EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mohammed Safi	v	Travelodge Hotels Limited

Heard at: Bury St Edmunds **On**: 3 to 5 April 2023 and 6 April 2023 in Chambers

Before: Employment Judge de Silva KC, Mr B McSweeney, Mr C Grant

Appearances

Claimant: In person

Respondent: Catherine Urquhart, Counsel

RESERVED JUDGMENT

1. The Claimant's claim for constructive unfair dismissal pursuant to section 98 of the Employment Rights Act 1996 is dismissed.

2. The Claimant's complaint that he was discriminated against because of his race pursuant to sections 19 and 39(2) of the Equality Act 2010 by the Respondent's failure to investigate his complaint about being sworn at by Mr Courts is well made and it is just and equitable to extend the period for this complaint to be brought pursuant to section 123(1)(b) of the Equality Act.

3. The Claimant is awarded the sum of £5,000 as compensation for his injury to feelings as a result of this complaint, together with interest of £705.75.

4. The Claimant's other complaints of direct race discrimination under sections 19 and 39(2) of the Equality Act 2010 are dismissed.

5. The Claimant's claim of victimisation pursuant to sections 27 and 39(3) of the Equality Act 2010 is dismissed.

6. The Claimant's claims for unlawful deductions from wages pursuant to section 23 of the Employment Rights Act 1996 and breach of contract pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 are dismissed.

REASONS

THE PROCEEDINGS

1. By Claim Form presented on 11 December 2021, the Claimant presented claims of unfair dismissal, race discrimination and payment of other sums.

2. At a Case Management Hearing on 6 July 2022, a list of issues was agreed, identifying nine acts of direct race discrimination and identifying the unfair dismissal claim as a claim of constructive unfair dismissal. The claim for unpaid sums was identified as a claim for breach of contract in relation to underpayment of wages from March to July 2020 and allegedly unpaid expenses. At that Case Management Hearing, claims against a number of individual respondents were dismissed, leaving only the current corporate respondent.

3. The Tribunal heard evidence from the Claimant and from the following witnesses on behalf of the Respondent: Irina Kitley (Hotel Manager, Avonmouth), Stuart Courts (Hotel Manager, Swindon), Tina Hartrey (District Support Manager, Bristol Region) and Martine Elliot (HR Business Partner). All provided witness statements and were cross-examined and asked further questions by the Employment Tribunal. The Tribunal was referred to a bundle of documents running to 410 pages plus a further 22 pages added to the bundle by the parties by consent.

4. At the Final Hearing, the Claimant sought to add to the bundle a transcript of a secret recording he had made of a conversation with a colleague named Swapnil on 22 February 2018. Some of the transcript was said by the Claimant to be a translation of what had been said in Urdu on 22 February 2018.

5. He said that these were relevant to the fact that he had gone on long-term sickness absence after this conversation and also for the views expressed about what Mr Huw Huckridge (District Manager (South Region)) thought of the Claimant. The recording had been shared with the Respondent in the course of these proceedings in November 2022 and the Claimant had been told that he needed to arrange a transcript. However, the first time that he provided a transcript was after the first day of the Final Hearing. The Respondent therefore had not had a proper opportunity to agree the transcript/translation, take instructions on it or call evidence on it. Moreover, the transcript was unclear (in part due to gaps in the transcript and the fact that some of it included a translation). In the circumstances, the Tribunal did not permit the document to be added to the bundle. In any event, it was not apparent to the Tribunal how the transcript was relevant to the pleaded issues.

FINDINGS OF FACT

6. The Tribunal makes the following findings of fact on the matters which are relevant to the issues between the parties. Where there was no dispute between the parties as to a particular fact, our findings are recorded below without further explanation. Where there was a dispute between the parties on the evidence, the Tribunal explains why it made its findings of fact.

7. The Respondent is a leading hotel business in the UK, employing around 10,000 individuals. The Claimant commenced employment with the Respondent on 22 March 2016. He worked at a number of the Respondent's hotels during his employment, covering night shifts. His ethnicity is Asian Pakistani.

8. From 27 March to 9 August 2017, he worked at the Bath Central hotel. It was agreed by Mr Huckridge that the Claimant would be paid an hour's pay in respect of the travel time each way between the Claimant's home in Portishead and the hotel in Bath Central. This was not within any of the Respondent's policies but in practice mangers applied a discretion to make such arrangements where they thought it was necessary. This was not expressly approved by the People Team but they acknowledged that this practice took place.

