Case No: 2203576/21

EMPLOYMENT TRIBUNALS

Claimant: **Ms. M. Mariotti**

Respondent: **Hippodrome Casino Ltd**

London Central

Employment Judge Goodman **17, 20-23 March 2023**
Ms S. Aslett
Mr S Godecharle

Representation:
Claimant: in person
Respondent: M. Dougherty, counsel

Judgement and reasons having been given in tribunal on 23 March 2023, these written reasons are delivered pursuant to a request made under rule 62(3)

REASONS

1. This hearing has been to decide claims of discrimination because of race and age, and a claim of breach of contract. They were brought following the dismissal of the claimant by the respondent by reason of redundancy on 1 October 2020.

2. The claimant went to ACAS for early conciliation on 22 October 2020, and a certificate was issued 19 November 2020. She presented a claim to the employment tribunal on 1 February 2021, so in time with respect to the dismissal. The Respondent disputes that acts of discrimination before 23 July 2020 are in time.

3. A list of issues was drafted by the respondent and clarified at a Case Management hearing on 22 February 2022. The tribunal worked from the list of issues attached to the case management summary.

4. The original claim form was drafted by the claimant and is not always easy to follow. The respondent understood the claimant to include a claim for indirect

discrimination and failing to make reasonable adjustments for disability. It was clarified by Employment Judge Clark at a Case Management hearing on 11 November 2021 that these were not claims brought by the claimant, and her language had been misunderstood, so they were not included on the list of issues.

5. In clarifying the issues hearing the claimant has identified the comparator group for the age discrimination claim as those aged 20 to 25, while she was 39.

Amendment of Claim – Victimisation

6. On day 4 of the hearing the tribunal queried whether on the claim as presented there was also a claim of victimisation, for having been dismissed for alleging discrimination in a grievance letter of 19 November 2019.

7. The respondent opposed an amendment to add a claim of victimisation. After adjourning to consider, the tribunal allowed an amendment to add a claim of victimisation. Oral reasons were delivered and recorded in Word at the time.

8. Summarising those reasons, the claimant's letter of appeal against dismissal contended the dismissal was because she had presented the grievance. The text of the grievance letter, which was in the hearing bundle, complained of many of the matters now alleged as discrimination in the tribunal claim form. The claimant had not pleaded explicitly that she was dismissed for this grievance, but as she was without legal representation, had limited command of English, the appeal letter was not available to the judge at the case management hearing, and as the dismissal was already pleaded as an act of discrimination, such that the respondent was already prepared to give evidence of their reasons for the dismissal, it was considered in the circumstances that the balance of hardship was such that the amendment should be allowed as just and equitable. **Vaughan v Modality Partnership UKEAT/0147/20/BA (V)** and **Selkent Bus Company v Moore (1996) ICR 836** were considered.

Conduct of the hearing

9. The claimant speaks some English, some Italian, and Amharic Tigrinya, having grown up in the Horn of Africa with a Tigrinya speaking mother and an Italian father. She had enough English (and Italian) to work for the respondent as a waitress, but her competence in either language was not enough for a tribunal hearing of legal claims. A Tigrinya interpreter was booked for the final hearing. Unfortunately, on the evening before the first day, the agency informed the tribunal that an interpreter was not available for 17 March. There was a review of the claims and issues only therefore on that day, the claimant being accompanied by a friend who acted as informal interpreter. The tribunal then adjourned to read the documents and witness statements. For the remaining hearing days a Tigrinya interpreter, Daniel Beyene, assisted the

claimant.

10. The tribunal heard evidence on 20, 21 and 22 March. We heard submissions on the morning of 23 March, then adjourned to consider a decision. The parties returned after 3pm, and oral reasons were given and recorded (the recording was noted to be 54 minutes).

11. During the hearing, the tribunal stopped some questions the claimant asked of the witness Fani Paprizova, because they referred to detailed matters not mentioned in her witness statement, or claim form, or list of issues, and it was considered unfair to raise this with a witness at a distance of three and half years from the event, when there were no relevant documents.

Evidence

12. The tribunal heard live evidence from:

Merona Marcello Mariotti, claimant, through the interpreter. Her witness statement is contained in an email to tribunal on 17 March 2023

Kokob Reda, the claimant's companion and informal interpreter, gave evidence of an episode when he delivered a fit note to the respondent, his witness statement being a short email to the tribunal 19 March 2023.

Maria Krasovska, bar supervisor. She was involved in a number of incidents the claimant identified as being because of race. She described her own race as half Russian, half North Korean.

Sokol Nikollaj, bar supervisor in 2019, when he worked with the claimant, and assistant general manager in 2020, when he assisted with scoring staff for proposed redundancies. He is Albanian. At work he communicated with the claimant in Italian.

