant did not work on 21, 22 or 23 January 2020. Whilst the Claimant's schedule includes a claim for 23 January 2020, we think the recollection of Mr Bandara as captured in the audio recording is likely to be more accurate, namely that the Claimant had that day off work. The Claimant did not disagree with Mr Bandara about this at the time. We do not accept that either of the Claimant's schedules are contemporaneous documents. Our conclusion is that the Claimant began a retrospective exercise in noting and analysing his hours, following his receipt of a first pay packet in February 2020, when the amount fell below that which he believed he was entitled to.

20. On 24 January 2020, the Claimant's schedule claims for him working from 2pm until 11.15pm with a 1 hour break. We do not accept he was working at the instruction of his employer until 11.15 pm. The evening shift, which the Claimant worked, usually finished at 10 pm. This is consistent with the evidence of the Respondent's witnesses and also contemporaneous text messages sent to the Claimant, telling him that if he stayed after 10 pm he would not be paid for this. Unfortunately, the Claimant was estranged from his wife and homeless at this time. He was staying with friends. Having no comfortable private place to which he might retire, the Claimant wished to stay at work later than he was required. This was tolerated but it was explained he would not be paid. We do not accept that he was routinely tasked with duties that took until 11pm or 11.30pm to complete. There were some exceptions to the 10pm cut-off, when his employer did require him to work late and these were recorded on the Respondent's system "Fourth".

21. We think the Claimant's handwritten schedules are, to some extent, a helpful guide to when he worked or did not but neither is entirely accurate. We do not accept the Claimant began to record his hours from the first day at work. We note that his first schedule includes an hourly rate of £8.31, which he also says is a rate of pay did not know of until receiving his first pay slip. It seems to us more likely, the Claimant began to record his hours in February 2020, after receiving his first pay packet and believing it was short. At that stage he sought, retrospectively, to recall and record the hours he had worked. Thereafter and going forwards, he could make a contemporaneous note.

22. Accordingly, our finding is that on 24 January 2020, the Claimant worked from 2pm to 10pm with a 1 hour break and was entitled to 7 hours pay.

23. Adopting the same approach, namely accepting save where we make express findings to the contrary, that the Claimant worked on the days he claims but is only entitled to pay up to 10 pm, our finding is that on both 25 and 26 January 2020, the Claimant worked from 12 pm to 10 pm with a one hour break and was entitled to 9 hours pay. He may have chosen stay at the pub later but he was not doing so or carrying out work pursuant to his employer's instruction.

24. On 27 January 2020, the Claimant worked from 2 pm until 10 pm with one hour break and was entitled to 7 hours pay.

25. As of 28 January 2020, the Claimant was 'on the books' and his working pattern was then entered onto the Respondent's system. We accepted that the hours recorded in this way were generally reliable, at least on those days when he both actually worked and was recorded as so doing. The general work pattern included a break, typically falling between 7 pm and 8.30 pm. On 28 January 2020, the Claimant worked from 2.30 pm until 10 pm with a one hour 30 minute break. He was entitled to 6 hours pay.

26. On 29 January 2020, the Claimant worked from 2 pm till 10 pm, again with a one hour 30 minute break. He was entitled to 6 ½ hours pay.

27. By about 30 January 2020, a problem had been identified by the Respondent's higher management with respect to evidence of the Claimant's right to work in the UK. A directive was issued that he could not work whilst the position was clarified. This was communicated to Mr Badra and is reflected in an email of 31 January 2020. In this regard, we accept the Claimant's evidence. Whilst his right to work was at issue, the need for him to carry out work at the George did not cease. He continued to be allocated shifts but as had been the position at the beginning of his employment, these were not recorded on Fourth. We find the Claimant worked from 2 pm until 10 pm with a one hour break on 30 January 2020 and was entitled to 7 hours pay.

28. The Claimant continued to work from 31 January through to 5 February 2020, without his hours being recorded on Fourth. Our findings are that he continued to work until 10 pm each day, with a one hour break, such that he was entitled to:

    28.1 31 January 2020, 6 ½ hours pay;

    28.2 1 February 2020, 9 hours pay;

    28.3 2 February 2020, 9 hours pay;

    28.4 3 February 2020, 7 hours pay;

    28.5 4 February 2020, 7 hours pay;

    28.6 5 February 2020, 7 hours pay.