9. The Claimant did not add these two hours when recording his time for each shift, he only stated the hours of the shift itself. His understanding was that his manager would record these additional hours as travelling time but this was not done. As a result, during the time he worked at Bath Central he was paid only for the hours of each shift and not for the hours of travel as had been agreed with Mr Huckridge.

10. The Claimant raised the issue of his travel expenses internally (it was described as an *"expenses"* issue, although strictly speaking it was an issue of unpaid hours rather than reimbursement of travel costs). Mrs Elliot carried out an investigation into the matter during which she spoke to Mr Huckridge and Anthony Pollard, Hotel Manager for Severn View. In the course of her meeting with Mr Pollard, he explained the arrangement between the Claimant and Mr Huckridge as set out above. He also referred to a complaint about the Claimant from Sam Butler, a colleague of the Claimant, claiming that he was a *"terrorist"* as he had the words *"I.S."* written on his car, which apparently someone had written on it. The Claimant was not aware of this complaint until the present proceedings.

11. As a result of the investigation, the Respondent determined that there were three hours 15 minutes of time which had not been paid to the Claimant. This was communicated to him in an email of 5 September 2019. However, the Claimant was still only paid for the shift hours and not the two additional hours of travel for each shift.

12. The Claimant was off sick from around April 2018, returning to work in around November 2019. In March 2020, the Respondent was required to close its hotels as a result of the national lockdown. Staff including the Claimant were placed on furlough. He was initially furloughed from 24 March to July 2020 when he was placed on flexible furlough.

13. Furloughed employees were paid 80% of their 'usual' weekly pay, up to a maximum of £2,500 per month. 'Usual' pay for variable hours employees (like Mr Safi) was based on the average weekly earnings from the same month in the previous year, or the average weekly earnings for the entire 2019-2020 tax year, whichever was higher. He was paid under the latter calculation as it was higher (the Claimant having been on sick leave in the same month the previous year after his sick pay expired).

14. In early 2021, the Respondent opened a hotel in Avonmouth where Ms Kitley worked as Hotel Manager. There was a recruitment shortage at this hotel in part due the effects of the pandemic and many of the staff that were there were new and inexperienced. As a result, she decided to offer the role of Assistant Manager to the Claimant without carrying out a competitive recruitment process. In addition, she had been told that he was competent and hardworking and he had told her that he was interested in becoming an Assistant Manager.

15. Ordinarily, a new manager would receive around four weeks of training in a different hotel once they were in post. The Claimant started in post on 24 June 2021. However, no training was provided as Avonmouth was understaffed and other hotels did not have the capacity to train him. Sometime in around July 2021 (the WhatsApp message in the bundle did not have a date), Ms Kitley messaged the Claimant saying that she had spoken to Mr Huckridge and that the Claimant would definitely be trained properly but probably not until September 2021. This was when she understood that the Gloucester hotel would have capacity to train the Claimant. She had considered Bristol as a venue for the training but they were not in a position to carry out the training as they too were understaffed.

16. On 13 July 2021, the Claimant did not attend his shift. Ms Kitley received a message from the manager of another hotel that the Claimant had worked at saying that he was at a police station. When Ms Kitley was at work the following day, she saw a post-it note on her desk with a phone number to call. She called and then spoke to the Claimant's wife.

17. On 16 July 2021, at the end of the Claimant's shift, Ms Kitley asked him to come into her office for a return-to-work meeting. Even though this was a mandatory meeting under the Respondent's policies, Ms Kitley did not make any notes of this meeting. This was, by the account of both the Claimant and Ms Kitley, a fraught meeting. They both say that the Claimant tried to leave the meeting a number of times. He alleges that she said that he needed to find work somewhere else. She denies this and that she said that, if they could not sit down and have a grown-up conversation, then she did not know how they work together.

18. We do not accept that she specifically told the Claimant that he needed to find work elsewhere. First, we do not think that she would have said this in circumstances where the Avonmouth hotel was very short staffed. Secondly, he did not behave as though he had been effectively dismissed or even threatened with dismissal.

