EMPLOYMENT TRIBUNALS

Claimant: **D Dimov**

Respondent: **(1) Mr Gurhan Mustafa T/A Mambocino / Riverside Fish and Steakhouse**
(2) Gastro Erith Trading Limited

Held at: London South Employment Tribunals

On: **24, 25, 26 January, 30, 31 March, 1 April (in chambers) 2022**

Before: **Employment Judge L Burge**
N O'Hare
H Bharadia

Representation
Claimant: G Pratt, Lay Representative
Respondents: J Heard, Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The First Respondent did not pay the Claimant in accordance with the National Minimum Wage and so unlawfully deducted his pay;

2. The Claimant's claim for holiday under the Working Time Regulations succeeds against the First Respondent;

3. The First Respondent subjected the Claimant to harassment related to race; and

4. The Claimant's claim of direct discrimination because of race fails and is dismissed.

REASONS

Introduction

1. In a claim form presented to the Tribunal on 16 March 2020, the Claimant brought claims of race discrimination, unlawful deduction from wages and breaches of the Working Time Regulation as he had not been permitted paid holiday.

The Evidence

2. Gina Pratt, Yildiz Vurdu, Jade Boden, Inesa Mikalauskaite, Meda Sveiteryte, Gyunay Hasan Hyusein (assisted by a Turkish interpreter) and Weronika Oleksik gave evidence on behalf of the Claimant. The Claimant gave evidence on his own behalf assisted by a Bulgarian interpreter. Gurhan Mustafa, Edita Joinatyte, Erdem Gunduz, Vidmantas Joinaitis and Marianna Georgieva (assisted at times by the Bulgarian interpreter) gave evidence on behalf of the Respondents.

3. The Tribunal was referred during the hearing to documents in a hearing bundle of 528 pages and also viewed a video of the Claimant with red marks on his neck.

4. Both Ms Pratt and Mr Heard provided the Tribunal with written and oral closing submissions.

Issues for the Tribunal to Decide

5. Was the Claimant discriminated against due to his race/nationality contrary to the Equality Act 2010 ("EqA")? The Claimant is Bulgarian. The Claimant said that he had been assaulted four times and that he eventually left the Respondent because he had had enough of the way he was being treated, which was like a slave.

6. The Claimant alleges that he was treated in the way he was because he is Bulgarian. The Claimant described being laughed at and humiliated. He says that he continued to be paid less than the national minimum wage throughout his employment and was not given holiday.

7. At the start of the hearing the Tribunal agreed with the parties the issues to be decided. These were:

    a. It was agreed that the types of race discrimination claims being made were direct race discrimination and racial harassment. The Claimant is Bulgarian and the First Respondent (Mr Mustafa) is Cypriot. Was there:

        i. direct discrimination because of his race within the meaning of section 13 of the Equality Act 2010 ("EqA 2010"), contrary to section 39 of that Act;

        ii. harassment within the meaning of section 26 of that Act, contrary to section 39 of that Act?

    b. Did the Respondents pay the Claimant in accordance with the

National Minimum Wage? If not, was this an unlawful deductions from his wages, contrary to section 13 of the Employment Rights Act 1996?; and

c. Were there breaches of the Working Time Regulations 1998, SI 1998/1833 through failures to give the Claimant requisite holidays, accrued but untaken leave?

5. There was also the issue of time limits, whether the Claimant had submitted his claims in time.

Witnesses

6. Eight witnesses gave evidence on behalf of the Claimant. Five witnesses gave evidence on behalf of the Respondents. The differences between the evidence of the two sides was stark. Five of the Claimant's witnesses were ex-employees of the Respondents. Four of the Respondents' witnesses were current employees of the Respondents, including the First Respondent's partner and step son. Two of the Claimant's witnesses were compelled to attend by witness Order, one because she was afraid of what Mr Mustafa would do in retaliation should she give evidence. According to the Claimant, the other compelled witness (Mr Hyusein) asked the Claimant for money to give evidence, although he did not pay him. The Tribunal approached Mr Hyusein's evidence with caution. All five ex-employees had moved on and worked elsewhere and so were less likely to be influenced by Mr Mustafa than the Respondents' witnesses who were currently working for him.

