EMPLOYMENT TRIBUNALS

Claimant: Mr A Teixeira

Respondent: Zaika Restaurant Limited

Heard at: London Central by CVP **On: 22-23 June 2023**

Before: Employment Judge Norris (sitting alone)

Appearances:

For the Claimant: Mr A Hoang-Brown, Counsel
For the Respondent: Mr S Stevens, Counsel

RESERVED JUDGMENT - REMEDY

The Respondent is ordered to pay to the Claimant the sum of £1,304.11 as compensation for unfair dismissal.

WRITTEN REASONS

Background to and history of the claim

1. The Claimant is one of two former employees of the Respondent who brought proceedings in 2020 relating to their dismissal for redundancy following the first COVID lockdown in April of that year, at which time the Respondent (a high-end Indian restaurant in London called Zaika) and the other two restaurants in the group together known as "Tamarind Collection" were forced to close.

2. A final hearing of both claims took place on 25-26 January 2021. In evidence, the Respondent accepted that it had not followed any procedure in dismissing the two claimants. In a Reserved Judgment with reasons sent to the parties on 8 March 2021, I decided that the claims of the Second Claimant, Mr Da Silva, should be dismissed because he lacked the necessary continuous service to bring a claim for unfair dismissal or a redundancy payment, but that the claims of the First Claimant, Mr Teixiera, succeeded. I ordered the Respondent to

make payments to him for unlawful deductions from wages, redundancy and notice pay, offsetting what had already been paid by the Respondent.

3. In relation to the award of compensation for unfair dismissal, I decided that the Respondent's Director, Mr Dhaliwal, who had made the decision to dismiss, had not put his mind to the pool for selection but that had he done so, he would have concluded that Mr Teixiera, to whom I now refer in this decision as "the Claimant", would have been in a pool of one and therefore would have been dismissed on the same date (29 April 2020); and accordingly that there was to be 100% *Polkey* reduction. The Claimant successfully appealed those findings as to the compensatory award and the EAT (Tayler J) remitted the matter to the same Tribunal for rehearing. Mr Da Silva did not appeal.

4. The Respondent was not legally represented at the hearing in January 2021, but Mr Stevens appeared before HHJ Tayler in the EAT and was then instructed again by the Respondent on a direct access basis for a remittal PHCM, which took place in March 2023, as well as for the rehearing. Ms Dannreuther of Counsel (instructed by Atkinson Rose solicitors) had represented the Claimant at the first hearing and in the EAT, but was not available thereafter. The Claimant was accordingly represented by Ms David of Counsel at the remittal PHCM and by Mr Hoang-Brown of Counsel at the rehearing.

5. At the remittal PHCM, the rehearing was listed. Orders were made for disclosure relevant to the remitted issues only (below), including specifically in relation to remedy, and for the Respondent to produce an agreed bundle by 5 May 2023. Witness statements were to be exchanged simultaneously by 19 May 2023. The parties were reminded of the requirements of the overriding objective.

Issues and Law

6. The issues to be considered at the rehearing were agreed to be as follows:

<u>Polkey reduction</u>

a. What redundancy procedure would the Respondent have adopted if it had acted fairly in all the relevant circumstances of the case, including its size and resources? In particular, the Tribunal should consider the following questions:

   i. Would there have been a warning/consultation process and, if so, what would the nature, content and period of that warning/consultation process have been?
   ii. What would the outcome of any warning/consultation process have been? In particular, would there have been either (a) changes to the decision to make redundancies, the selection pool or the selection criteria or (b) offers of alternative employment?
   iii. What selection criteria would fairly have been arrived at by the Respondent?

iv. What selection pool, including as to size, would fairly have been arrived at by the Respondent?

b. How likely was it that the Respondent would have dismissed the Claimant on the ground of redundancy following a fair procedure?

c. If the Claimant would have been dismissed, or there was a chance of the same, when would the dismissal have occurred?

Quantum

d. Has the Respondent shown that the Claimant failed to take reasonable steps to mitigate any loss he may prove?

e. To what compensation is the Claimant entitled, if any?

7. I have reminded myself of the law as set out at paragraphs 10 to 24 of the EAT's remittal judgment and the authorities to which the parties referred in their submissions at the rehearing.

The Rehearing

8. HHJ Tayler had observed at the end of his judgment that I had been "hampered by the fact that the parties had not properly prepared to deal with the Polkey issue". Given the history of the case, it was disappointing that at the rehearing, which took place as listed on 22-23 June 2023, the parties were still not properly prepared to deal with the *Polkey* issue.