29. As at 4 February 2020, the Claimant's right to work had been clarified and is reflected in an email that date. From 6 to 16 February 2020, the Claimant's working hours were accurately recorded on Fourth, such that he was entitled to:

    29.1 6 February 2020, 7 hours;

29.2 8 February 2020, 10 ½ hours pay;

29.3 9 February 2020, 9 ¼ hours pay;

29.4 10 February 2020, 6 ¼ hours pay;

29.5 11 February 2020, 8 ½ hours pay;

29.6 14 February 2020, 4 ¼ hours pay;

29.7 15 February 2020, 7 hours pay;

29.8 16 February 2020, 7 hours pay.

30. The next pay cut-off date was 16 February 2020. The Claimant was entitled to be paid for 163.75 hours @ £8.31 = £1,360.77. For this period he was actually paid £574.08. Accordingly, there was a **underpayment of £786.68**.

31. From 17 to 25 February 2020, the Claimant claims for various shifts that are not recorded on the Fourth system. We are satisfied he did work such shifts, on the basis most typically worked on previous occasions, which is to say until 10 pm with a one hour break. We are reinforced in our conclusion about the fact of him working during this period, by WhatsApp or iMessage exchanges on 17 and 23 February 2020, which are consistent with him being at work on those days. Furthermore, in closing submissions on behalf the Respondent, it was conceded the Claimant did in fact work on 22 and 23 February 2020. Accordingly, he was entitled to:

31.1 17 February 2020, 7 hours;

31.2 18 February 2020, 7 hours;

31.3 21 February 2020, 9 hours;

31.4 22 February 2020, 9 hours;

31.5 23 February 2020, 9 hours;

31.6 24 February 2020, 8 ¾ hours;

31.7 25 February 2020, 7 hours.

32. We adopt the same approach with respect to 28 February to 2 March 2020. Our understanding is that the Respondent makes a concession for all or part of this period but our finding would have been the same effect even if this were not so. Accordingly, the Claimant was entitled to:

32.1 28 February 2020, 4 hours;

32.2 29 February 2020, 8 ¼ hours;

32.3 1 March 2020, 4 ½ hours;

32.4 2 March 2020, 7 hours.

33. On 7 March 2020, the Claimant attended for work but left after 45 minutes. On Fourth he is, wrongly, recorded as having worked 9 ½ hours. He was only entitled to 45 minutes pay.

34. On 8 March 2020, the Claimant did not work at all. He is wrongly recorded as having worked 9.2 hours. He was entitled to no pay for that day.

35. This pattern continued for several days. The Claimant was recorded as working 13 ¼ hours on 9 March 2020, 10.1 hours on 11 March 2020, and 9.7 hours on 12 March 2020, when he did no work on any of those days and was not entitled to pay.

36. The next relevant pay cut-off date was 15 March 2020. The Claimant was entitled to be paid for 81.25 hours @ £8.31 = £675.19. For this period he was actually paid £754.82. Accordingly, there was a **overpayment of £79.63**.

37. Although it is more relevant to our findings on harassment, as set out below, we know the Claimant's evidence about the overpayment made to him at this time is that it was part of a deliberate ploy by Mr Badra and / or Mr Bandara to achieve his dismissal. This makes no sense at all. Separately from whether or not the Claimant was, contractually, in a probationary period, he had considerably less than 2 years continuous employment. The Claimant had no protection from unfair dismissal and it would have been a simple matter for Mr Badra to dismiss him on the basis that his performance had been unsatisfactory. It would seem to us much more likely these incorrect hours were recorded either as a result of an error or if done deliberately, this was in an attempt to compensate him for hours he had worked previously which had not been processed. The notion that this was done to lay the groundwork for a disciplinary allegation of fraud is very far-fetched. The Claimant made Mr Badra aware of the payment of wages for 7 and 8 March but no action was taken by the Respondent.

Furlough Pay

38. The Respondent's premises were closed during the first lockdown and in fact from 20 March 2020.

39. For the 64 day period from 17 January to 20 March 2020, the Claimant worked 250 hours, treating 17 and 18 January as 2 ½ hours each. He was entitled to £2,077.50. The Respondent operated a 4-weekly (as opposed to monthly) pay cycle. Based upon his average pay, this would equate to £908.91 for a 4-week (28 day) period (£2077.50 x 28/64). 80% of his 4-weekly pay (as due rather than received) was £727.13.