Fani Paprizova, head waitress, identifiable as white and not British, but whose national or ethnic origin is otherwise not known to tribunal. She trained new staff.

Mike Hayden, food and beverage director, who is white British. He heard the claimant's appeal against the decision to make her redundant.

13. There was a witness statement for **Shkrumbrim Krasniqi**, but he did not attend the hearing. He had been available for a final hearing in September 2022, but that hearing was vacated for lack of judicial resource. Since then he has left the respondent's employment (in November 2022), and was no longer willing to come. The tribunal read the witness statement, but where his evidence conflicted with others we took little heed of what he said, as it had not been possible to test it by questions.

14. The Respondent applied to strike out the claimant's witness statement on the basis that it was written in English, disclosed late, and was unsigned. The claimant said it was an accurate statement of the evidence. Mr Reda said the claimant had written a statement in Tigrinya, and he had then translated it, sending it in email form. The tribunal took into account that even if the witness statement was disallowed, the claimant was still able to use the claim form, an email sent by her (or on her behalf), in English dated 15 March 2022, further information supplied pursuant to order 11 November 2022, and the accounts of events in her October 2019 grievance letter, which are all in the bundle, and that any discrepancies could be challenged in the hearing. We decided to admit the 17 March 2023 emailed witness statement.

15. Having heard the evidence, we concluded that the claimant's evidence, whether oral or written, have been confusing, changing, and sometimes contradictory. We made allowances for something being lost in translation or in transmission (both Mr Reda and a voluntary adviser having been involved at earlier stages), and for her not being able to read much of contemporary documents in English, and could not conclude that she was deliberately misleading, but the unreliability made it difficult to assess factual conflicts.

16. There was a hearing bundle of 243 pages.

17. At the start of the hearing the tribunal also admitted to evidence four emailed items disclosed by the respondent the previous day. These were two omissions from an email chain about fit notes in August 2019, an email about a specific fit note of 28 October 2019 about reduced duties, the email attaching the grievance outcome dated 22 February 2020, as there was dispute about when the outcome letter was sent to the claimant, and a complete copy of the contract of employment, as two pages were missing from the copy in the bundle.

18. When asking questions of the witnesses, the claimant produced a notebook written in Tigrinya script said to be contemporaneous with events. The document been disclosed before and had not been translated. The tribunal considered whether to adjourn or even vacate the hearing for a translation could be prepared and submitted to the respondent so that they could take instructions from their witnesses, but anticipated that this could not be done within the current time allocation. Having regard to the costs to be incurred by the respondent in postponing or adjourning, and the substantial delay that would result in having to relist a multi-day hearing, when the hearing was already taking place two or three years after some of the events complained of, the tribunal decided it would not be just and equitable to admit these late documents.

Findings of Fact

19. The respondent runs a casino in Leicester Square, which covers five floors, with nine or 10 bars. 800 staff are employed, 200 of them in hospitality,

overseen by the food and beverage director, Mike Haydon.

20. The bar teams were overseen by Sokol Nikolai, who reported to Shkumbrim Krasniqi, general manager.

21. The respondent said in evidence that they employed people are 76 nationalities. Nationality is recorded so as to check that employees have the right to work in United Kingdom, but there was no ethnic monitoring, and it is possible that many of these employees are from Eastern Europe, and so "white". It was said that there were and are some black staff. The claimant got a job through her cousin, who was and is employed by the respondent as a driver.

22. As for age, there were 10 waitresses in the casino and 8 in the restaurant. There were 10 cocktail waitresses and waiters. Three of them were 38, 39 and 40 respectively, 4 under 25, 2 in their late 20s, and one is 32.

23. The claimant is of mixed race, Italian and Eritrean. She identifies as black. Her mother tongue is Amharic Tigrinya. She speaks English and Italian, with enough English for day-to-day hospitality work, but she has difficulty reading and writing English.

24. She started work on 10 May 2019 after a trial shift of 2 hours or so working alongside Fani Paparizova. She was later assisted by Lehal. She had a brief explanation of the claimant's products and systems. On 11 July 2019 she attended a formal induction by HR adviser Beatrice Banjo, It was alleged as age and race discrimination that the induction was inadequate. We could not understand from the evidence in what way the claimant considered the induction inadequate. The respondent has never identified that she was inefficient. She seems to have been regarded as good at her job. There is no evidence about others getting more induction, or better induction. We concluded it is not shown that she had a less adequate induction than other staff.

25. She was paid £8.50 per hour, under a zero hours contract with a 48 hour opt out, and in practice worked about 50 hours per week. She worked shifts, the rota being set by the general manager.

26. Staff are paid 16 to 20 days in arrears. There was delay paying for the first three shifts she worked in May 2019. They were eventually paid in mid July 2019. The tribunal makes this finding from reading the documents. The claimant says that she had difficulty reading the pay slips provided to her online, so she did not detect that the payment made in July included payment of arrears due from May.