9. The Claimant had made minimal changes to his original statement, adding just 16 lines under the heading "Alternative to Redundancy" and seven lines in relation to mitigation efforts over the three years since his dismissal (I return to this below). However, very little effort had apparently been expended addressing the other issues to be considered at the rehearing and many errors - not just of a typographical nature - in the original remained, including:

a. The new statement still referred to the final hearing as being listed for 25-26 January 2021 and maintained, implausibly, "To this day, I still do not know the reason why I was dismissed";

b. Errors of fact had not been corrected, for instance in relation to the Claimant having obtained a degree in "food production and pastries" in Goa in 2000. The Claimant had repeated this assertion in his supplementary witness statement prepared for the 2021 hearing but accepted in cross-examination at that hearing (and I found accordingly) that this was not true; he had in fact studied for a year and was then awarded a diploma in hotel management;

c. The new statement continued to allege that there had been a breach of the "ACAS code of conduct" (as did the schedule of loss, which sought an uplift of 25% for failure to comply with the Code). I had found in my previous decision that the Code is "not applicable to dismissals for redundancy";

d. The Claimant had not taken out the three paragraphs relating to his claim for unpaid wages, which had been determined in the previous decision;

e. The original statement said that the Claimant had recently started a new role as a "Senior Chef De Party" [sic] at Dishoom and was waiting for his new contract. The 2023 statement says that he left that role in August 2021 but devoted just seven lines to his subsequent employment in the intervening two years;

f. The original statement contained a table detailing what were said to be the Claimant's mitigation efforts. This table had five entries, suggesting that the Claimant had spent a total of just eight hours pursuing new roles (including two hours applying for Job Seekers' Allowance) over five separate days in August and September 2020. There was no addition or alteration to this in the 2023 statement.

g. There was no cross-referencing to the (limited) remedy documents in the new bundle, several pages of which had been entirely redacted so as to show no information at all so that the reason for their inclusion was unclear.

10. The Respondent's statement (by Mr Dhaliwal) was also unhelpful in that it asserted that Mr Dhaliwal had "decided that the Claimant was in a pool of one". In fact, my "key conclusion" following the original hearing (as identified by the EAT and indeed the one which led to the remittal) was that "the … Claimant could reasonably have been placed in a pool of one had Mr Dhaliwal put his mind to it" (emphasis added). The clear implication of this was that I found Mr Dhaliwal had not put his mind to it and thus evidence was required to assist the Tribunal in piecing together what would have happened if he had. However, in the statement for this hearing, Mr Dhaliwal named only some of the other chefs in the kitchen (said to be "more senior" than the Claimant). He did not give any details as to their skills or experience, only the "stations" in which they worked. He too had almost entirely failed to cross-reference any of the pages in the 411-page bundle, save where he wanted to rely on my previous findings.

11. As a consequence, the estimates given by the representatives for the length of cross-examination at the outset of the re-hearing (an hour for Mr Dhaliwal, half an hour for the Claimant) were understandably wildly out. I had to explain more than once, and to both parties, that I needed to assess the chances of what would have happened if the Respondent had followed a fair procedure. This hypothetical scenario appeared to cause both the Claimant and Mr Dhaliwal difficulties.

12. Mr Dhaliwal gave evidence throughout the first morning and after the lunch break on the first day, including answering a number of questions from me. A great deal of what was put to him in cross-examination had not been addressed in either his or the Claimant's witness statements but it was necessary for me to intervene to inform my speculation as to what would have happened in a fair procedure.

13. The Claimant gave his evidence on the afternoon of the first day. He answered some supplemental questions in chief and was then cross-examined. Mr Dhaliwal had been released at the conclusion of his own evidence and had left the hearing but had to come back to hear the answers the Claimant was giving so that he could give Mr Stevens instructions. We sat until 17.20 so that the Claimant was not left part-heard overnight.

14. At the end of the first day, I realised that some of the Claimant's evidence had conflicted with his evidence on the previous occasion. I caused his original and supplementary witness statements from the January 2021 hearing (neither of which his Counsel had seen) to be sent to both representatives first thing on day two. The Claimant was not in attendance and we adjourned briefly so that his Counsel could try to make contact with him and take instructions. As he was unable to do so, we proceeded on the basis that the Claimant would not be recalled and we would deal with the evidential conflicts in submissions. The Claimant did then phone Mr Hoang-Brown when he was part-way through making those submissions, and we adjourned again for him to take the call, but the position as to recalling the Claimant was unchanged.

15. We completed submissions just after midday on day two. I reserved my decision.

Evidence and findings of fact

<u>The Respondent's decision as to redundancies</u>

16. Mr Dhaliwal's unchallenged evidence at the 2021 hearing was that Zaika closed in March 2020 in line with the requirements of the first national lockdown and did not reopen until 8 September 2020. While some restaurants operated a takeaway service during lockdowns, Zaika did not. The Claimant said at the re-hearing that he had heard a rumour it had done so. He did not adduce any evidence to support this suggestion which I consider to be entirely speculative and I reject it.

17. I previously found it to be relevant to the Respondent's decision to make redundancies that even prior to the first lockdown, business had reduced significantly and that Mr Dhaliwal was not optimistic that diners would return quickly – or possibly at all – to pre-pandemic levels. Mr Dhaliwal confirmed in cross-examination at the rehearing that the situation was indeed both dire and unprecedented. It was not just a downturn as had been experienced previously,

for example in 2008. The government was making changes to the rules around lockdown almost daily and it was difficult to keep up; this created uncertainty.

18. However, Mr Dhaliwal also explained in cross-examination at the rehearing that his view was if London survived, the Respondent would survive, though likely not in the same way or to the same extent as before. I had also previously found that the fact he could not be sure the Respondent would require the same number of employees in future led to Mr Dhaliwal's decision to carry out redundancies, notwithstanding the introduction of the CJRS and the possibility of placing staff on furlough.