40. On 17 April 2020, the Claimant was paid £587.38. This was expressed to comprise furlough pay of £398.67 and an unexplained "top up" of £188.71, totalling £587.38. Whilst this would seem to involve an underpayment with respect to the Claimant's furlough pay entitlement, we noted an overpayment in the previous period and it must be appropriate to give credit for this:

    40.1 pay due - £727.13;

    40.2 less pay received - £587.38;

40.3 less overpayment carried forward £79.63;

40.4 **underpayment £60.12**.

41. On 15 May 2020, the Claimant was paid £531.56. Given £727.13 was due, this amounted to an **underpayment of £195.57**.

42. On 12 June 2020, the Claimant was paid £531.56. Given £727.13 was due, this amounted to an **underpayment of £195.57**.

43. On 16 June 2020, the Claimant was instructed to return to work on 3 July 2020. His entitlement to furlough pay ended at that point.

44. On 10 July 2020, the Claimant was paid furlough pay of £496.36 (£61.68 + £434.64). This was referable to the pay period ending 5 July 2020. Given the Claimant's furlough ended on 3 July, he would have been entitled to slightly less than the usual 4-week furlough payment. The amount paid for furlough, £496.36 represents 93.4% of the usual £531.56. Doing our best with this information, it seems more likely than not the Claimant was underpaid to the same extent (93.4% of £195.57) resulting in an underpayment of **£182.62**.

45. Whilst the Respondent had taken the time point, this depended upon the last deduction in a series being that in March 2020. The Respondent conceded the claim was in time if the series of deductions continued during the furlough period. As such, it is unnecessary for us to make any findings about whether it was reasonably practicable for the Claimant to have presented his unlawful deductions claim sooner than he did.

Harassment

46. Having worked through the timeline in connection with the days and hours the Claimant worked, it is necessary for us to go back through some of those earlier dates to make findings of fact about the matters he relies upon as amounting to harassment related to race or religion. For race discrimination, the Claimant relies upon being of Sri Lankan ethnic origin. For religious discrimination, the Claimant relies upon being a Catholic.

23 February 2020

47. We accept it is likely, on this day and many others, that the Claimant was told to do cleaning work. This was part of the duties of a kitchen team member. A rota was drawn up and the Claimant was not the only employee required to clean. Indeed, sometimes team leaders or managers would also do this. Cleaning included the front of house toilets. Whilst the Respondent had front of house and kitchen staff teams, there was some overlap in their duties. The Claimant was not singled out.

48. We do not find the Claimant was told he would never do any cooking. Necessarily, when he was instructed to carry out other duties, he could not at the same carry out cooking duties. When the Claimant did object to these duties it is likely he was told that if he refused to do his job, he would be dismissed. That is the usual consequence of a persistent failure to follow reasonable management instructions.

49. We pause to note that the allocation of cleaning duties to the Claimant was not something new or which happened for the first time on 23 February 2020. Rather, this had been a part of his duties all along. The obvious reason for matters coming to a head on this occasion, which had nothing whatsoever to do with his race or religion, was that he had just received his first pay packet and he believed this was considerably less than was due to him. It is quite obviously this factor which led him toward adopting an obstructive attitude.

50. Separately from the Claimant's disgruntlement with respect to pay, it appears to us the Claimant accepted his employment with the Respondent under something of a misapprehension. He was recruited as a kitchen team member. We are not at all surprised that a large part of his duties comprised cleaning. It seems the Claimant thought he was going to be trained as a chef. In his evidence at the Tribunal, the Claimant complained that he was not being taught how to cook. It does not, however, appear that the Respondent recruited him with this intention. That is not to say he would do no cooking or learn nothing in that regard, simply that there would be a considerable amount of rather more mundane duties to be carried out day-to-day.