27. The next allegation of discrimination is that on 6 June 2019 the claimant was unilaterally moved to a position (Lola's, a burlesque bar within the casino) without support or training, and that she was asked to work at different

locations without agreement. When she asked what she was to do in Lola's, she was told Lehal would show her round. She went to see Mr Krasniqi about it. He told her to do as she was ordered. Fani Paparizova's evidence is that she could ask staff to move within the premises at short notice, and that as the same drinks and food was served in all bars, there was no need for additional specific training. The claimant said in her grievance that Mr Krasniqi asked her to do as Ms Paparizova asked. The contract of employment does provide that she was to work to their direction. The claimant's evidence is that some staff refused to work at Lola's because the burlesque atmosphere was unpleasant, and that someone called Linda, whose name is not identified in the witness statement or any other document, had refused to work there. The Respondent's witnesses were unable to deal with this particular, having around a hundred staff.

28. On 3 August 2019 the claimant was serving within an area of tables allocated to her. A colleague, Daniela, had served one of those customers and, offered him a discount. When the claimant went to serve him and he asked for the discount she asked if he had a discount card, but he had not. Customers must not be given discounts unless they have a discount card, or unless authorised by a supervisor. The claimant considered this important because tips are allocated based on the spend at tables, and if another waitress encroached on her area, the money would not be credited to her. The claimant challenged Daniela. Daniela complained. On 6 August 2019 Mr Krasniqi was told about the episode. The complaint is that he said: "not to worry, I'll sort her out". She was moved to work upstairs. The claimant says that following this episode she was "branded hard to work with". She says this was discrimination because of age and race.

29. The claimant says that on 11 August Maria Krasovska said that she should not expect the youngsters to do the work. The episode was not mentioned in the grievance letter of November 2019, but it was discussed in January 2020 at a meeting about the grievance, as recorded in the grievance response letter. The claimant said that she had been told that because she was older she had to cover younger employees in carrying out their work obligations. Ms Krasovska maintained her words had been misrepresented. She had advised the claimant not to quarrel with a younger waitress, Safia, about moving a glass, and to behave in a more grown up way.

30. There is general complaint that she had a 30 minute break in a 10 hour shift, while her colleagues in addition were allowed 10 or 15 cigarette breaks during the day. The claimant does not smoke and agreed in evidence that she had never asked for additional breaks. She said at the meeting in January 2020 that not having additional breaks was unfair, and because of both race and age.

31. Also on 11 August 2019 the claimant had a fall at work, injuring her wrist. Maria Krasovska was heard to call out seeking someone to help: "the black girl fell down". She was taken to the security team and a taxi called to take her

to hospital. The claimant went to hospital. She was off work with fit notes from then until September. She went to hospital for an MRI scan on 24 August. Having emailed a backdated certificate on 23 August, she was asked to hand deliver certificates, not email them. Mr Reda took one in for her. He was concerned that the casually dressed person (Bruno) he spoke to was not a manager and rang the claimant to have it confirmed that he was. He asked to be given copies to keep. Bruno returned with copies. Mr Reda was disappointed not to have some receipt for the original. His account, which includes that he was told by Bruno not to tell him how to do his job, suggests the episode was confrontational. The claimant considers that no one else was asked to supply original fit notes, not email them.

32. On returning to work on 13 September, the claimant worked, she says, 50 hour weeks. She supplied a fit note from the doctor asking for amended duties on 9 October, and then discussed with a manager what lighter duties might be required. The grievance letter complains Shkumbrim Krasniqi said (the date is not stated but it seems from later evidence that the claimant identified this as 9 October) that she was going to be given reduced hours, which she described as a warning. The explanation Mr Krasniqi gave to Beatrice Banjo when she was investigating the grievance in February 2020 was that he had reduced her hours because she could not or would not follow managers' instructions. So on the claimant's account her duties were not restricted, even though she wanted restricted duties (which could mean reduced hours) and the manager is reported to have said her hours were cut because she would not follow instructions. Such evidence as we have suggests she did continue to work, on a pattern similar to that before. The claimant explained that amended duties meant that from then on she worked in a different bar, where she could push doors, rather than pull them, when carrying trays, to avoid using the injured hand.

33. On 16 September 2019 the rota changed, but the claimant did not get the email with the new rota. When she was away from work on 23 October, thinking she had a night off, her supervisor, Carlos, telephoned and asked why she was not in work. She said it was she was not down to work, but came in to work nonetheless. There seems to have been more confusion, as on 2 November 2019 she was asked for fit notes, as if she had been absent, when she had not.

34. On 12 November she was again away from work because she was not fit. She did not in fact return before dismissal in October 2020. On 12 November 2019. she also asked HR about lodging a grievance and was sent the policy and a form to complete.