19. Mr Dhaliwal said at this rehearing that he reached the conclusion quite quickly in March 2020 that he had to cut payroll because the business had no money coming in. He believed that redundancies were the only way forward, and that he, as the owner of the business and the person who runs it day-to-day, was the appropriate decision-maker. He said he is closely involved with and has information about all the employees and how they had behaved over the last months or years. He was not making random decisions just because the business was closed; there was a lot of historic data governing his actions.

20. He did not however think at that stage that the situation called for a restructuring of the business, which for him implied consideration of bankruptcy. Mr Dhaliwal acknowledged that there might have come a point when the decision had to be taken that the business was no longer viable and total closure would have been necessary, but in March and April 2020 that was not part of his thinking.

21. He also refuted the suggestion put to him that other options, such as offering part-time working or asking staff to change roles in the kitchen, might have been viable. This was not a reduction in work for a finite period, it was a complete cessation of work for an indefinite period.

22. I accept Mr Dhaliwal's evidence as to his decision to make redundancies.

<u>Selection pool/criteria</u>

23. Mr Dhaliwal concedes, and I have so found, that the way in which he implemented that decision was not fair. He did not consult with the employees at all. The Respondent simply told seven "FOH" (front of house) employees, two managers and the Claimant that they were dismissed.

24. At the rehearing it was not suggested on the Claimant's behalf that he should have been pooled with all other staff, and my focus is therefore on the pooling (or lack thereof) among the chefs. However, in cross-examination it was put to Mr Dhaliwal that the situation generally warranted a collaborative approach with all staff to try to come as a collective to decisions in the best interests of the business. Mr Dhaliwal was dismissive of that suggestion. He said that employers need to make decisions and employees need to do their jobs. He

considered that the best decision he could come up with at that time, given the circumstances – at least so far as the kitchen staff were concerned – was to make a "non-specialist chef" redundant, in addition to the other nine employees from outside the kitchen pool.

25. The reason for making a "non-specialist chef" redundant, according to Mr Dhaliwal, was that the Respondent is a restaurant charging premium prices and it would be very risky in terms of maintaining the necessary quality to move people around in the kitchen. He acknowledged it can be done in certain circumstances, such as when the specialist chefs are on holiday or call in sick: then Mr Dhaliwal would request cover from a colleague. It would not, however, be realistic to require a non-specialist to become a specialist overnight. Mr Dhaliwal considered it would take five to ten years to become a specialist.

26. For that reason, Mr Dhaliwal considered that the Claimant, who in Mr Dhaliwal's eyes was the only non-specialist chef at Zaika, was the logical choice and would have been in a pool of one if he had thought about it. He agreed that if there had been more non-specialist chefs, they would have been pooled with the Claimant.

27. Further, had the lockdown continued with no re-opening date in sight, it was fair to say that all the chefs might have been at risk; but in what Mr Dhaliwal called "Phase One", he was content to focus on those who did not specialise – i.e. the Claimant - because he considered that the kitchen could still be run without them. His evidence was that if he had made the specialist chefs redundant, the business would not survive because it would not be able to reopen at the end of lockdown. As it was, when the restaurant did reopen, takings were down 70%. Mr Dhaliwal considered in such lean times, there would be no need for non-specialist "helpers", whereas during busy times those employees are used in the kitchen for, among other jobs, preparing the *mise en place*.

28. The evidence as to whether the Claimant was a specialist chef or a "helper" and whether he was able to replace any of his colleagues, was hotly contested and hence it was extremely disappointing that neither party had considered it in any detail in the witness statements. I have had to do my best with the evidence that was in the bundle, taken with the oral evidence. As far as I can make out, other than the Claimant, the kitchen staff and their various specialisms were as follows:

    a. Daniel Shekhar Rozario, the head chef and a specialist tandoor chef;
    b. Somnath Mehra, a specialist tandoor chef (running the bread section of the tandoor station);
    c. Gautam Barman, a specialist curry chef (running the station);
    d. Alberto Poly Silva, a specialist pastry chef (running the station);
    e. Seby (Bastiao) Travasso, a specialist in pantry (frying and cold section starters) (running the station);

f. Mahesh Rayar, a specialist curry chef;
g. Ashley Rodrigues, working in pantry;
h. Sagayaraj Gnnapraga, a specialist curry chef;
i. Paulwin Silva, working in pantry.

29. Mr Dhaliwal's focus was on those who did not contribute to the menu; he said that chefs who run stations also come up with new dishes and carry out trials. His view was that all the senior chefs at (a) – (e) above contributed to the menu but that the Claimant did not. Mr Dhaliwal said their salaries were in the region of £39,000 to £45,000 per annum, whereas the Claimant's was, as I have found, £34,000 by the date of his dismissal.

30. The Claimant did not challenge this while Mr Dhaliwal was giving his evidence, but when it came to the Claimant's own evidence, he denied that anyone was receiving as much as Mr Dhaliwal had suggested. The Claimant said for example that Mr Barman had shown him his payslip and it showed Mr Barman was earning no more than £35,000, although the Claimant could not recall precisely how much it was for. That said, he then acknowledged that Mr Barman had the same arrangement as the Claimant himself in terms of having cash (presumably tronc) payments in addition to what was set out on his payslip. The Claimant also said he thought Mr Silva was earning only £26,000 to £27,000.