19. However, even on her own account, she was alluding to his no longer working at Avonmouth with her. Ms Kitley states that she spoke to Mr Huckridge and the HR department who recommended that she suspend the Claimant which she decided

not to do. Had this happened, there would likely have been an internal record of this. No such record has been disclosed in these proceedings. Therefore, we find on the balance of probabilities that there was no such recommendation from the HR department.

20. On 2 August 2021, Mr Courts was covering as manager at Avonmouth. The Claimant was present when Mr Courts was explaining the bar computer system to an employee, Adrian. The Claimant, in an effort to assist, joined the discussion and started interrupting Mr Courts' explanation.

21. Mr Courts asked the Claimant not to interrupt him. This was Mr Courts' oral evidence which was not challenged by the Claimant (and the issue is framed in the list of issues as Mr Courts saying that the Claimant should not tell him what to do and only then swearing at him). Mr Courts then told the Claimant to *"fuck off"* and escorted him away from the conversation.

22. Mr Courts says in his statement that he immediately spoke to Mr Huckridge about this and Mr Huckridge told him to speak to the Employee Relations team. Mr Courts said in oral evidence for the first time that he sent an email to the Employee Relations Team. There is no reference to this alleged email in his witness statement and no such document has been disclosed. When put to him that this was not in his statement, he said *"it happened and we moved on"* which does not address why this was not mentioned in his statement.

23. No record of contact between Mr Courts and the ER team has been disclosed. Had there been contact, there would likely be records of this as the matter was a potentially serious one for the ER team to deal with. We therefore do not accept that Mr Courts contacted the ER team about this, by email or otherwise. We also find it implausible that a manager in Mr Huckridge's position would have advised an employee who had committed an act of potential misconduct of this kind, simply to raise it with the ER team rather than for example the manager raising it with the ER Team themselves.

24. Mr Courts later apologised to the Claimant offering to shake his hand in the reception area. The Claimant shook his hand, feeling that he had no choice but to do so, especially as it was a public area.

25. The Claimant complained to Mr Huckridge about this and Mr Huckridge apologised to the Claimant (although it is not apparent precisely what Mr Huckridge was apologising for). Mr Huckridge said that he would investigate the matter. Mr Huckridge was not called to give evidence, even though he is the subject of one of the allegations of discrimination.

26. There is no documentary evidence of anything that Mr Huckridge did about the Claimant's complaint. Mr Courts stated in his written statement that he 'anticipates' that Mr Huckridge had felt that he had dealt with matter appropriately by asking Mr Courts to escalate the matter to the ER Team. However, as set out above, we have found that this did not happen and we do not in any event think that Mr Courts is in a position to anticipate what Mr Huckridge had felt.

27. There is a procedure at the Respondent's hotels for staff members to carry out what are known as 'fire walks' every two hours over the course of the day (including nights). The purpose of this is to ensure for example that fire exits are not blocked. Staff were required to log the time of their fire safety walk in a printed Fire Walk Patrols and Inspection of Escape Route log and to sign the log with their initials to show that this had been carried out.

28. Under another procedure, staff members carry out what are knows as 'customer journey walks' where staff members walk the hotel at the beginning of a shift to ensure among other things that surfaces are clean. This was introduced as a result of the Covid-19 pandemic. Staff were expected to log their customer journey walks in an application on their phone so that management could see that the walks had been done.

29. The Claimant was on a night shift on the night of 10/11 August 2021. On the morning of 11 August 2021, Ms Kitley looked at the Fire Walk Patrols and Inspection of Escape Route log and noticed that the Claimant had not signed the log (with his initials) against the printed entries for the four fire walks during his overnight shift. The version of the log before the Tribunal had the Claimant's initials in it but he did not challenge her evidence that the walks had not been initialled by him as at the morning of 11 August 2021 and moreover he did not assert that he had in fact done the fire walks.

30. Ms Kitley and Ms Elliot, who happened to be present at Avonmouth that day, watched some of the CCTV footage for the 10/11 August 2021 overnight shift and it appeared from this that the Claimant had not been doing the fire walks. They asked Magdalena Poppadiuk, Hotel Manager for Gloucester, to review the CCTV footage which she did. Based on this review, Ms Poppadiuk completed a CCTV transcript identifying what she had seen. The version before the Tribunal is undated and unsigned (even though there is a box for a signature and the date). The transcript stated that none of the four fire walks on his shift had been completed. Her entry for 5.28am on the transcript states *"sign for the fire walks"*. Her CCTV transcript also states that the Claimant was seen vaping and helping himself to a 7Up soft drink.