35. On 19 November 2019 she sent in a written grievance about this and a number of earlier matters, substantially those relied on in these tribunal proceedings.

36. According to Mike Haydon, at around this time too a personal injury lawyer instructed by the claimant had written a letter of claim about her injury at work. He said it had not gone further.

37. The grievance letter was not at first picked up by the respondent. They said this is because she had sent it to a no-reply recruitment email address, when it should have gone to the HR Department. The explanation provided by the respondent was that the then human resources manager Lina, had emailed the claimanyt on 12 November asking her to complete the grievance form, and sending her the grievance policy. The claimant emailed the grievance form to the HR Department on 17 January 2020. Beatrice Banjo, acting HR manager, then interviewed the claimant about the grievance and carried out some enquiries. She interviewed Lehal, Fani, Daniela, Carlos, Maria Krasovska, the bar managers, and Shkumbrim Krasniqi, general manager. She replied to the grievance in a six-page letter dated 21 February 2020. She agreed with the claimant that she had not been sent the revised rota in September 2020. She also proposed that bar managers had one-to-one meetings with her more regularly about her performance, and that they should ensure that only customers with discount cards got a discount, “not simply because their family friends”. This seems to acknowledge that Daniela may have been in the wrong on the customer discount issue.

38. On the claimant’s allegation that she had been discriminated against on grounds of race, the respondent explained the various episodes and denied that race had anything to do with what happened. On the allegation that she was discriminated against by Maria on grounds of age by being told “not to expect the youngsters to do the work”, Maria had recalled a dispute between Safia and the claimant about an empty glass, that the claimant was accused of being very rude, when asked about it by Maria she had complained that the others did not want to work, and Maria told her she had to be the “wiser and be the bigger person as she is an adult, Safia is much younger than her”.

39. Having gone sick on 12 November, the claimant did not return to work until dismissed in October 2020. In February 2020 she was asked to attend an occupational health assessment with an outside provider, and was sent four reminders. She did not make the appointment for the 11 February 2020, and says it was because she got lost trying to find it, and the clinic could not fit her in when she turned up late. She was seen on 10 March. The doctor’s report of 13 March noted difficulty communicating with her. The claimant told the doctor that she had had an MRI scan but “they do not tell me anything”. She reported problems gripping, twisting and rotating the wrist. The doctor felt unable to assess her condition or prognosis without further information from her own doctors, though he would have thought her fit to return based on the natural history of the condition.

40. The first national lockdown for Covid started on 20 March 2020. The claimant was not therefore expected at work, ill or not.

41. The casino was still closed on 4 July, when the company wrote to all staff warning that they were proposing to consult about redundancy, inviting staff to elect representatives for consultation purposes, all on the basis that the prolonged closure meant that the respondent was suffering significant losses, despite staff agreement to take a 20% pay cut, and suppliers agreeing to reduced or deferred payment. Even with the prospect of limited opening being permitted soon, restrictions continued. Customers were not expected to attend in any number, because of economic uncertainty, restricted travel, and "customer sentiment". They did not therefore expect losses to improve significantly.

42. Mr Krasniqi and Mr Nicollaj conducted a consultation meeting with the claimant on 29 July 2020. It was recorded and we have the transcript. The reasons for making redundancies were explained. Everyone was at risk. The process was going to take about eight weeks. There were going to score staff on a matrix and the people with lower scores would be invited to a second meeting.

43. On 5 August the claimant asked Beatrice Banjo when she was going to get a reply to her grievance. She was told it had been emailed to her on 2 February.

44. On 6 August Krasniqi and Mr Nikollaj scored the claimant on the matrix. She scored 5/10 for job knowledge skills, breadth of experience, and versatility. She had 6/10 for qualification and training, 9/10 for performance, 1/10 for attendance, and 10/10 for her disciplinary record. Multiplying by five for weighting, in total she scored 280. The various categories on the score sheet have a comments column. These said she is great with guests, worked alone without supervision, theatre and events trained, and did both early and late shifts. She knew about my menu and cocktails. She could work in different bars. She was mature, flexible, always willing to help, worked six days a week and long days.

45. The tribunal saw, as the claimant had not at the time of dismissal, the table of all the bar staff scored for redundancy. The claimant's score was the lowest, but of the 16 others on this list made redundant, there was one score of 280, another of 295, and the rest ranged from 340 to 415. Twelve waitresses were in the redundant group.

46. The respondent wrote to the claimant on 23 September saying she had been provisionally selected for redundancy, and sent a copy of the score sheet. There had been insufficient applications for voluntary redundancy. They had considered all suggestions about avoiding redundancies. She was invited to a meeting on 26 September to discuss the selection criteria, her scores, alternative vacancies within the organisation, and other questions she might have.