7. Ms Oleksik, witness for the Claimant, was an ex-employee of the Respondents. She no longer lived in England, only had occasional contact with the Claimant and they were not close. The Tribunal found her to be a credible witness and placed particular weight on her evidence. Most of the Claimant's witnesses gave evidence that Mr Mustafa and Ms Joinatyte were in a relationship. Only then in oral evidence did Mr Mustafa and Ms Joinatyte say that they were life partners, contrary to the implication in their witness statements. Vidmantas Joinaitis is Ms Joinaitis' son. The Tribunal concluded that his evidence was not reliable, for example it was not credible that he was so independent from the family (despite living with them and him looking after his sister sometimes) that his sister did not know his name, she only knew him as "brother". Ms Georgieva's evidence was also not reliable. When asked if the Claimant worked at Mambocino while living with her, at first she answered no and then yes and then when pushed, yes. Her evidence changed and she contradicted herself often during cross examination.

Findings of fact

8. The Claimant came to England from Bulgaria in 2016 with no family and without being able to speak English. Mr Mustafa (the First Respondent) owned a coffee shop in Erith called Mambocino where Mr Hyusein worked, a friend of the Claimant's. From the end of 2016, Mr Mustafa set up a restaurant called Riverside Fish and Steak House. Contrary to the

Claimant's witnesses' evidence, the Respondents' witnesses gave evidence that the Claimant did not work in Mambocino in 2016 and that he had only started working for Mr Mustafa when he started in Riverside in 2017. However, there was a picture of the Claimant wearing a Mambocino tshirt at a paintballing event in 2016. Mr Mustafa's evidence that he had boxes of Mambocino merchandise lying around and that the Claimant's friend Mr Hyusein would have given him one is rejected. It is more likely that the Claimant was given one when he started working in Mambocino. All four ex-employees who had been working at Mambocino in 2016 (plus the Claimant) confirmed, and the Tribunal finds as a fact, that the Claimant had started working at Mambocino in August 2016 shortly after he arrived in England.

9. When the Claimant arrived in England he had very little English. The Claimant did not receive a contract of employment, nor did any of the witnesses who worked for the Respondents at that time. The Tribunal finds as a fact that the Claimant was employed by Gurhan Mustafa (the First Respondent). Mr Mustafa had given him the job, he worked to him, there was no contract and there was no documentation to show that the Claimant was employed by anyone else. This accords with HMRC's Employment History which shows that "Gurhan Mustafa" was the Claimant's employer for the tax years ending 5 April 2018 and 5 April 2019. Gurhan Mustafa and Gastro Trading Erith Ltd were stated to be his employers for the year ended 5 April 2020. The Claimant had not been told that his employment had been transferred to Gastro Trading Erith Ltd, or to anyone else. The Tribunal finds that the Claimant did not know what rights that he had and what his pay should have been.

10. The Claimant worked at Mambocino every day and assisted with tasks such as washing up, taking out the refuse and recycling, collecting and unpacking deliveries, food preparation and general cleaning. Ms Mikalauskaite gave evidence that the Claimant would go and make himself food, go outside and eat to have a lunch break, but after a while Mr Mustafa would shout at him and say "why are you sitting down go and work". Other witnesses referred to staff making themselves food which they would not be charged for. Ms Joinaitis gave evidence that she ate at Mambocino or Riverside for every meal, she did not have a kitchen at home. The Tribunal finds as a fact that the Claimant, as well as the other staff members, would eat at Mambocino and not be charged.

11. The Claimant had help from Ms Georgieva's son to obtain his National Insurance number in November 2016. The Claimant then started to work in the evenings at Riverside Fish and Steak House which was being set up. This was a new business for Mr Mustafa and his partner Ms Joinaitis was the manager. Mambocino and Riverside were connected by corridors. The only payslips the Claimant was given during his employment had "Mr Gurhan Mustafa T/A Riverside Fish and Steak House" as his employer.