51. In his witness statement, the Claimant alleges that Mr Bandara told him that "Christian people like you wearing crucifixes we[re] put here only to do the cleaning". We do not find that Mr Bandara made that statement or anything like it. The Claimant said that Mr Bandara was a Buddhist and discriminated against him for being Christian. In his witness statement, separately from denying the Claimant's complaints, Mr Bandara says that he too was a Christian. In the course of cross-examination, the Claimant asked Mr Bandara if he could say a prayer. Before answering this question, Mr Bandara appeared to move his position (he was giving evidence by way of CVP) and to be looking downwards. The Claimant said he was reading the prayer. Irrespective of Mr Bandara's religious beliefs, we were struck by the total absence of any complaint from the Claimant whatsoever during his employment that he was being discriminated against because of his religion. The Claimant sought to explain this omission on the basis that he was very stressed, estranged from his wife, his son was ill and he was homeless (staying with friends). The difficulty with that explanation is that the Claimant did complain in writing at length about various matters and these did not include the discrimination now alleged. The Claimant also said he did not know what discrimination was until the first telephone case management preliminary hearing. That explanation is hard to credit given the Claimant had already submitted a claim form to the Employment Tribunal alleging race and religious discrimination before that preliminary hearing. The final part of the Claimant's explanation for the omission was that there was no point complaining to Mr Badra about this. The difficulty with this explanation is that the Claimant took his complaints outside of the pub, sending two detailed letters to Ms Haydon of the Respondent's HR department. We noted that the Claimant appeared to backtrack on this allegation to some extent during the hearing, describing his differences with Mr Bandara as being "cultural" and "ideological". We were also struck by the Claimant saying repeatedly in the course of being cross-examined, that his relationship with Mr Bandara deteriorated after he "raised his voice" by which the Claimant meant complained about his treatment. Our conclusion is that Mr Bandara did not make any adverse comments about the Claimant being a Christian during his employment. If he had done so, the

Claimant would have complained about that at the time. Furthermore, Mr Bandara was very welcoming to the Claimant, cooking him a meal on the occasion when they first met. It was their shared Sri Lankan ethnicity which led to the Claimant being introduced to Mr Bandara and employed by the Respondent.

52. Strikingly, following the Claimant having explained to Mr Bandara that he had not been paid correctly and also that he was in an extremely difficult financial position, the latter agreed to loan the former a considerable sum of money. On 24 February 2020, Mr Bandara transferred £531 from his bank account to that of the Claimant. This appeared from the transcript of the conversation to be intended to reflect the pay the Claimant was due to receive from the Respondent. We find it very difficult to believe that at the same time as Mr Bandara was harassing the Claimant and making slurs based on his religious beliefs, he would also send him money in this way.

53. The events of 23 February 2020, had nothing whatsoever to do with the Claimant's race or religion.

1 March 2020

54. We accept that Mr Bandara laughed when the Claimant slipped and fell over. Whilst it might be tempting to hope that one colleague would only ever react in a sympathetic way towards the misfortune of another, common experience suggests this is not always the case. The slapstick element of a fall may prompt laughter. We do not find, as the Claimant suggested in his witness statement that Mr Bandara put oil on the floor deliberately to cause this fall. The suggestion is a ridiculous one and without any evidence whatsoever. Unfortunately, it appears to us, the Claimant has a tendency to jump to conclusions when he encounters misfortune. Furthermore, the Claimant's allegation was undermined by his own evidence, which was to the effect that the location where he fell was one prone to spillages.

55. We accept that Mr Bandara told the Claimant he was not wearing proper shoes that were safe to use in the kitchen. It was not the Respondent's practice to issue shoes. Rather, it was incumbent upon the employees to find their own suitable shoes.

56. We do not accept the Respondent provided the Claimant with "rubbish smelly shoes and dirty clothes". As far as uniform was concerned, this was provided by the Respondent. A number of such uniforms in different sizes were kept in the kitchen. These were shared by the staff. There was a washing machine and staff were expected to put their uniforms into this at the end of a shift and turn this on, so that they might be cleaned. The Claimant told us that, on occasions, when he went to put his uniform into the washing machine it was already on a washing cycle and so he would leave it by the side. It is, therefore, possible that on 1 March 2020 or some other date, the Claimant arrived for work and there was no clean uniform available in his size, perhaps because he or someone else had not put this into the machine at the end of their previous shift.

57. None of this, the laughter, the comment about shoes or finding there was no clean uniform in his size, had anything whatsoever to do with the Claimant's race or religion.