47. At the meeting it was noted that as a result of the recent government announcement about Covid infection they were having to close again. (Having

reopened on 16 August 2020, they closed again from 5 November to 2 December 2020, and then again from 16 December 2020 to March 2021). They told her that they were advertising for jobs as maintenance technician, slot host and flexi casino waiters, and these were only for staff at the casino. They then reviewed the matrix scores. They explained that the lowest score was for attendance, and accepted it was not her fault that she had not been in work. The claimant asked questions about getting her pay slips and was told how to get copies.

48. On 1 October 2020 the claimant was dismissed by letter. She was to be paid one month's notice, which was not required to work.

49. On 2 October 2020 she appealed the decision. She said she had not had a grievance outcome, even though Beatrice Banjo had told her on 5 August it had been sent to her on 2 February (it was established in tribunal this was an error – it had been sent on 22 February). She believed that the grievance was the real reason for dismissal. She also said the matrix score was not inaccurate. Being scored 9/10 for performance was incompatible with scores of 5/10 in other areas.

50. The appeal was referred to Mike Haydon. He spoke to the managers who had scored the matrix and wrote to the claimant on 13 October asserting that she had been sent the grievance outcome in February, and the company considered the matter closed. The grievance had played no part in her selection for redundancy. Her 5/10 assessments were based on her performance in the period that she had actively worked for the company. However, three months was not a long time, and she was "still learning about the complexities of the role and the service as well as developing and improving". She was not at the same level as other team members who had worked there longer or had greater industry experience. Mr Haydon had checked with the managers who had done the scoring and was satisfied that it was a fair and accurate reflection of performance and competence. Her score was considerably lower than others in the selection pool.

51. Mike Haydon's evidence was that 200 staff were made redundant, 85 of them from hospitality, 40 of those were bar staff (not all are waiters), including the claimant. He said that other than attendance, the comments on the matrix were identical on every staff member's form. They did not relate to the claimant in particular. Only the comment on attendance was particular to the individual.

Relevant law

52. Direct discrimination because of a protected characteristic is defined in section 13 of the Equality Act 2010. Discrimination is where the employer treats the employee less favourably than he treats or would treat another. When making comparisons there must be no material difference in the circumstances of the people being compared- section 23.

53. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

. How this is to operate is discussed in **Igen v Wong (2005) ICR 931**. The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts require to prove any explanation are in the hands of the respondent.

54. **Anya v University of Oxford (2001) ICR 847** directs tribunals to find primary facts from which they can draw inferences and then look at: "the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the actual decision complained of in the originating applications were" because of a protected characteristic. There must be facts to support the conclusion that there was discrimination, not "a mere intuitive hunch". **Laing v Manchester City Council (2006) ICR 1519**, explains how once the employee has shown less favourable treatment and all material facts, the tribunal can then move to consider the respondent's explanation. There is no need to prove positively the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88** - but Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867,** that the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more".

55. Victimisation is prohibited by section 27 of the Equality Act. It occurs when the employer treats the employee unfavourably because the employee has done a protected act, which includes making an allegation that the employer has breached the Equality Act.

Discussion and conclusion

56. We take the allegations from the list of issues one by one.

57. The first is that the induction session was insufficient. On the facts, we concluded there was no evidence that the claimant's induction session differed in any way from other people's induction sessions. She has not established less favourable treatment.

58. The next is that she was moved on 6 June 2019 without support or training and asked to work at different locations without agreement. On the evidence, employees could be directed to work in other parts of the casino, and they were so directed from time to time; there is no evidence that she required additional training; she was provided with "support" by Lehal, an experienced member of staff of whom the claimant makes no complaint. There is no evidence that she was treated in any way less favourably than other staff when asked to move from time to time.

59. The next allegation is about what Mr Krasniqi said after the dispute with Daniela about who was to serve a particular customer and whether Daniela should have given him a discount. There is no doubt that there was a dispute, which was still live three days after the event when the general manager returned to work. It was something he may well have thought he should "sort out". We have no other evidence of the remark and it is quite possible that he said that he would sort "it" out, which is unobjectionable. The claimant thought it unfair as she considered she was in the right. If it was unfair, that does not mean that the reason for moving her so they did not work together was because of the difference in race, or because the claimant was older. In this respect, we noted that the only evidence of any distinction in race was when the claimant fell on 11 August. Moving one of them was an undoubted solution to the dispute. She was moved to a place with similar duties. It is not explained why this was a disadvantage. We could not conclude, even after considering inferences, that this was an action taken because of the claimant's race, or because of her age, or that it required explanation by the respondent.