12. Ms Oleksik and Ms Vurdu gave evidence that they worked variable hours but that the Claimant worked all day at Mambocino and in the evening at Riverside. Ms Mikalauskaite gave evidence that the Claimant worked 7 days a week at Mambocino. The Respondent's witnesses said that the Claimant would also leave work to carry out his personal tasks such as

hairdressing, going to the post office and bank. Ms Mikalauskaite gave evidence that there were hygiene issues for the Claimant as he worked all day at Mambocino and then at Riverside and he only had one Mambocino T-shirt. Mr Mustafa also gave evidence to the Tribunal that the Claimant had hygiene issues, he did not shower frequently, was a heavy smoker and so took breaks and did not wash his hands after smoking. The Tribunal finds as a fact that the Claimant was a heavy smoker and did have frequent smoking breaks. The Tribunal also finds that the Claimant had only been given one Mambocino shirt and did not wash it often as he did not have much time off to be able to wash it.

13. The Claimant's evidence changed about what hours he started and finished, although he consistently said that he worked all the time. There were a few rare occasions when he would not work on a day. The Respondents provided no rotas or any other documentation to show what the Claimant's hours were. While they produced payslips in the name of Gastro Trading Erith Limited this was not until the day before the Preliminary Hearing in December 2020. The Tribunal believed the Claimant, and finds as a fact, that he had never seen those payslips before and never heard of the name Gastro Trading Erith Limited. Given the lack of corroborating documentation from both sides the Tribunal has decided the Claimant's hours at Mambocino based on the balance of probabilities, according to how the witnesses described them. The Tribunal finds as a fact that the Claimant worked 7 days a week at Mambocino for 5 hours a day on average with his start and end times ranging from 07.00 – 18.30. He would then go and work in Riverside in the evenings.

14. Ms Joinaitis' evidence is accepted that when Riverside was not busy staff would finish earlier but that when they had more bookings, more staff would be asked to work. The Claimant only started to receive payslips from Riverside from mid 2017. The Tribunal find as a fact that once Riverside opened, the Claimant continued to work at Mambocino during the day and then would go straight to Riverside on most evenings. The Respondents did provide payslips for the Claimant's work in Riverside, he received some of these while he was in employment, and so the Tribunal finds as a fact that the Riverside payslips do represent the hours he worked at Riverside.

15. All the witnesses who worked for the Respondents were paid in cash at the end of the week, although some later asked to be paid by bank transfer. Some received payslips, usually either given late in bundles or only provided when they left the workplace. Some payslips indicated only the set hours for each employee but if extra hours were worked this would be supplemented by cash payments each Sunday. Ms Oleksik was not given any payslips until she left Mambocino when she got "a pile". Ms Boden gave evidence that she thought her employer was Mr Mustafa and that she received bundles of payslips, sometimes in advance.The Claimant was not given any payslips for his work at Mambocino. Initially he was not given payslips for his work at Riverside. From 1 July 2017 he started to get payslips for Riverside and these show that he worked 20 hours from 1 July 2017 – 5 January 2018 (there was a break of 5 weeks from 1 September – 12 October 2017).

16. The Claimant had been told he would be paid minimum wage. The Tribunal finds as a fact that the Claimant was paid £250 cash in hand per week when he only worked at Mambocino but that once he worked at Riverside also, he received £300 per week. It was always cash in hand at the end of the week and it was never the amount specified in the payslips. When Ms Vurdu challenged Mr Mustafa on why the Claimant's pay was so low Mr Mustafa's response was "if you don't like it pay him yourself".

17. The Claimant never received holiday pay. Ms Mikalauskaite took two weeks' holiday but only got paid for one. Ms Oleksik was allowed to go on holiday but with no pay, she gave evidence that she only got paid for the hours she was working. Ms Boden received no holiday pay during her employment 2014 – 2019 until the end when she complained and then she received a small amount. Ms Vurdu never got any holiday pay. Mr Gunduz gave evidence that he got two weeks' paid holiday. The Tribunal finds as a fact that none of the witnesses took and were paid for their full legal entitlement, with the exception perhaps of Ms Joinaitis, although she could not remember what her entitlement was. Mr Mustafa and Ms Joinaitis gave evidence that the Claimant did not want to take holiday. The Tribunal rejects this and finds that the Claimant was not encouraged to take paid holiday and was never paid holiday.