2 March 2020

58. The Claimant's claim is that on 2 March 2020 he was prevented from going into the office for a meeting. His witness statement, describes events in a somewhat different way. There he says he was told to go upstairs for a meeting and when he queried why this was not taking place in the office, Mr Bandara replied "third class people like you we[re] not going to go inside for the office room". We do not accept that Mr Bandara made this remark or said anything similar to it. As we have already noted, Mr Bandara was welcoming and supportive of the Claimant. Once again, we were struck by the absence of any contemporaneous complaint about such language from Mr Bandara, including in either of the letters which the Claimant wrote to Ms Haydon.

59. The Claimant may well have been told to go upstairs to meet with Mr Badra and, whether or not this took place in the office it had nothing to do with his race or religion. The Claimant was, by this time, very unhappy about wages. It is likely he discussed this with Mr Badra and / or Mr Bandara on several occasions. The Claimant, in his witness statement, says the reason the meeting on 2 March 2020 did not take place in the office is because there was CCTV (and their meeting would be recorded). We pause to note, if that were true, it would have nothing to do with the Claimant's race or religion. We very much doubt, however, this was the case. The Claimant was by this time in the habit of taking photos, recording audio or video of conversations with his managers. He believed he was doing this surreptitiously, without anyone noticing, but it is perfectly clear this was not so. We were played one audio recording the Claimant made of a conversation with Mr Badra. This included Mr Badra saying, in a rather bored tone of voice as though this was now a regular occurrence, that the Claimant was probably recording this. The Claimant appears to have believed he was engaged in a process of uncovering serious wrongdoing on the part of his managers. Those managers seem to have been somewhat less concerned about these matters and simply wished the Claimant would get on with his job.

60. We are not persuaded by the Claimant's evidence that Mr Bandara shouted at him aggressively. Our observation from the audio is that it was the Claimant who tended to become heated in conversation. This is also consistent with our observation at this hearing, of the Claimant often beginning to speak rapidly, at length and with increasing volume.

61. Once again, none of this had anything to do with the Claimant's race or religion.

9 March 2020

62. From his evidence at the Tribunal, it became clear the Claimant was alleging that it was Mr Bandara who discriminated against him because of race or religion. He did not say that Mr Badra was against him for the same reasons, in effect he suggested Mr Badra's treatment of him was influenced by Mr Bandara, the former becoming the tool of the latter. This struck us as unlikely proposition, given their respective seniorities.

63. The harassment allegation with respect to 9 March 2020 is that the Claimant was not served when he attended the pub as a customer. In his witness statement the Claimant did not say that Mr Badra or Mr Bandara saw him on this occasion. He says that Omer, another member of the kitchen team, saw and ignored him. The Claimant's claim was case managed at two preliminary hearings by different judges. In the course of that process, Mr Badra and Mr Bandara were identified as the alleged discriminators. Unsurprisingly, the Respondent called these two men as their witnesses in this case. We did not, therefore, hear any evidence from Omer.

64. The Claimant's evidence in this regard is very limited. Although he says Omer saw him, he does not say this happened more than once, or that he took any steps to attract service, such as waving or beckoning Omer to come over. Nor does the Claimant say that he went to the bar to place an order. The Claimant has not given any evidence of animosity toward him due to race or religion on the part of Omer. We are not on this basis satisfied, on the balance of probabilities, that Omer did indeed notice the Claimant or recognise that he had yet to be served. There is nothing whatsoever to suggest any connection with race or religion.

10 July 2020

65. It is likely the Claimant was told to clean the toilets on this occasion. As set out above, this was part of his duties. We do not, however, accept the Claimant was then, as he says in his witness statement, given the "full-time role of cleaning toilets". This is a ridiculous suggestion. Even if Mr Badra had wished to proceed in such a way, cleaning the toilets could scarcely be made into a full-time role. The Claimant's objection was the same as before. This was an unpleasant duty he did not think he should have to carry out.