60. The fourth allegation is saying "the black girl fell down" when she fell and injured her wrist. Ms Krasovska was unable to remember saying anything of the kind, and it was not mentioned by the claimant until she presented the grievance in November. We concluded she probably did say that, because it was an odd thing to mishear. We could not conclude without more that this indicated a discriminatory mindset. Ms Krasovska supervised around 200 staff. She may well not have been able to remember, in the middle of a nightshift, the claimant's name, and used "black girl" as a way of identifying who needed help. We could see nothing unfavourable about the way the claimant's injury was handled; anyone else's injury occurring in the circumstances would have been handled as it was. Arrangements were made for her to rest, and as walking wounded, a taxi was called to take her to hospital. This is appropriate treatment, which would have been given to anyone in similar circumstances.

61. Age discrimination is alleged for the episode on 11 August, when according to the claimant she was told youngsters were not expected to work. Having heard the evidence of both claimant and Ms Krasovska, in our finding a dispute did occur about Safia picking up (or not picking up) a glass, there was

a fractious dispute between the two, and the Safia did complain to the supervisor about the way the claimant treated her. We concluded that being told to "grow up" indicated that Ms Krasovska thought the claimant had behaved an immature way and should have been more restrained. It is a commonplace to condemn as "childish" quarrelsome and impulsive behaviour which is characteristic of children, but which adults are expected to have overcome, and to refer to responsible actions and attitudes as "grown-up". We did not consider that the claimant being taken to task by Ms Krasovska for her quarrel with Safia was less favourable treatment because of the claimant's age. She was being told that she should have behaved better.

62. The next allegation is that the claimant was threatened with her hours being reduced. We have very little context for this, and what evidence we do have is confusing, as the claimant's hours were not reduced, and the discussion took place in the context of the claimant asking for adapted duties. As a result of the conversation she was moved to a different bar where she did not have to pull doors open. It is possible that Mr Krasniqi said something about having to reduce hours in the context of a discussion about accommodating her wrist weakness; in the context of discussing adjustment for disability it is hard to view it as a threat. We do not give much weight to the hearsay report in Beatrice Banjo's response to the grievance. She was investigating some months after the event, she also well have misunderstood the comment, especially as when asked about the move to Lola's bar in June Mr Krasniqi was complaining that she would not follow instructions We are not able to conclude that she was 'threatened'. This allegation is not made out on the facts.

63. The next allegation is that Carlos rang on 23 October to ask why she was not at work. This was explained by reference to the fact that she had not in fact been sent the new rota, as Ms Banjo established. Nothing suggests that the omission was anything but a mistake. The claimant does not suggest that Carlos knew she had not got the new rota. We could not conclude that this was less favourable treatment because of race, or because of age. He would have telephoned a younger or a white person who had not turned up for work whom he believed had got a copy of the new rota.

64. The next complaint is that the claimant was asked on 2 November for medical reports, which we understand to mean copies of her GP fit notes. The episode was very hard to explain or understand, and there are no documents to assist. The claimant has not described the context, and Mr Krasniqi had no recollection of the conversation. We concluded that the most likely explanation was some misunderstanding that she had not gone to work on 23 October because she was unfit, rather than because she had not received the rota, and they wanted a fit note to cover that absence. The claimant has not established that she was treated less favourably than anyone else would have been in the circumstances.

65. The next allegation is that the claimant was only given 30 minute breaks, while other people could take cigarette breaks. The managers' evidence was that everyone could take a 30 minute break, plus two other 15 minute breaks, to be taken when they wished and the floor was less busy. Their evidence was that if the claimant was not getting these breaks it was because she did

not ask to take them. The claimant did not say she asked for the short breaks and was refused, and when being questioned in tribunal, her only complaint about taking breaks was that on 24 October there had been a delay in her getting the 30 minute break. There was no evidence other than the "black girl" remark in August, and the conversation about Safia, to support a conclusion that her race or age had anything to do with this. We concluded that not asking for breaks was why she did not get them.

66. We considered the time point. The last matter referred to in the grievance occurred on 2 November 2019, and there is no further allegation of discrimination until the matrix scoring on 6 August leading to the dismissal on 1 October 2020. The Equality Act requires a complaint to be presented within three months of the act complained of, unless there is an extended course of conduct, when time runs from the end of the course of conduct. Failing that, a tribunal can admit a claim out of time if it is just and equitable to do so. That involves considering the balance of prejudice between the parties, having regard to the extent of the delay, the reason for it, and its effect on the cogency of the evidence.

67. The claimant did consider the earlier matters discriminatory as she made clear when she presented the grievance. She was sent the outcome in February 2020. We considered the break between November 2019, when she ceased work, and October 2020, when she was dismissed for redundancy, too long for any course of conduct, not least because, as appears below, we did not consider the redundancy selection to be part of any discriminatory course of conduct.