18. The Claimant gave evidence that he stopped working for Mr Mustafa at the end of August/beginning of September 2017. The Claimant says he worked for another employer for one or two weeks, he could not recall exactly. Neither Mr Mustafa nor Ms Joinaitis could recall the length of the break either. The payslips from Riverside show that the Claimant took a break from 1 September 2017 until 12 October 2017. On balance the Tribunal finds that the Claimant had a break in employment for 5 weeks from 1 September 2017 until 12 October 2017.

19. When the Claimant returned to employment for Mr Mustafa he went back to working in Mambocino 7 days a week (5 hours on average) and also 20 hours per week in Riverside. While there are payslips missing from 5 January 2018 to 30 March 2018, the Tribunal heard no evidence that there was a break in service at that time and so finds that, on the balance of probabilities the Claimant continued to work at 20 hours per week until March 2018. From March 2018 the Riverside payslips show that the Claimant worked 16 hours a week until 25 January 2019 when his hours increased and he worked 30 hours a week. At the end of June 2019 the Claimant stopped working at Riverside, although his pay slips only go up to 5 April 2019. From 22 July 2019 the Claimant worked in Dominos pizza in the evenings.

20. The Respondents' witnesses gave evidence that the Claimant was messy. Mr Gunduz gave evidence that the Claimant did not listen to instructions and that he would often disappear. Ms Joinaitis gave evidence that the Claimant was messy, he did not follow instructions and she did not like working with him. The Claimant's witnesses gave evidence that Mr Mustafa treated the Claimant very badly and he would often swear at him in Turkish or English.

21. The Claimant gave evidence that he would often be called a "f***ing Bulgarian" and a variety of other offensive swear words. Ms Oleksik gave evidence that Mr Mustafa was a chatty, helpful and easy going person but that when the café got busier he would sometimes lose his temper, although not at her, and that he was verbally and physically aggressive towards the Claimant. Ms Mikalauskaite gave evidence of verbal abuse and physical abuse from Mr Mustafa towards the Claimant, one of the physical incidents she witnessed herself. Under cross examination she said he would swear at him and call him a "f***ing idiot" and use Turkish words that meant animal, donkey and gypsy. Ms Vurdu gave evidence that Mr Mustafa was a bad employer, he mistreated staff in different ways but the Claimant was very overworked. She said that Mr Mustafa shouted at everyone but mainly the outbursts were at the Claimant. Ms Vurdu said Mr Mustafa used offensive language in Turkish meaning gypsy and cow. Ms Boden gave evidence that she witnessed frequent verbal abuse from Mr Mustafa to the Claimant, often in anger in response to the Claimant's mistakes where he would swear at him and call him "idiot".

22. The Respondent's witnesses denied that Mr Mustafa was abusive to the Claimant. However, when giving evidence to the Tribunal Mr Mustafa lost his temper on more than one occasion and treated the Claimant's representative, Ms Pratt, with disdain, commenting on how he never trusts a "church person" and saying that she was a "bad person". While Ms Pratt was challenging with her questions, the aggression he showed to her was unwarranted. His behaviour in the Tribunal, together with the Claimant's witnesses' evidence leads the Tribunal to find that Mr Mustafa frequently behaved in an abusive and offensive way towards the Claimant. The Tribunal finds as a fact that the Claimant was overworked and subjected to "humiliation, threats, curses, swearing, maltreatment" being called idiot, animal, pig, donkey, cow and gypsy. The Tribunal also finds that the Claimant experienced this unwanted treatment as hostile, degrading humiliating and offensive.