31. Despite the fact that Ms Kitley and Mrs Elliot had (by their own account) concerns on 11 August 2021 that the Claimant was not carrying fire walks, he was not suspended at this time and was rostered to do a night shift on 14 August 2021. During this shift, it became apparent to the Claimant that there were no staff available to cook breakfast for guests the following morning (which was a Sunday). Ms Hartrey asked the Claimant to ask the night staff to do the cooking; however, they were not trained to do this. Ms Hartrey understood from a conversation with the Claimant that he was unavailable do this himself as his wife (who gave birth shortly afterwards) had a medical appointment.

32. As a result, Ms Hartrey felt compelled to attend Avonmouth herself to cook breakfast, even though she had worked for three months without a day off. When she attended, she was surprised and frustrated to find that the Claimant was present in the kitchen which to her mind meant that she had not needed to come

in after all. She expressed her frustration to the Claimant that he was present. She told him to get out of the kitchen.

33. On 15 August 2021, the Claimant wrote to Andrew Southwood, a District Manager saying that he was upset due to *"a few Managers treating me unfairly"*. He named Ms Hartrey in this email. The following day, the Claimant commenced a period of paternity leave.

34. Some time after 15 August 2021, Ms Hartrey was asked to become involved in the issue of the Claimant's conduct on the night of 10/11 August 2021. She does not say by whom and it is not clear who asked her although she says that she consulted the ER Team. Although she suggests in her witness statement that *"we"* saw on the CCTV footage that the Claimant was sleeping on shift, in cross-examination she said that she did not watch the CCTV footage before the Claimant's suspension.

35. She does not say whom she watched the footage with and she does not say that she saw evidence of the Claimant not carrying out fire walks. She told the Tribunal in oral evidence that she had carried out an *"investigation"* and made *"notes"* of her viewing of the CCTV footage; however, no such notes were disclosed in these proceeding or put before the Tribunal. There is no mention of an investigation or notes in her witness statement.

36. She also suggests in her witness statement that she was the person who made the decision to suspend the Claimant. However, she said in oral evidence that it was Ms Kitley's decision to suspend, on advice from the ER Team, and she was only communicating this to the Claimant. Ms Kitley did not suggest to the Tribunal that it was her decision to suspend the Claimant. We find on the balance of probabilities that it was the ER team's recommendation that the Claimant be suspended. This was justified by the evidence of the Claimant potentially not having carried out fire walks. We find that Ms Hartrey followed this recommendation without questioning it.

37. On 31 August 2021, a suspension letter in Ms Hartrey's name was sent to the Claimant. This stated that there would be a fact-finding process in relation to three allegations: forgery/fraud, not conducting fire walks and sleeping on duty.

38. On 14 September 2021, the Claimant was invited by Leanne Ryan, Hotel Manager, to a fact-finding interview on 16 September 2021. The allegation of forgery/fraud had been dropped and an allegation of theft (taking stock from bar/café) had been added. The allegation of not conducting fire walks remained. Ms Ryan carried out a fact-finding interview on 16 September 2021. The Claimant instructed solicitors around this time to deal with the disciplinary issue although they were not instructed in relation to issuing the Employment Tribunal proceedings.

39. By email of 21 September 2021, the Claimant stated to Amy Joseph in the ER team that he was considering whether to raise a grievance. He said that he had lost almost all trust and confidence in the company to treat him fairly and he was considering his position. By email of 22 September 2021, he stated that he had raised with Mr Huckridge the issue of Ms Kitley's behaviour on 6 July 2021, Mr

Courts' swearing at him and telling him to 'fuck off' on 2 August 2021 and Ms Hartrey's behaviour in the morning of 16 August 2021 in front of team members.

40. By letter of 18 November 2021, the Claimant was invited by Ms Ryan to a further fact-finding interview on 20 November 2021. In this letter, the allegations of sleeping and theft had been dropped and an allegation of vaping while on reception had been added. The allegation of not conducting fire walks remained.