31. I prefer the evidence of Mr Dhaliwal in this respect as is more likely to be aware of the salaries of each member of staff, even three years on from the period wit which we are concerned. There is no guarantee, even if Mr Silva told the Claimant what he was earning, that the figure he gave was accurate. The Claimant did not suggest he knew what the others earned, or that he definitely knew what anyone's salary was.

32. The Respondent's evidence was that up to and including 2020, Mr Rozario always took his holiday from the beginning of January until mid-February each year so that he could visit family in India. Mr Dhaliwal said that the Respondent's business was so completely different at its peak from non-peak, it was as though they were two different restaurants. Mr Rozario habitually worked six days a week, other than during his six weeks holiday, working in and heading the meat section of the tandoor station as well as running the kitchen. When he was away, which was always during the "off peak" period, Mr Silva and Mr Rodrigues ran the kitchen in terms of the rotas, ordering etc. They were both off themselves two days a week but the kitchen was open seven days, so they had to split the work between them.

33. Both Mr Rozario and Mr Mehra were involved in marinating the meat in the tandoor station. Mr Dhaliwal said this was a very lengthy process, taking up to two days for different marination processes. The Claimant was never part of that process. At the time, Mr Dhaliwal said that Mr Mehra did (and still does)

the butchery in the restaurant. Both he and Mr Rozario were able to do it but Mr Mehra did the most. If he was going to take a day off, he would butcher enough meat for two days, so that the "helper" would have it ready for them while Mr Mehra was on leave. It would not have been possible for Mr Rozario to have done all the butchery as well as running the kitchen, if Mr Mehra had been made redundant. Again, none of this evidence was challenged while Mr Dhaliwal was on oath.

34. Mr Rozario himself left the Respondent sometime after Zaika re-opened but the Respondent has replaced him "like for like" i.e. a head chef who works in the tandoor section. This new person does not have extended holidays abroad and so the restaurant can work around him, with one person managing both meat and bread in the tandoor section during slow periods such as on bank holidays when there may be as few as 30 or 40 guests in the restaurant. There is no occasion when the new head chef and Mr Mehra are both off at the same time.

35. Mr Dhaliwal acknowledged in cross-examination that in the years before COVID, when Mr Rozario went to India every January, there would be days when Mr Mehra was also off. He claimed that a tandoor specialist from another restaurant in the Tamarind Collection would come to Zeika. He said that that person did not appear on the Respondent's rosters for the period because their shifts would be marked on the roster for their usual restaurant. He denied that the Claimant ran the tandoor section.

36. So far as the curry section was concerned, Mr Dhaliwal considers Mr Barman an extremely good curry specialist, who he says has spent 12 years working in a top hotel. Mr Dhaliwal denied that if Mr Barman was made redundant, the remaining two chefs could manage the station between them. He said that he would love to be able to run the section with two chefs as his payroll would be lower, but the reality is that the section would be in trouble if it lost Mr Barman. The Claimant could not have replaced any of the three chefs in that section on a full-time basis, though he could help out if one of them was off sick or on holiday, and during "down" times, not peak hours.

37. On being pressed in cross-examination, Mr Dhaliwal conceded that there might have been occasions when there was only one curry chef on shift, but he said that a kitchen could not be run permanently with only one and that in any case, the Claimant did not assist in the curry section. In a perfect world, Mr Dhaliwal said, there would be two specialist curry chefs on any given shift and if the restaurant was busy, even that would still be a struggle. The biryani oven was further away and curries needed to be co-ordinated, so preferably there would be three.

38. Turning to pastry, Mr Dhaliwal said Mr Poly Silva was the only person in his section and thus if he was made redundant, the section would close and there would be no desserts in the restaurant. He agreed that many other people

could "dispense" desserts in terms of coming in during the evening service, plating them up and sending them to the tables, but only Mr Poly Silva could prepare them. The desserts section was not in the main kitchen, so Mr Poly Silva could not help out in there if another section chef was absent. Mr Dhaliwal denied that the Claimant had trained Mr Poly Silva.

39. Mr Travasso's role was said by Mr Dhaliwal to be "critical", co-ordinating the dishes going out. Indeed, he said all three pantry chefs had a heavy workload plating and dispensing the food and all three were critical to the pantry section running effectively. Dispensing from this section is different because the person doing it co-ordinates the food for every table (up to 220 covers on a busy Friday or Saturday), and must have knowledge of gluten and other allergies. Mr Silva does the preparation for the pantry in the morning and in the evening, dispenses cold starters on the counter. He works five days a week and Mr Rodrigues does it on his days off. Mr Dhaliwal denied also that the Claimant had trained Mr Rodrigues.

40. It was put to Mr Dhaliwal in cross-examination that if he had consulted with the chefs, there may have been those who were willing or hoping to take redundancy or who did not want to return to work for health and safety reasons while COVID remained a risk. Mr Dhaliwal refuted this. The only person, he said, who did not return when Zaika re-opened, was a sommelier. Everyone who had worked in the kitchen returned, save, obviously, for the Claimant.

41. Mr Dhaliwal's analysis of each of the other kitchen staff was largely unchallenged by the Claimant.

<u>The Claimant's skills and experience</u>

42. So far as the Claimant himself was concerned, Mr Dhaliwal said he was employed by the head chef as a tandoor chef but he then became a "helper" who rotated around all four sections. The Claimant does not accept this, but although this was what Mr Dhaliwal had said at the 2021 hearing, the Claimant had carried out no analysis in his witness statement of his colleagues' skills or experience, nor given any detailed evidence about his own ability to replace any of them. He accepted in cross-examination that he was aware the purpose of the rehearing was to establish what skills he had in the kitchen. There was no explanation for why, in those circumstances, he had not addressed them in his statement.