68. The most likely reason why she delayed is that she did not appreciate that she had had an outcome to the grievance letter, possibly because of her lack of literacy in English, and also perhaps because she had seen it, not read it in any detail, and then forgotten about it. However, until she was at risk of redundancy, she had never attempted to follow up the lack of response to the grievance. We considered most people would have expected an employer to respond in some way over the eight months since the interview with Ms Banjo. The effect of the delay is that the respondent had to investigate and defend a claim based mostly on matters they had investigated briefly- and apparently without making or retaining any written records - in January and February 2020, many months earlier. Ms Banjo was not available to give evidence about any notes she may have made. There was therefore substantial prejudice to the respondent. The claimant is still able to rely on these matters as evidence of the reasons for the dismissal, which is in time. We concluded we should not exercise discretion to allow the claims about matters preceding dismissal as it was not just and equitable to do so.

Protected Act

69. Before discussing the reasons for the dismissal, we consider whether there is a protected act in the victimisation claim. The claimant's grievance letter concluded: "I am treated unfairly, and I feel I am being discriminated against mostly based on my race, but also my age". The letter made specific reference to Maria saying "the black girl fell down", and to being told not to expect youngsters to do the work and that she had to cover the younger

employees in carrying out the work obligations. There are no other references to the claimant's race or age, or to the race or age of others. We concluded that it is a protected act for the purpose of section 27 and that we have to decide what part that played in the reason for dismissal.

Dismissal

70. We turn to the dismissal. On the evidence we have no doubt that there was a genuine redundancy situation because of the effect of Covid on profitability in all hospitality businesses. The matrix and scoring formula were straightforward and applied to all bar staff. We accepted the explanation that she only scored 5/10 because she only had three months experience and would have more to learn, and accepted the evidence that the comments about attendance record were standard. There is no doubt that her poor attendance (she had been absent for 267 days) weighed against her. If she had got a 9/10 score on those that were marked as 5/10 and 6/10, then multiplied by five that she would still have come into the redundant band. The claimant may have puzzled at the scores given the written comments made, but having heard the evidence we do not accept that the scores were manipulated to achieve her dismissal. There was no reason why the respondent should overlook her absence record, which is unrelated to age or race, and an employer is entitled to decide not to retain those who are unable to work There is nothing to suggest that her age played any part, or her race. As for the grievance, the people scoring it knew about the grievance because they had been interviewed about it seven or eight months earlier.

71. The tribunal does not accept that the claimant was not sent the grievance until October 2020. We thought it more likely that she had overlooked 22 February email because of her difficulty reading English, and the mistake was made when she was told it had been sent on the 2, not 22 February conclude. For those making the selection, the grievance was past history.

72. The reasons given by the respondent why the claimant was selected for redundancy in a collective redundancy, in which many were dismissed, are adequate and without taint of race orange discrimination.

Breach of contract

73. This concerned pay during the claimant's notice, and, possibly, for May 2019. On the evidence of the payslips, the claimant was paid for May 2019, and she was paid in the notice period. Breach is not established.

Conclusion

74. None of the claims succeed.

Late Delivery of Written Reasons

75. Judgement and reasons were delivered in tribunal on 23 March, and the record of the judgement was sent to the parties later that day.

76. On 27 March the claimant wrote to the tribunal saying: “I would like to request copies of the transcript(s) of my Tribunal hearing, please can these be forwarded to me via email”.

77. This was not actioned by the administrative staff and on 24 April the claimant wrote again, saying she wanted the reasons for the judgment. That was sent to me, with an explanation by the clerk on 3 May that the earlier email had not been read as a request to be provided with the reasons for the judgment and had not been forwarded for that reason.

78. With older models of dictation handsets, from 2016 it has no longer been possible for judges to upload voice files, and instead the handset is given to the typist to transcribe a recording. The handset was already with the typist to transcribe reasons delivered in another case on 31 March 2023. (This case was the first time since March 2020 that I had recorded a judgment rather than delivering it in written form, because handsets could not be used when working from home, and I had continued to reserve and write reasons in the few long in person hearings). I was told in April there was a problem with the older model of dictation handset because a software licence had not been renewed and the administrative staff could not upload the voice file, but there might be a solution. I was told on 11 May that there was no solution, and, further, it was not now even possible to play back from the handset because the controls had jammed. No one has been able to resolve this difficulty. On 25 July I was supplied with a newer model handset. But in the meantime it was necessary to work from notes to reconstruct the reasons in both the cases where the recording was inaccessible. Over the summer I have been heavily committed to sitting and to writing up judgments that could not be recorded, and it was not until this week that I have had a writing day to use for this case. I have had the benefit of the original notes used to deliver reasons in tribunal, have checked facts, dates and spelling from the hearing bundle and witness statements, and from the handwritten notes of oral evidence. I acknowledge the frustration the claimant will have experienced, and hope this explanation goes some way to explain why there has been delay supplying written reasons.