41. The fact-finding interview was carried out on 30 November 2021 by Ms Joseph as the Claimant had felt that Ms Ryan's notes of the first fact-finding meeting were inconsistent. This stated that the allegation of forgery/fraud was being pursued (signing the fire walk record without having completed the fire walks).

42. By letter of 2 December 2021, Ms Joseph provided a notification of disciplinary hearing on 15 December 2021. The allegations concerned the failure to complete the fire walks, forgery/fraud (signing the fire walk record without having done them) and vaping in reception on eight occasions. The letter enclosed the disciplinary policy, the fact-finding meeting notes, the fire walk log, a revised CCTV transcript and CCTV footage relating to the allegations.

43. As set out above, on 11 December 2021, the Claim Form was presented in the Employment Tribunal. On 14 December 2021, the Claimant wrote to Ms Joseph stating *"After careful consideration I have decided to Resign from current position as AHM Avonmouth Travelodge. Please accept this email as my resignation with immediate effect"*. By email of the same day, Ms Joseph gave him the opportunity to retract his resignation but he confirmed the same day that he wanted to resign.

RELEVANT LAW

Race Discrimination

44. Section 13(1) of the Equality Act 2010 states: *"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"*.
45. Section 23(1) Equality Act states: *"On a comparison of cases for the purpose of section 13 … there must be no material difference between the circumstances relating to each case"*.

46. Section 136 of the Equality Act states: "*(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".*

47. In ***Igen Ltd v Wong*** [2005] IRLR 258, the Court of Appeal explained that the claimant must first prove on the balance of probabilities facts from which the tribunal could conclude (in the absence of an adequate explanation) that the respondent has committed an act of unlawful discrimination. The burden of proof then passed to the respondent to prove that it did not commit that act,

demonstrating on the balance of probabilities that the treatment was in no sense whatsoever because of the protected characteristic (here, race).

48. In ***Madarassy v Nomura International plc*** [2007] IRLR 246, the Court of Appeal held that the bare facts of difference in status and difference in treatment are not, without more, sufficient material from which a tribunal could conclude that a respondent had committed the act of discrimination.

49. In ***Royal Mail Group Ltd v Efobi*** [2021] UKSC 33, the Supreme Court, confirming the application of the two-stage approach to the burden of proof, held that a Tribunal may consider all the evidence from whichever party raises it when coming to the conclusion as to whether the burden has shifted.

Unfair Dismissal

50. Section 95(1)(c) of the Employment Rights Act 1996 states that an employee is dismissed by his employer if the employee terminates his contract, with or without notice, in circumstances in which he is entitled to terminate it without notice by reason of his employer's conduct.

51. As set out in the List of Issues, the issues for the Tribunal in relation to this head of claim are:

    a. Whether the Respondent committed a repudiatory (fundamental) breach of contract, which goes to the heart of the contract;

    b. Whether the employee resigned at least in part because of this breach and not for another unconnected reason;

    c. Whether the employee has waived the breach or affirmed the contract by a delay in resigning (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221).

52. Section 111 of the Employment Rights Act 1996 ('ERA') sets out the right to bring a complaint of unfair dismissal to an employment tribunal. Section 111(2) provides: *"…an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal- (a) Before the end of the period of three months beginning with the effective date of termination, or (b) Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months"*.

Unlawful Deductions from Wages

53. A worker may bring a claim for unlawful deductions from wages in respect of underpayment of wages under section 13 of the Employment Rights Act. Such a claim must be brought within three months of the last deduction (section 23(2)-(3)). However, if the tribunal is satisfied that it was not reasonably practicable for a

complaint 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.

Breach of Contract

54. Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that a tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented within the period of three months beginning with the effective date of termination of the contract giving rise to the claim subject to extensions.

Further Time Issues

55. In ***Capek v Lincolnshire County Council*** [2000] ICR 878 at 886E CA, Mummery LJ held that *"if, as here, there is an effective date of termination, the jurisdiction of the tribunal is confined to those cases in which the complaint is presented within the period between two fixed points of time, i.e., the start date (the effective date of termination) and the end date (the end of the period of three months beginning with the contract termination date)"*.

56. Section 123(1) of the Equality Act 2010 states, so far as is relevant: *"…proceedings on a complaint within section 120 may not be brought after the end of- (a) The period of 3 months starting with the date of the act to which the complaint relates, or (b) Such other period as the employment tribunal thinks just and equitable"*.