43. To the extent he dealt with these issues at all, the Claimant had asserted broadly in the statement for the rehearing that he was the only chef capable of handling all the sections and was more skilled than the other chefs employed. His position was that he could easily have transitioned to work on one of the "other" sections (presumably, "other" than the tandoor section) and would happily have done so. He said that if he had been asked for his views during a consultation period, he would have asked the Respondent to make either Mr

Travasso or Mr Silva redundant and he would have taken their place in the pantry.

44. In oral evidence, the Claimant said that prior joining the Respondent in 2015, he had worked at the Holiday Inn in India for more than five years and then he had worked as the Head Chef (tandoor) at a restaurant called Copper Chimney in the USA for around six years. While he was working in India, he was a waiter initially then a trainee chef. On coming to the UK he had worked in Masala Zone in Earls Court before joining the Respondent, which he acknowledged was better regarded than Masala Zone. There was no supporting evidence I the bundle of the Claimant's experience and although he said it was all on his CV, that was not in the bundle either.

45. The Claimant said that he worked as a tandoor chef when he started with the Respondent in 2015, then he was "promoted" to the pantry section before moving to the curry section, with curry and pantry helping each other. When the pastry chef left, the Claimant moved on to pastry. He said there was nobody else with him when he was working in pantry and curry initially, but this did lead to many complaints from customers, presumably about food quality. The Respondent grew fast, from 30 to 40 covers up to between 200 and 300 by the time of the lockdown in 2020.

46. The Claimant expressed himself confident in oral evidence that he could have replaced any of the curry chefs (though as I set out below, he did not suggest that he should have done so) or either of Mr Rodrigues or Mr Silva. He believed he had more knowledge and was more senior to those in all the sections.

47. The Claimant initially denied that when Mr Rozario was away, the Respondent called on a tandoor chef from another restaurant in the Tamarind Collection but then accepted that a curry chef called Sagay or Sagayaraj did sometimes come from elsewhere in Tamarind to work at Zaika. This may have been Mr Gnnapraga, who does appear on the rosters from January to March 2020 as working at Zaika, although he remained on them after 14 February when Mr Rozario had returned from holiday and was himself rostered, so I make no definite finding. It was the Claimant's case in any event that this occasional chef came when there were parties at Zaika, and that he was not coming to substitute for Mr Rozario.

48. The Claimant also asserted in cross-examination that he did butchery for the Respondent, notwithstanding this was not referred to in his witness statement and nor did he mention it when answering supplemental questions in chief. He initially said the meat for the restaurant came from outside prepared so all that was required was cutting up chicken; he then agreed however that this was not correct and that the meat had to be coated and marinated. He said that the length of the marinade was not as long as Mr Dhaliwal had suggested and that the meat would be marinated only for between one and three hours, the length

depending on how busy the kitchen was. He then accepted that this was not correct and that the kitchen knows how much meat it requires and marinates it a day in advance.

49. The Claimant had not challenged Mr Dhaliwal while he was giving evidence about these matters, and I find that Mr Dhaliwal's evidence was cogent and plausible. The Claimant's evidence by contrast was inconsistent and lacking credibility. It makes little sense that what is on the menu for the day (or the quality of the food) in a high-end restaurant can be dictated substantially or at all by how busy the restaurant was the day before.

50. The Claimant also acknowledged that if a chef had the skills to run multiple different sections (pantry, tandoor and curry) they would be very sought-after and could command a high salary in well-regarded restaurants. Indeed, he agreed with Mr Stevens' suggestion that they could get a job at any three-Michelin starred restaurant in the country earning six figures. He maintained nonetheless that he was such a chef.

51. The Claimant sought to support this by saying that when he was offered a job at a competitor restaurant, Chokhi Dhani, in May 2018, Mr Dhaliwal told him he was a good chef, second to Mr Rozario, and asked him to stay. The Claimant said he had not asked the Respondent for a pay rise. He claimed he had been enjoying his work with the Respondent but resigned because he had been offered a good opportunity and said that he was joining Chokhi Dhani as a curry chef. He said he told Mr Dhaliwal he needed Sundays off because he had a young child at home and repeated that he had not asked for a pay rise. Nonetheless, he said, the Respondent subsequently increased his pay.

52. This was the aspect of the evidence on which I asked the representatives to address me, early on the second day. In the supplemental statement produced by the Claimant on the second day of the 2021 hearing, he had said that he had no desire to leave the Respondent but could not turn down a pay rise of £2,000 per annum so he approached Mr Dhaliwal to hand in his notice. Although he did not want to leave, the additional money would be invaluable to his family and "on that basis alone" he said he had to accept the position he was being offered. Mr Dhaliwal matched the salary, so the Claimant remained with the Respondent. Then in May 2019, the Claimant had felt he was "still being underpaid for [his] skillset" and asked for a further meeting with Mr Dhaliwal and Mr Rozario. He asked for, and was given, a further pay rise.