The First incident

23. The Claimant gave evidence that he had been alone in the kitchen when Mr Mustafa had come in very agitated, walking forward and backwards, talking to himself angrily. The Claimant had not understood him and Mr Mustafa had pushed him onto the floor. Mr Mustafa denied it happened and there were no witnesses to the event. The Claimant's evidence was that the incident occurred in Spring 2017. However Ms Pratt thought he had told her it happened in November 2017. In his witness statement the Claimant did not mention being threatened with fists yet this allegation was made in his further particulars. The Claimant's evidence changed about when the alleged incident occurred and the details, he was not consistent under cross examination. The Tribunal concludes that, on balance, the first incident did not take place as described by the Claimant.

The Second Incident

24. The Claimant gave evidence that at the beginning of December 2017 he had been working at Riverside the evening before and had come in to work

at Mambocino. At around 8.30 am Mr Mustafa came in. The Claimant had bought two cans of drink in with him, one of which was open. The Claimant said that Mr Mustafa was angry and pushed the cans on the floor, grabbed the Claimant and pushed him to the corridor. Ms Mikalauskaite gave oral evidence that she was behind the bar with two colleagues, she heard an argument, Mr Mustafa pushed the Claimant into the hallway, took him by his shirt and pushed him against the wall swearing at him calling him "f***ing idiot" and Turkish words which translate to animal, pig, donkey and gypsy. They were then separated by Ms Mikalauskaite. The Claimant gave evidence that he managed to run away and went to Mr Hyusein's house and told him what happened. Mr Mustafa denied that the incident occurred.

25. On balance, the Tribunal prefers the evidence of the Claimant and Ms Mikalauskaite and finds that Mr Mustafa pushed the Claimant into the hallway, took him by his shirt and pushed him against the wall swearing at him calling him "f***ing idiot" and Turkish words which translate to animal, pig, donkey and gypsy. They were then separated by Ms Mikalauskaite. The Tribunal finds that the Claimant experienced this unwanted treatment as intimidating, hostile, degrading, humiliating and offensive.

Third incident

26. The Claimant gave evidence that in April or May 2019 Mr Mustafa called him in the kitchen and started to shout at him, asking what he had been doing all day long and why he had not boiled the peas, to which the Claimant said he had been helping the girls as it was very busy. The Claimant said that Mr Mustafa then grabbed him by the throat shouting "F***ing c**t", "F***ing Bulgarian". Mr Hyusein separated them and after the event took a video of the Claimants neck with red marks on. This video was showed to the Tribunal and did show the Claimant with red marks on his neck. Mr Hyusein did not corroborate the swearing based on nationality, he described the swearing as swear words used in every day language.

27. Mr Mustafa said that the incident did not involve him physically attacking the Claimant and that he was shouting at the Claimant because he had picked up mashed potatoes with his hand and put it on a plate to serve to a customer.

28. On balance, the Tribunal finds in April or May 2019 Mr Mustafa grabbed the Claimant by the throat causing red marks, whilst shouting swear words at him before Mr Hyusein separated them. The Tribunal finds that the Claimant experienced this unwanted treatment as intimidating, hostile, degrading, humiliating and offensive.

Fourth incident

29. The Claimant gave evidence that Ms Joinaitis tried a few times to head-butt him and then in June 2019, she head-butted him and told him she did not want him in her restaurant anymore.

30. This allegation was not in the Claimant's original claim form. Ms Joinaitis denied it. No witnesses other than the Claimant said that Ms Joinaitis

pretended to or actually head butted the Claimant. On balance the Tribunal finds that the fourth incident did not happen.

31. The Claimant left Mambocino on 4 November 2019. He sent Mr Mustafa a text message saying "I quit I will no longer work for you I wish you luck I'm sorry Leave". Mr Mustafa replied "Ok sorry to hear that I call Accounter tomorrow so they can pay your holiday money". On 11 November Mr Mustafa sent another message saying "I talk to Accountere she is doing your holiday money tomorrow you can go and take it next week ok". The Claimant gave evidence that by then he had blocked Mr Mustafa's number and so did not receive his messages.

32. The Claimant contacted ACAS on 17 January 2020 and a certificate was issued on 17 February 2020. The Claimant submitted his claim on 16 March 2020.