57. In ***Lupetti v Wrens Old House Ltd*** [1984] ICR 348 at 351C, EAT, Balcombe J considered the issue of whether a claim of discriminatory dismissal arose for the purposes of limitation on the date that the claimant was given oral notice of his dismissal, or the later date when it took effect. The EAT held that *"the act complained of is the termination of employment and accordingly the effective date for considering when time starts to run is the date when the man finds himself out of a job rather than the date when he is given notice. Of course, the two may be the same…"*.

CONCLUSIONS

58. The Tribunal makes the following conclusions on the issues in the Agreed List of Issues.

Direct Race Discrimination

Was the claimant treated less favourably because of his Asian Pakistan ethnic and national origins being a non-white person, in that:

On 24 June 2021, having been promoted Assistant Manager, he was denied the required four weeks' training in the role by Ms Irina Kitley, Hotel Manager

59. For the reasons set out above, the Claimant was not denied the four weeks' training ordinarily provided to new managers. The training was delayed due to lack of resource, in particular at the Avonmouth hotel. This was the reason for the delay and Ms Kitley explained to the Claimant that he would receive training in September 2021.

On 13 July 2021, Ms Kitley after questioning the claimant in relation to his arrest by the police in relation to an allegation that he had followed someone, said to him, "That's it. You find yourself another job." The Claimant was not charged with an offence

60. As set out above, Ms Kitley did not say to the Claimant that he needed to find another job. She did however allude to the possibility of the Claimant no longer working at the Avonmouth hotel with her. The reason for this was the fraught conversation they were having and the Claimant repeatedly threatening to leave the meeting.

On 2 August 2021, Mr Courts shouted and repeatedly swore at the claimant when the claimant was assisting him in logging on to the bar ordering computer system. He said to the claimant that he should not to tell him what to do, and then said, "I want you to leave now. Fuck off"

61. As set out above, it is admitted by Mr Courts that he swore at the Claimant. This was not done *"repeatedly"* as alleged; he said it once after the Claimant had interrupted his conversation with a colleague, even after Mr Courts had asked the Claimant not to interrupt him. He later apologised to the Claimant. Although it was wholly unacceptable for him to speak to the Claimant in this way, the Tribunal is satisfied that the reason for this was the fact that the Claimant had interrupted him and was nothing whatsoever to do with the Claimant's race.

The Claimant complained to Mr Huw Huckridge, District Manager, about Mr Courts' conduct towards him and he, Mr Huckridge, apologised for Mr Courts' behaviour and promised to investigate it but no investigation was carried out

62. We accept the Claimant's evidence that he complained to Mr Huckridge about Mr Courts' conduct towards him and that Mr Huckridge promised to investigate this.

63. No investigation was carried out despite the highly offensive (albeit not discriminatory) treatment of the Claimant by Mr Courts. As set out above, no documentary evidence of anything that Mr Huckridge did about the Claimant's complaint has been disclosed. There is no credible explanation for why nothing was done (just what Mr Courts 'anticipates' what the reason was for no investigation taking place).

64. The Tribunal heard evidence that Mr Huckridge had been ill in the summer of 2021 and that he had left the Respondent although the Tribunal was not told why he had not been called (and we note that Ms Kitley was called as a witness when she too has left the Respondent's employment).

On 15 August 2021, Ms Tina Hartrey, Manager, behaved in an aggressive manner and shouted at the claimant telling him to "Get out" when he said that a 16 year old employee should not be allowed to cook unsupervised

65. On 15 August 2021, Ms Hartrey told the Claimant to get out of the kitchen. This was done in a way which demonstrated her frustration with the Claimant but not aggressively. She did this because she was frustrated at having been required to go into the hotel on one of her very rare days off at that time and because she had been led to understand by the Claimant that he could not be present that morning as his wife had an appointment. This was not in any sense whatsoever because of the Claimant's race.

Ms Hartrey did not discipline the night shift staff for refusing to cook

66. The Claimant accepted that there was no reason to discipline the night shift staff.

On 31 August 2021, Ms Hartrey suspended the Claimant while he was on paternity leave

67. As set out above, Ms Hartrey suspended the Claimant on the recommendation of the Employee Relations team. The issue of not conducting fire walks was itself a substantial issue affecting the safety of guests and justified suspension pending investigation, in circumstances where the Claimant was about to return from paternity leave. This was the reason for the decision to suspend the Claimant.