66. We do find the Claimant was limited to a 30 minute lunch break. This appears to have been a more restrictive approach than that which was previously adopted. We pause to note, the Respondent was at this time reopening its business after the first lockdown. One of the matters explored by the Claimant at very great length during this hearing, was Mr Badra presenting him with a document entitled "House Rules", which included provisions with respect to lunch breaks, and asked him to sign this. We were played audio of this conversation. It is quite clear the Claimant was given the opportunity to take this document away, consider its contents, and return a signed copy the following day. The Claimant thought this was a deeply improper exercise. His view was that if the Respondent had wished to impose such rules, then they had been obliged to do so at the commencement of his employment and could not do so at a later stage. There is, however, no evidence to suggest the Claimant was singled out in this way. The Claimant gives no evidence, for example, that other kitchen team members were subsequently allowed to have a one-hour lunch break.

67. The Claimant says he was given one mask for use at work on two days. We accept what is said about this. He does not, however, say why this was unsuitable or put forward any evidence that his colleagues were provided with a larger number of facemasks.

68. We do not accept that the events of 10 July 2020, had anything to do with the Claimant's race or religion. Our conclusion is that the Claimant was very apprehensive about returning to work. He had raised complaints with the Respondent's HR Department and sought a transfer. By this stage, it appears he was intent on recording every conversation he had with his colleagues so that he might use whatever was obtained as evidence in subsequent legal proceedings.

Dismissal

69. The Claimant's claim does not include any complaint about the termination of his employment. At the beginning of his employment, there was an enquiry into his right to work in the UK. An ECS check carried out at that time, verified his right to work up to 3 August 2020. The bundle of documents for this hearing includes an email of 15 October 2020, sent by the Respondent's HR function to the Claimant, noting that he failed to attend a disciplinary hearing and this would be rescheduled to 17 October 2020. The allegation was that he had failed to provide documentation for his proof of right to work. A letter of 20 October 2020, states that the disciplinary hearing took place in his absence and he was dismissed. He was advised of his right to appeal but there is no evidence this was exercised. Given there is no claim in this regard, it is unnecessary for us to make any further findings of fact about the termination.

Law

Discrimination

70. In the employment field and so far as material, section 39 of **the Equality Act 2010** ("EqA") provides:

> **(2) An employer (A) must not discriminate against an employee of A's (B) -**
>
> **(a) as to B's terms of employment;**
>
> **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
>
> **(c) by dismissing B;**
>
> **(d) by subjecting B to any other detriment.**

71. As to the meaning of any other detriment, the employee must establish that by reason of the act or acts complained of a reasonable worker might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work. An unjustified sense of grievance cannot amount to a detriment for these purposes; see **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL**.

Burden of Proof

72. The burden of proof is addressed in EqA section 136, which so far as material provides:

> **(2) 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.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision occurred.**

73. When considering whether the claimant has satisfied the initial burden of proving facts from which a Tribunal might find discrimination, the Tribunal must consider the entirety of the evidence, whether adduced by the claimant or respondent; **see Laing v Manchester City Council [2006] IRLR 748 EAT**.

74. Furthermore, a simple difference in treatment as between the claimant and his comparators and a difference in protected characteristic will not suffice to shift the burden; see **Madarassy v Nomura [2007] IRLR 246 CA**.

75. The burden of proof provisions will add little in a case where the ET can make clear findings of a fact as to why an act or omission was done or not; see **Martin v Devonshires Solicitors [2011] IRLR 352 EAT**, per Underhill P:

> **39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head "the devil himself knoweth not the mind of man" (per Brian CJ, YB 17 Ed IV f.1, pl. 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law […]**

<u>Harassment</u>

76. Insofar as material, EqA section 26 provides:

> **(1) A person (A) harasses another (B) if—**
>
> > **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> >
> > **(b) the conduct has the purpose or effect of—**
> >
> > > **(i)violating B's dignity, or**
> > >
> > > **(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **(2) A also harasses B if—**
>
> > **(a) A engages in unwanted conduct of a sexual nature, and**
> >
> > **(b) the conduct has the purpose or effect referred to in subsection (1)(b).**

> **(3) A also harasses B if—**
>
> > **(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,**
> >
> > **(b) the conduct has the purpose or effect referred to in subsection (1)(b), and**
> >
> > **(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> > **(a)the perception of B;**
> >
> > **(b)the other circumstances of the case;**
> >
> > **(c)whether it is reasonable for the conduct to have that effect.**