The Law

Race Discrimination

33. Section 9 EqA states that "race" includes nationality and ethnic or national origins.

34. S.39(2) EqA provides:

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

35. S.212(1) EqA provides that the concept of 'detriment' does not include conduct that amounts to harassment.

36. S.136 of the EqA sets out the burden of proof:

> *"…(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…"*

37. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another (*Hewage v Grampian Health Board* [2012] IRLR 870, SC).

38. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no

discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

39. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states:

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

40. This was confirmed by the Supreme Court in *Royal Mail Group Ltd v Efobi* [2021] UKSC 33.

41. Case law recognises that very little discrimination today is overt or even deliberate. Witnesses can be unconsciously prejudiced.

Direct Discrimination

42. Under s.13(1) of the EqA read with s.9 and s.10, direct discrimination takes place where a person treats the claimant less favourably because of race/nationality than that person treats or would treat others. Under s.23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

43. It is often appropriate for a tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as he was (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285).

44. In *London Borough of Islington v Ladele (Liberty intervening)* 2009 ICR 387, EAT, Mr Justice Elias (then President) confirmed the principal in *Shamoon* and said that a strict reliance on the comparator test can be positively misleading where the protected characteristic contributes to, but is not the sole or principal reason for, the employer's act or decision.

45. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out (*Nagarajan v London Regional Transport* [1999] IRLR 572, HL.

Harassment

46. Section 26 EqA provides:

> *"(1) A person (A) harasses another (B) if—*

> *(a) A engages in unwanted conduct related to a relevant protected characteristic,*
> *and*
> *(b) the conduct has the purpose or effect of—*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
> *…*
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect."*

47. In *Hartley v Foreign and Commonwealth Office Services* 2016 UKEAT/0033/15/LA, the Employment Appeal Tribunal stated that the alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive and that:

> "[23] *The question posed by s.26(1) is whether A's conduct related to the protected characteristic. This is a broad test, requiring an evaluation by the Employment Tribunal of the evidence in the round – recognising, of course, that witnesses will not readily volunteer that a remark was related to a protected characteristic… the Equality Code says (paragraph 7.9):*
>
> > *7.9 Unwanted conducted "related to" a protected characteristic has a broad meaning such that the conduct does not have to be because of the protected characteristic …"*

48. *Warby v Wunda Group plc* EAT 0434/11 stated that the context in which unwanted conduct takes place is an important factor in determining whether it is related to a relevant protected characteristic.

49. In *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam* [2020] IRLR 495 HHJ Auerbach gave further guidance:

> "[21]… whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.
>
> [25] Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be."

Time limits for discrimination

50. S. 123 EqA provides:

> *"(1)Proceedings on a complaint within section 120 may not be brought after the end of—*
>
> > *(a)the period of 3 months starting with the date of the act to which the complaint relates, or*
> > *(b)such other period as the employment tribunal thinks just and equitable.*
> > *…*
>
> *(3)For the purposes of this section—*
> > *(a)conduct extending over a period is to be treated as done at the end of the period;*
> > *(b)failure to do something is to be treated as occurring when the person in question decided on it.*
> > *…"*

51. Time is also extended in some circumstances to take into account compliance with the Early Conciliation procedure.

52. In *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96 the Court of Appeal confirmed that in deciding this question:

> *"The focus should be on the substance of the complaints … was there an ongoing situation or a continuing state of affairs in which officers … were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts".*

53. In considering whether separate incidents form part of an act extending over a period, "one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents" (*Aziz v FDA 2010 EWCA Civ 304*, CA).

National Minimum wage

54. The basic effect of the legislation implementing the national minimum wage ("NMW") is to amend workers' contracts of employment to provide a minimum rate per hour below which they should not be paid.