Invoking the disciplinary procedure against the claimant

68. The Respondent's concerns about not conducting fire walks, again being an issue affecting the safety of guests, justified the disciplinary procedure being invoked. This was a procedure in which the Claimant would be able to answer this allegation and the other allegations and for example put forward any mitigating factors. This was the reason for the decision to invoke the disciplinary procedure.

69. We understand why the Claimant would have been concerned about the fact that the Respondent was relying on different disciplinary allegations at different times, as set out above. However, we accept that the Respondent did this in light of the evidence of potential misconduct before it and there is nothing untoward about this.

Constructively dismissing him

70. This is not an alleged act of discrimination in itself. However, for the reasons set out above and below, we find that there was no discriminatory constructive dismissal.

Did the respondent treat the claimant less favourably than it treated Mr Courts, Ms Hartrey, and the night shift workers, who were not the subject of disciplinary proceedings, or a hypothetical, white, Assistant Hotel Manager, in similar circumstances? If so, was that treatment because of his race? If so, what is the respondent's non-discriminatory explanation for the treatment?

71. So far as the allegation about the lack of investigation into Mr Courts is concerned, the Claimant has established facts from which the court could decide, in the absence of any other explanation, that the Respondent discriminated against him. As set out above, the conduct was highly offensive and the incident justified investigation. Therefore the burden of proof shifts to the Respondent to explain why Mr Huckridge did not cause the matter to be investigated, as he had told the Claimant he would. The Respondent has not satisfied this burden. The Tribunal has not been told why the matter was not investigated. Mr Courts surmising as to the reasons for this is not a substitute for an explanation from Mr Huckridge whom the Tribunal did not hear from. Therefore, the Tribunal finds that the Claimant was treated less favourably in this regard than a hypothetical comparator who was not of Asian Pakistani ethnicity.

72. Although the claim is outside the primary three-month time limit under section 123 of the Equality Act, the Tribunal finds that it is just and equitable to extend time. It is understandable that the Claimant did not want to bring a claim during his employment (albeit he in fact made his claim a few days prior to his resignation) and the claim is only a matter of a few weeks out of time. Memories would not have faded over such a short period and it is not suggested by the Respondent that Mr Huckridge was not available as a result of this short delay.

73. So far as each of the other allegations of discrimination are concerned, the Tribunal finds that the Respondent has proved a non-discriminatory explanation for its conduct and that race was not a factor in the Respondent's conduct or decision making, as set out above.

Constructive Unfair Dismissal

Has the respondent without reasonable and proper cause conducted itself in a manner likely to destroy or seriously damage the relationship of mutual trust and confidence reposed in it?

74. There was one act which amounted to a breach of the implied duty of trust and confidence which was the discriminatory failure to investigate Mr Courts. There are no other acts which amounted to or were capable of contributing to a breach of this term, including in relation to the suspension and disciplinary proceedings which were justified by the seriousness of the allegation of failure to carry out the fire walk in particular.

If so, did the claimant affirm the breach before resigning on 14 December 2021, a day before the scheduled disciplinary hearing as he feared that he was going to be unfairly dismissed from his employment?

75. The failure to carry out an investigation into the incident of 2 August 2021 was ongoing but can be taken to have started more than four months before the Claimant's resignation. Even when he pursued complaints internally for example in his email of 21 September 2021, the Claimant did not complain about the lack

of investigation by Mr Huckridge, so much as the behaviour of Mr Courts itself. For these reasons, the Tribunal finds that the Claimant waived the breach and affirmed the contract before resigning on 14 December 2021.

Did the claimant resign in consequence of the breach? The Claimant relies on the above conduct under in support of this claim.

76. In any event, the Claimant did not resign even in part as a result of the failure to investigate Mr Courts. There is no evidence that this was on his mind at the time of his resignation. In the circumstances, the Tribunal finds that the Respondent did not constructively dismiss the Claimant.

8.11 If the claimant was dismissed, what was the dismissal and was it a potentially a fair one')

77. As set out above, the Claimant was not dismissed so it is not necessary to consider whether there was a potentially fair reason for dismissal.