77. Whilst the unwanted conduct need not be done 'on the grounds of' or 'because of", in the sense of being causally linked to, a protected characteristic in order to amount to harassment, the need for that conduct to be 'related to' the protected characteristic does require a "connection or association" with that; see **Regina (Equal Opportunities Commission) v Secretary of State for Trade and Industry [2007] ICR 1234 QBD**. Notwithstanding it was decided under the prior legislation including the formulation "on the grounds of", the observations made by the EAT in **Nazir v Asim [2010] ICR 1225** may still be of some relevance:

> **69 We wish to emphasise this last question. The provisions to which we have referred find their place in legislation concerned with equality. It is not the purpose of such legislation to address all forms of bullying or anti-social behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law—such as a person's race and gender.**

78. The EAT further considered the relevant causal test **in Bakkali v Greater Manchester Buses (South) Ltd t/a Stage Coach Manchester: UKEAT/0176/17/RN**; per Slade J:

> **31. […] Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. […] "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the Claimant […] However such evidence from the**

> **alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place.**

79. In relation to the proscribed effect, although C's perception must be taken into account, the test is not a subjective one satisfied merely because C thinks it is. The ET must reach a conclusion that the found conduct reasonably brought about the effect; see **Richmond Pharmacology v Dhaliwal [2009] IRLR 336 EAT**.

80. Guidance on the threshold for conduct satisfying the statutory definition was given by the EAT in **Betsi Cadwaladr University Health Board v Hughes [2014] 2 WLUK 991**; per Langstaff P:

> **10. Next, it was pointed out by Elias LJ in the case of Grant v HM Land Registry [2011] EWCA Civ 769 that the words "violating dignity", "intimidating, hostile, degrading, humiliating, offensive" are significant words. As he said:**
>
> > **"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."**
>
> **11. Exactly the same point was made by Underhill P in Richmond Pharmacology at paragraph 22:**
>
> > **"..not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. 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 grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."**
>
> **12. We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.**

Unlawful Deductions

81. So far as material, section 13 of the **Employment Rights Act 1996** ("ERA") provides:

> **13 Right not to suffer unauthorised deductions.**
>
> **(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.**

82. The time for presenting a claim with respect to an underpayment of wages is governed by ERA section 23:

> **23 Complaints to employment tribunals.**
>
> **(1) A worker may present a complaint to an employment tribunal —**
>
> **(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),**
>
> **[…]**
>
> **(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—**
>
> **(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or**
>
> **(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.**
>
> **(3) Where a complaint is brought under this section in respect of—**
>
> **(a) a series of deductions or payments, or**
>
> **(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit**

> **under section 21(1) but received by the employer on different dates,**
>
> **the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.**
>
> **(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).**
>
> **(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable. […]**

Conclusion

Harassment

83. To the extent the treatment complained of was found by us to have occurred, we are satisfied it was unwanted by the Claimant.

84. For the reasons set out above, our conclusion is that none of the treatment complained of (to the extent we have found it occurred) had any connection whatsoever to the Claimant's race or religion. There were no facts, from which in the absence of an explanation, we could have made a finding of any such connection. In any event, we have made positive findings as set out above for why things were done. On this basis, the Claimant's harassment claim must fail.

85. Furthermore, none of the treatment complained of had the proscribed purpose or effect. Neither Mr Badra nor Mr Bandara had that purpose. The conduct itself, objectively, came nowhere near having the proscribed effect. The Claimant's view of matters (apart from pay where he had a legitimate complaint) was unreasonable.

Unlawful Deductions

86. As set out above, there were a series of deductions in which the Claimant received less than properly payable:

    86.1 19 January 2020, underpayment of £41.55;

    86.2 16 February 2020, underpayment of £786.68;

    86.3 15 March 2020, overpayment of £79.63;

    86.4 17 April 2020, underpayment £60.12 after offsetting the overpayment of £79.63 ;

    86.5 15 May 2020, underpayment of £195.57;

    86.6 12 June 2020, underpayment of £195.57;

86.7 10 July 2020, underpayment of £182.62.

86.8 Total underpayment **£1,462.11**.

Written Particulars

87. As above, no initial statement of employment particulars was provided. This was a case of complete failure. The Respondent's approach to paperwork at this location, be that physical or online, was abysmal. We award 4 weeks pay, in the sum of **£908.91**.

EJ Maxwell

Date: 24 February 2023

Sent to the parties on:
25 March 2023
…….
For the Tribunal Office:
T Cadman
……..……..