55. Section 13(1) Employment Rights Act 1996 ("ERA") provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

56. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to s.23 ERA. A claim must be brought within three months of the date of the deduction or, where the deduction is part of a series, within three months of the last such deduction (S.23(2) and (3) ERA). Where it is not reasonably practicable to bring an unlawful deductions claim within the three-month time limit, an employment tribunal may still consider the claim if it is brought within such further period as the tribunal considers reasonable (s.23(4) ERA). The time limit may also be extended to facilitate ACAS early conciliation.

57. The Deduction from Wages (Limitation) Regulations 2014 SI 2014/3322

impose a two-year limitation on most claims for unlawful deductions from wages by introducing a new S.23(4A) and (4B) into the ERA.

Annual Leave

58. Directive 2003/88 was implemented in the UK by the Working Time Regulations 1998, as amended (the "Regulations").

59. Regulation 13 of the Regulations sets out workers' right to four weeks' annual leave per year.

60. Regulation 13(9) of the Regulations provides that leave may only be taken in the leave year in respect of which it is due, and it may not be replaced by a payment in lieu except where the worker's employment is terminated.

61. Regulation 16 deals with workers' rights to receive remuneration in respect of annual leave and says that a worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave.

62. Regulation 30 provides that a worker may present a complaint to an employment tribunal that his employer has refused to permit him to exercise any right he has under Regulation 13 or has failed to pay him the whole or any part of any amount due to him under regulation 16. Claims must be presented within three months:

> *"... beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made; and*
>
> *within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months."*

63. Regulation 30B provides for the three-month time limit to be extended when the parties are engaging in early conciliation through ACAS.

64. Employers have a burden of showing they have given the worker the opportunity to take paid annual leave and encouraged them to take it. If the employer cannot meet that burden, the right to paid leave does not lapse but carries over and accumulates until termination of the contract, at which point the worker is entitled to a payment in respect of all the untaken leave accumulated throughout their employment. (*King v Sash Window Workshop and anor* 2018 ICR 693, ECJ, and *Smith v Pimlico Plumbers Limited* [2022] EWCA Civ 70).

Conclusions

65. The Claimant's claims of unlawful deductions from wages in respect of being paid under the National Minimum Wage and breaches of the Working Time Regulations for failure to provide paid annual leave are in time.

National Minimum Wage

66. The Claimant worked for Mr Mustafa (the First Respondent). He was the one who gave him the job, who paid him each week. There was no contract of employment to indicate that anyone else was the employer. The only payslips he was given during his employment said that "Mr Gurhan Mustafa T/A Riverside Fish and Steak House" was his employer. The Tribunal concludes that the First Respondent was the Claimant's employer.

67. The Tribunal has found that there was a break in the Claimant's employment when he went to work for another employer from 1 September – 12 October 2017. The Claimant did not bring a claim within time following his first period of employment. As such the Claimant's claims run from his second period of employment, from 12 October 2017. Taking into account the facts it has found about hours of work, the Tribunal concludes that the Claimant worked the following hours and received the following pay:

Date from	Date to	No of weeks	Paid per week	Min wage (p/h)	Hours worked	Hours split (Mambocino/ Riverside)	Total paid to the Claimant	Should have been paid
12/10/2017	31/03/2018	24	£300	£7.50	55	35/20	£7200	£9900
01/04/2018	24/01/2019	44	£300	£7.83	51	35/16	£13200	£17570
25/01/2019	05/04/2019	12	£300	£7.83	65	35/30	£3600	£6107
06/04/2019	30/06/2019	12	£300	£8.21	65	35/30	£3600	£6403
01/07/2019	04/11/2019	19	£250	£8.21	35	35	£4750	£5460

68. The Claimant was therefore not paid in accordance with the National Minimum Wage and so the First Respondent unlawfully deducted the Claimant's wages. The Claimant will only be able to claim for 2 years' unlawful deductions, as set out in S.23(4A) and (4B) ERA.

Breach of Working Time Regulations – Annual Leave

69. The First Respondent accepted that the Claimant was owed money for untaken annual leave. The First Respondent has the burden of showing he gave the Claimant the opportunity to take paid annual leave and encouraged him to take it. As Mr Mustafa did not discharge that burden the Claimant's right to paid leave does not lapse and carries over throughout his employment (from 12 October 2017 to 4 November 2019) and accumulates throughout. The Claimant is therefore entitled to 4 weeks' pay per year of his employment in respect of untaken/unpaid holiday.