Employment Judge Goodman
21 September 2023

REASONS SENT to the PARTIES ON

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. 21/09/2023

FOR THE TRIBUNAL OFFICE

LIST OF ISSUES

Claims

1. The Claimant claims:

1.1 Direct discrimination on the grounds of Age contrary to section 13 Equality Act 2010;

1.2 Direct discrimination on the grounds of Race contrary to section 13 Equality Act 2010;

1.3 A claim for breach of contract (wrongful dismissal).

Jurisdiction

79. The Tribunal does not have jurisdiction to hear a public law claim for a purported breach of the Human Rights Act 1998 and there is no horizontal effect of that Act which would enable the Claimant to bring such a claim against a private entity.

Time Limits

80. Are all or any of the matters complained of that occurred on or before 23 July 2020 out of time, or do they form part of a continuing act for the purposes of section 123 (3) (a) EqA? 4. Insofar as any or all of them are out of time, should time be extended under section 123 (1) (b) EqA?

Direct discrimination on grounds of Race (section 13 EqA)

81. Did the Respondent treat the Claimant less favourably than it treats or would treat a hypothetical comparator who is not of the same colour and/or not of West African/ Italian ethnic or national origin in respect of:

a. The Claimant's allegation that her induction session with Senior HR Advisor, Beatrice Banjo, was insufficient;

b. The Claimant's allegation that on 6 June 2019 she was unilaterally moved to a position without support or training and that within that role she was asked to work at different locations without agreement;

c. The Claimant's allegation that on 6 August 2019, Shkumbin Krasniqi made a comment "not to worry, I'll sort her out" in response to her serving one of her colleague's tables on 3 August 2019;

d. The Claimant's allegation that on 11 August 2019, Maria Krasovska made the comment "the black girl fell down" in response to the Claimant falling over on the same date;

e. The Claimant's allegation that in or around September 2019 when Mr Shkumbin Krasniqi returned from holiday, he threatened the Claimant that her hours would be reduced;

f. The Claimant's allegation that Carlos de Almioa contacted her to ask her why she was not at work on 23 October 2019;

g. The Claimant's allegation that on 2 November 2019 Shkumbin Krasniqi requested copies of the Claimant's medical reports from her;

h. The Claimant's allegation that she was only given a 30 minute break during a ten hour shift throughout her employment; An alleged temporary reduction in the Claimant's working hours on 9 October 2019, and the allegation that if she did not accept the reduction her employment would be terminated; and

i. Dismissing the Claimant for the purposes of section 39 (2) (c) EqA on 1 October 2020.

82. In respect of each of the acts/omissions set out at paragraph 21 above, to the extent it is found that they occurred and constituted less favourable treatment, was such treatment because of the Claimant's race?

Direct discrimination on grounds of Age (section 13 EqA)

7. Did the Respondent treat the Claimant less favourably than it treats or would treat a hypothetical comparator not in the Claimant's age group (those aged 39 years of age) in respect of:

a. The Claimant's allegation that her induction session with Senior HR Advisor, Beatrice Banjo, was insufficient;

b. The Claimant's allegation that on 6 June 2019 she was unilaterally moved to a position without support or training and that within that role she was asked to work at different locations without agreement;

c. The Claimant's allegation that on 6 August 2019, Shkumbin Krasniqi made a comment "not to worry, I'll sort her out" in response to her serving one of her colleagues tables on 3 August 2019;

d. The Claimant's allegation that on 11 August 2019, Maria Krasovska made the comment "not to expect the youngsters to work" in response to the Claimant's query relating to duties that she was asked to carry out; e. The Claimant's allegation that in or around September 2019 when Mr Shkumbin Krasniqi returned from holiday he threatened that her hours would be reduced;

f. The Claimant's allegation that Carlos de Almioa contacted her to ask her why she was not at work on 23 October 2019, when she was on her annual leave;

g. The Claimant's allegation that on 2 November 2019 Shkumbin Krasniqi requested copies of the Claimant's medical reports from her;

h. The Claimant's allegation that she was only given a 30 minute break during a ten hour shift throughout her employment;

i. An alleged temporary reduction in the Claimant's working hours on 9 October 2019, and the allegation that if she did not accept the reduction, her employment would be terminated; and

j. Dismissing the Claimant for the purposes of section 39 (2) (c) EqA.

8. In respect of each of the acts/omissions set out at paragraph 23 above, to the extent it is found that they occurred and constituted less favourable treatment, was such treatment because of the Claimant's Age?

9. If so, what is the age of the relevant comparator group with whom the Claimant compares her treatment?

10. Did the Respondent have any objective justification to discriminate on the grounds of age?

Breach of Contract

11. Was there a breach of contract, express or implied?

Statutory Defence

12. If the Employment Tribunal finds discrimination to have occurred on the basis of any of the protected characteristics as alleged, did the Respondent take all reasonable steps required to prevent discrimination, allowing it to rely upon section 109 (4) EqA 2010.

Remedy

13. If the Claimant is successful in her claims, what remedy is appropriate, if any?