53. I accordingly made findings to that effect in the previous decision and they were what underpinned my conclusions as to the higher salary rate as advanced by the Claimant. Mr Dhaliwal's evidence matched the Claimant's and indeed he gave evidence in 2021 that he had felt pressured by the Claimant into increasing the Claimant's pay, because on both occasions, the Claimant had waited until the Respondent was short-staffed to ask for the rise, threatening to

leave if he did not get it. Mr Dhaliwal gave this as a factor as to why he considered the Claimant less reliable.

54. As I have said above, neither of the representatives at the rehearing had been at the first hearing and they had not seen the statement in which the Claimant had set out the circumstances of his offer from Chokhi Dhani and the matching of that offer by the Respondent so that he stayed at Zaika. No fault attaches to them in not addressing the issue in evidence. In the circumstances, however, I reject the Claimant's version of events in this regard and accept the evidence of Mr Dhaliwal.

Conclusions

Polkey reduction

55. I conclude that a fair procedure would have involved consultation with the affected employees, as is now acknowledged by the Respondent.

56. I reject the submission that a fair procedure would necessarily have had to involve putting all staff at risk of redundancy into a single large pool. At the date of the Claimant's dismissal, it is correct to say that the situation was dire and the future of the business uncertain. Mr Dhaliwal had already seen revenues dropping pre-COVID and was fairly sure that there would not be an immediate return to "business as usual" once lockdown restrictions were lifted, but he believed it would pick up. I find that he must have made a decision to make redundancies at some point between 17 March and 1 April 2020, the latter being the date the employees concerned were told they were being dismissed. It was from that date, therefore, that consultation should have started, i.e. prior to any decision crystallising.

57. To some extent, the Respondent was in a better position than it had been after the financial crash in 2008, because in 2020, it had the CJRS to fall back on in the immediate future and there had been nothing like that in place in the earlier period. However, Mr Dhaliwal had already given thought to what the position might be after the restaurant re-opened, before COVID restrictions were imposed and the CJRS came into being. At that stage, he believed he was looking at a diminution in business and not a cessation (to use the language of the statute) or as Mr Dhaliwal himself put it, "Phase One". Nonetheless, I consider that there was nothing that would have dissuaded him from the decision that some redundancies were required.

58. That being so, I conclude that it would have been inevitable that the Respondent would have differentiated between FOH employees and chefs, and I conclude that this would have been a reasonable approach to take; they are not interchangeable in the roles they do. The latter are trained, skilled and experienced in cooking, the former are not. Chefs are paid higher wages, and by reference to an annual salary rather than an hourly rate, because they are likely to be much harder to replace. A restaurant cannot operate without chefs,

whereas it could have run a takeaway service (for example) with no FOH staff at all. Fewer FOH employees would be required if (as it turned out was the case) there continued to be restrictions on diner numbers following lockdown, and waiters were on zero hours contracts so that when they were not working, they were not being paid; it therefore cost the Respondent much less to keep them on even allowing for accrual of holiday pay for instance and even before taking into account the CJRS.

59. As such, it would not have been realistic (and indeed was not suggested for the Claimant) that he could/should have "bumped" out a member of FOH staff. Even if there had been consultation across the entire workforce, as there should have been, I conclude it would have taken place in different pools, and the Claimant would have been in the pool of kitchen staff, not a single pool of all staff at Zaika. That was the pool that I conclude would have been dealt with first (if they were done sequentially), given the higher fixed salary rates among the staff in it.

60. I further find that within a pool of kitchen staff, it would have been potentially reasonable for the Respondent to differentiate between "speciality" and "non-speciality" chefs. Had the Respondent done so, I conclude that the factors indicated in Mr Dhaliwal's statement (seniority, ability to run a section, performance, punctuality and loyalty) would have been included in a matrix that would have been drawn up by Mr Dhaliwal himself. In particular, the latter – loyalty – clearly weighed very heavily in the analysis of the Claimant that Mr Dhaliwal did conduct, despite not having articulated it at the time and not having discussed it with anyone, including the Claimant, when he did so. So though he did not score anyone else, he formed a mental picture of the Claimant that led him to say it should be the Claimant who was dismissed for redundancy, and those factors form the basis of what I conclude a matrix would have contained.

61. I am not persuaded that the line between the Claimant and the other chefs was as clearly defined as Mr Dhaliwal seeks to suggest. It is clear from the rota for instance that there were several days in January and February 2020 when Mr Rozario was on leave where Mr Barman was also off. On 16 January 2020 for instance (a Thursday), there were only six chefs on the roster: Mr Rayar, Mr Rodrigues, Mr Gnnapraga, Mr Travasso and Mr Silva, plus the Claimant. That would mean two curry chefs and three in the pantry. Taking into account Mr Dhaliwal's evidence that Mr Mehra would have prepared the meat and Mr Poly Silva the desserts the previous day, there would still have had to be someone on tandoor that night, cooking. Even if the restaurant was low on covers because it was a January night in the middle of the week (fears about COVID not yet being a factor), and even if somebody came from Tamarind to help out in and/or to run the tandoor section because Mr Rozario was on holiday, that meant the Claimant must have run at least the bread section in tandoor.