8.12 If so, was the dismissal fair or unfair having regard to section 98(4)

78. As set out above, the Claimant was not dismissed, therefore issues of fairness do not arise.

79. In any event, the claim for unfair dismissal was made on 11 December 2021, three days prior to the Claimant's resignation on 14 December 2021 which was the date of the termination of his employment.

80. The Tribunal does not have jurisdiction to consider a claim for unfair dismissal that is brought before the Effective Date of Termination (other than in cases where notice is given which does not apply here), see for example ***Capek*** referred to above. Under s111(2)(a) of the Employment Rights Act 1996, the Tribunal only has jurisdiction to consider claims brought within the three months 'beginning with' the Effective Date of Termination, namely (in the instant case) the period of time running from 14 December 2021 to 13 March 2022.

81. This is something which was pointed out by the Respondent throughout the proceedings and the Claimant did not seek to address this. In the circumstances, the Tribunal had no jurisdiction to hear the Claimant's claim for unfair dismissal in any event. The same applies in relation to the Claimant's claim in respect of alleged discriminatory dismissal under the Equality Act – see ***Lupetti*** referred to above.

Had the respondent breached the claimant's contract of employment in relation to pay when he was on furlough from March 2020 to September 2020 having been paid £536

per month instead of 80% of £1,800 that being his gross monthly wage, and subsequently failed to pay his full contractual wages up to May 2021?

82. The Claimant was paid correctly in accordance with the government furlough scheme. As set out above, he was paid 80% of the average weekly earnings for the entire 2019-2020 tax year as this figure was higher than the average weekly earnings from the same month in the previous year (as the Claimant was on sick leave in the same month the previous year, his sick pay having expired).

The Claimant is also seeking the reimbursement of expenses he incurred in carrying out his work, in the region of £2,000.

83. As set out above, what the Claimant is claiming is in essence wages for the time he spent travelling to and from his home in Portishead and the hotel in Bath Central in the period from 27 March to 9 August 2017. These wages had been agreed by Mr Huckridge on behalf of the Respondent but the Claimant was not paid for these as the hours were not recorded on his time sheets.

84. However, the Claim Form was only presented in December 2021. So far as any claim for unlawful deductions from wages under the Employment Rights Act 1996 is concerned, it is several years out of time. There is no reason put forward by the Claimant for this long delay or why it was not reasonably practicable for the claim to have been made in time. In any event, it was brought within an unreasonably long period thereafter. Therefore, the Tribunal finds that it has no jurisdiction to hear a claim for unlawful deductions from wages under section 13 of the Employment Rights Act in respect of these sums.

85. Any claim for breach of contract in respect of these sums would be outside the jurisdiction of the Employment Tribunal as it was made prior to date of termination of the Claimant's contract of employment (see Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994). A claim for breach of contract in the Employment Tribunal must be brought in the period of three months beginning with the effective date of termination of the contract and not before the start of that period.

Remedy

86. The Tribunal has found that there is a single act of discrimination, i.e. the failure to investigate the Claimant's allegation about his treatment by Mr Courts on 2 August 2019. The lowest ***Vento*** band (£900 to £9,100 for claims presented in the year starting 1 April 2021) is appropriate for less serious cases, such as where the act is a one-off occurrence. An award in this range would reflect the principle that awards should not be too low as this would diminish respect for the policy of the legislation but should be restrained as excessive awards could be seen as a way to untaxed riches. The failure of Mr Huckridge to instigate an investigation was not as the heart of the Claimant's concerns about discrimination, for example this failure was not identified as an act of discrimination during his employment, unlike

other matters that the Claimant complained about. However, the Tribunal accepts that substantial injury to feeling was caused to the Claimant by the discriminatory failure to investigate a highly offensive comment made to him by a manager at the Respondent. In the circumstances, the Tribunal makes an award of injury to feelings in the sum of £5,000.

87. The Claimant is entitled to interest on this award pursuant to the Employment Tribunals (Awards in Discrimination Cases) Regulations 1996 at 8% per annum. This amounts to £705.75 from 2 August 2021 to dat.

Employment Judge de Silva KC

Date: 7 June 2023

Sent to the parties on:

12 June 2023

For the Tribunal:

GDJ