Harassment

70. The Claimant was treated very badly throughout his employment with the First Respondent. He was overworked, underpaid and he was subjected to verbal abuse, and on two occasions, to physical abuse - he was pushed against a wall and grabbed by the throat. Mr Mustafa would swear at the Claimant and use words in English or Turkish meaning idiot, animal, pig,

donkey, cow and gypsy. This behaviour was unwanted it not only violated the Claimant's dignity but also was experienced by the Claimant as creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Given the extent of the mistreatment, the Tribunal concludes that it was reasonable for the conduct to have that effect.

71. Did the unwanted behaviour relate to the Claimant's nationality or national origins, which is Bulgarian? The words and actions do not overtly make reference to the Claimant's nationality, however, the Tribunal is aware that very little discrimination today is overt or even deliberate. Witnesses can be unconsciously prejudiced.

72. The Claimant was vulnerable because he had come to England shortly before he started working for the First Respondent with no family and he could not speak English. He got a job washing up and working as a general help at Mambocino but he did not know about the rights that he had and what his pay should be. When asked in cross examination why he did not get help or go to the police he answered that he could not speak the language and so would not be able to get any help. All of these vulnerabilities were intrinsically connected to his nationality and Mr Mustafa took advantage of him because of them.

73. There were a variety of nationalities working at Mr Mustafa's businesses. Mr Mustafa sometimes treated others badly. But it was the Claimant who he treated very badly, not only by over working and underpaying him but abusing him verbally and also physically twice. The language that he used showed a contempt for him personally: "animal", "pig", "dog", "donkey" and "gypsy". The Tribunal concludes that the Claimant has shown there was "something more… from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination" (*Madarassey).* The burden therefore shifts to the Respondents to show that its treatment was "in no sense whatsoever" related to the protected characteristic.

74. The Respondents' witnesses said that the Claimant was messy, he did not follow instructions. Most of the witnesses said that the Claimant worked all the time. There were also hygiene issues for the Claimant as he worked all day at Mambocino and then at Riverside and he only had one Mambocino T-shirt. Mr Mustafa also gave evidence to the Tribunal that the Claimant had hygiene issues, he did not shower frequently, was a heavy smoker and so took breaks and did not wash his hands after smoking. Not following instructions is impacted by being a Bulgarian national who does not speak English well. Having hygiene issues is linked to being overworked and being denied holiday.

75. The Tribunal concludes that even if the Claimant had hygiene issues, did not wash his hands and was messy this does not explain why the First Respondent treated the Claimant as badly as he did – overworking and underpaying him, swearing at him, calling him animal, pig, donkey, gypsy and cow and physically assaulting him twice. In any event, the First Respondent denies the over working, under paying, swearing at, calling the Claimant names or physically assaulting him. In the absence of an explanation for the treatment that the Tribunal has found occurred, the First Respondent has not been able to show that the treatment was "in no sense

whatsoever" related to the Claimant's nationality. The Claimant was overworked, underpaid and he was subjected to verbal abuse, and on two occasions, to physical abuse - he was pushed against a wall and grabbed by the throat and all of these actions were related to his nationality. The Tribunal concludes that the Claimant's claims of harassment therefore succeed.

Direct Discrimination

76. S.212(1) EqA provides that the concept of 'detriment' does not include conduct that amounts to harassment. Having found that the Claimant has been subjected to harassment, it follows that he cannot also claim direct discrimination for the same acts.

Time Limits for discrimination

77. The claims were brought within three months (with ACAS extension) of the Claimant leaving his employment. The verbal abuse, with two instances of physical abuse, continued throughout his employment and was carried out by the same person. The Tribunal therefore concludes that it is conduct extending over a period. It is therefore to be treated as done at the end of the period and so his claim against the First Respondent is in time.

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Employment Judge **L Burge**

Date: 12 April 2022