62. Further, the job that the Claimant secured in December 2020 with Dishoom as a Senior Chef de Partie paid just £2,000 a year less than he was earning with the Respondent at dismissal. I conclude that that is therefore likely to be a similar level at which the Claimant was working when he was at the Respondent – i.e. more than a "commis chef" or "helper" as Mr Dhaliwal now suggests.

63. That said, I do not accept that the Claimant's skills were of the level claimed by the Claimant. His evidence as to the butchery and marinating of meat for instance was inconsistent and wholly lacked credibility. I accept the Respondent's submission that the Claimant gave a very poor account of himself in his evidence, sometimes contradicting his own oral evidence within minutes, and as I have said, he had scarcely engaged in his written statement with the purpose of or issues in this rehearing.

64. It is also very notable that the Claimant's applications for employment since leaving the Respondent have not been to work as a head chef in Michelin starred restaurants (or even for the sort of roles that the Respondent had found advertised on the Indeed website in January 2021, such as Group Executive Chef in West Drayton paying £40,000 a year) as might be expected if his skills and experience were at the levels he claims. Instead, he spent three hours in August 2020 (including a two-hour interview) applying unsuccessfully for an unspecified role at the "Kingsfield Arms" which I infer is a pub, and made a single, similarly unsuccessful, application for a job as an "Indian chef" in an unspecified venue later that month via Indeed.

65. I conclude that if the Respondent had carried out a consultation, it would have informed the entire restaurant workforce of the proposals to carry out redundancies in the different pools (of which there would probably have been three: FOH, kitchen and management) and advised the employees of the criteria that it proposed to use. As I have said above, I consider this notification would have come at some point before 1 April 2020 once Mr Dhaliwal had reached the decision that redundancies were necessary. It was not suggested that the Respondent might have offered a voluntary redundancy package (enhanced or otherwise), but given the fact that everyone returned after the restrictions were lifted, I consider it very unlikely that any of the chefs would have taken it if the Respondent had.

66. Notification would have to have been done by email or by a remote "town hall" meeting (Zoom or similar) because of the lockdown restrictions on meetings in person, and that could have been carried out very quickly – within one or two days - after the decision was made, because at the time, employees were almost by definition a "captive audience". On balance of probabilities I consider the Respondent would have used email because that is how it notified the employees of the proposal to place them on furlough.

67. Mr Dhaliwal would then have drawn up the criteria he was proposing to use and assessed each of the kitchen staff against them before informing each of them of his assessment. I conclude that the Respondent would have excluded the Head Chef from the pool, regardless of any other considerations, given his unique role and pivotal importance to the kitchen. I have previously found that it was Mr Rozario who made the phone calls explaining to the Claimant and to Mr Da Silva that their employment was being terminated, so, Mr Dhaliwal might well have chosen to discuss with Mr Rozario the structure of the pool, the criteria and the individual scores. This discussion might perhaps have been over two to three days, though it might well have been shorter since again Mr Rozario would inevitably not have had other work commitments to distract him and so would have been available throughout the day.

68. Assuming that any such discussion or consideration by Mr Dhaliwal did not result in each of the section heads also being excluded from the pool (which I consider would not have been unfair if it had), there would then have had to be a maximum total of nine individual consultation meetings. Again, those meetings would have had to be conducted remotely, with the information emailed to the participants in advance.

69. I conclude that the criteria (to which I return below) could be drawn up and the kitchen staff scored against a matrix within the first week from the Respondent notifying them they were at risk, and then assuming that the Respondent would conduct a fairly modest three meetings a day, I consider that the entire process would have been concluded within two weeks.

70. Although I do not accept that a fear of demoralising the kitchen staff should necessarily have prevented the Respondent from conducting a consultation exercise or putting everyone at risk, I consider it highly unlikely in the circumstances that the process would have been protracted. Given the size and resources of the Respondent, a two-week period to complete an exercise involving one redundancy from a pool of nine would not be objectively unreasonable.

71. I conclude that the Claimant has not shown on balance of probabilities that he has the skills and experience necessary to replace any of the chefs who are normally allocated to the Respondent's different kitchen sections, but more to the point, I conclude that he would not have persuaded Mr Dhaliwal that he did. Mr Dhaliwal's discussion with the Claimant about the scoring would therefore undoubtedly not, on the evidence before me, have led to any meeting of minds, and ultimately, I conclude that the Claimant would have been unable to persuade the Respondent that there should be no redundancy at all or that he should be retained in the place of any of his kitchen colleagues.

72. I have set out above the reasons why Mr Dhaliwal had reached the conclusion that a redundancy was necessary from the kitchen staff, in addition to those

being made elsewhere. Those reasons are not objectively unreasonable and Mr Dhaliwal clearly considered it was his decision to make. He has also explained that he viewed the Claimant as:

a. Less senior to the colleagues that ran stations. There was no agreement between the parties on the point and it is difficult to assess, absent any reliable supporting evidence, whether that was a fair analysis, but the Claimant did not challenge Mr Dhaliwal's evidence on the previous occasion that the other chefs had up to twelve or thirteen years' service with the Respondent;

b. Unable to run the curry section two days a week. I consider that this ties in to the "loyalty" factor, below, but it would also have meant the Claimant "bumping" one of his colleagues who were allocated specifically to that section (i.e. Mr Barman, Mr Rayar or Mr Gnnapraga) and the Claimant did not himself suggest that this would be appropriate;

c. An underperformer compared to the rest of the kitchen staff. There was no supporting evidence of this and Mr Dhaliwal appeared to accept in cross-examination that what he meant was that the Claimant was not punctual and disloyal, both of which are factors considered separately, so that underperformance should have been discounted entirely;

d. Not punctual. I found in my previous determination that the Claimant had appeared to accept he was occasionally late for work, and he repeated that in the rehearing. There was no reliable evidence that his colleagues were late as frequently or by as much as the Claimant.

e. Lacking in loyalty. I have grouped Mr Dhaliwal's final two factors (the Claimant was "always asking for pay rises, especially when other kitchen staff was on holiday [sic]" and "he had already once resigned to join Chokhi Dhani") under this head. I have found that the Claimant has not been truthful at this rehearing in his evidence and that Mr Dhaliwal's assessment of the situation is accurate.

73. It would not have been unreasonable, given what might fairly have been described as a potentially existential threat to the Respondent, for Mr Dhaliwal to have weighted these elements, with "loyalty" as the main one. I conclude he reasonably wanted to ensure that when he re-opened at some unknown point in the future, he would have a core of reliable staff who could have the kitchen up and running quickly, and taking that into account, it was his view that he could not depend on the Claimant to achieve it as much as he could rely on the other chefs. Therefore, even if the Claimant had scored as much or slightly more than his colleagues on all the other factors, it was clear that the two elements of the "loyalty" factor would have been determinative in Mr Dhaliwal's

scoring of the Claimant and would have been objectively both reasonable and accurate.

74. This is not the same thing as the Respondent "getting rid of an unwanted employee". As I found in my previous decision, had there been no global pandemic, the Claimant might never have been dismissed. His punctuality was not sufficiently poor even to warrant a formal warning. When he had announced his intention to leave and join a competitor, or had asked for a pay rise in the past, the Respondent had not simply accepted his resignation or refused his requests as it could have done if it wanted him out; instead it met his requests for an increase in salary and so he stayed. However, once the decision was made that a redundancy from among the kitchen staff was necessary, some consideration had to be used to differentiate between the chefs.

75. The Respondent would have acted in an objectively reasonable fashion if it had used the factors (other than 72(c)) above, and weighting (e) as the determinative factor if necessary. It was not suggested on the Claimant's behalf that any of his colleagues would have scored lower than the Claimant in that regard or indeed overall. Whether or not the Claimant was **capable** of running the stations is probably beside the point; as a matter of fact he was not running any of them, and the Respondent was entitled to conclude that it would not upset the status quo by dismissing a specialist senior chef who was already in place and replacing him with the Claimant.

76. I do not accept that the Claimant would have taken unpaid leave or even that he would have suggested he might. As I found previously, the day after the Claimant was given notice, he said he did not accept it because he wanted to support his family and "pay rent" as to which an option of unpaid leave (and no redundancy payment) would simply not work. Even had he done so, I consider that Mr Dhaliwal would have refused this option because he had seen revenue falling before lockdown and he was – as it turned out, rightly – concerned that it would not pick up quickly after restrictions ended; therefore he had resolved that reducing the size of the workforce was the correct and only way to proceed.

77. Mr Dhaliwal said previously, and I found accordingly in my previous decision, that giving notice early would maximise the chances for the Respondent's employees to look around for alternative employment while remaining on paid furlough leave; and indeed that is identified in *Williams & Others v Compair Maxam*[1] as being one of the two potential reasons for giving a warning to employees who are at risk of being dismissed for redundancy, the other being to ensure there is effective consultation, including about the possibility of alternative work with the employer. However, in this instance, there was no "alternative employment" that might have been available to the Claimant at that time and working part time was not an option open to anyone while the

[1] [1982] ICR 156

restaurant was closed indefinitely. It was also not feasible to make any other adjustment to the way the kitchen worked, given that it was not working at all.

78. In the circumstances:

    a. There is 100% likelihood that the Claimant would have been dismissed in any event, had the Respondent followed a fair procedure.

    b. The Claimant is entitled to compensation for the time it would have taken to follow that procedure, which in my assessment is a period of two weeks.

    c. Accordingly I do not need to go on to consider whether the Respondent has shown that the Claimant has failed to mitigate his losses.

Remedy

79. I assess the amount payable as follows:

    a. I have previously found that the Claimant's gross annual salary was £34,000, or £652.06 per week (365/7 = 52.143 weeks. 34,000/52.143 = 652.0547).

    b. Although the Claimant continued to be paid by the Respondent, albeit at a reduced rate, for three months following his effective date of termination, I have already offset those payments against what was owed to him by way of deductions from wages, notice and redundancy pay and therefore no deduction falls to be made from the award.

    c. The Respondent is accordingly ordered to pay to the Claimant two weeks' pay, which is the gross sum of £1,304.11. This judgment may be satisfied by the Respondent paying to the Claimant what it calculates to be the net sum due and accounting to HMRC for tax and national insurance on the balance. Furthermore, if the Claimant believes that too much has been deducted (e.g. because his liability for tax and national insurance should be based on his current circumstances as opposed to those in 2020) he can apply to the Revenue for a refund.

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Employment Judge Norris
Date: 28 July 2023
JUDGMENT AND REASONS SENT TO THE PARTIES ON:

28/07/2023

FOR THE TRIBUNAL OFFICE