# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr V Shibchurn**

**Respondent:** **La Trattoria Walthamstow Limited**

**Heard at:** **East London Hearing Centre**

**On:** **23 February 2017**

**Before:** **Employment Judge Russell**
**Members:** **Ms J Houzer**
**Mr M Batten**

**Representation**
**Claimant:** **In person**
**Respondent:** **Mr J Bryan (Counsel)**

# JUDGMENT

**It is the unanimous judgment of the Employment Tribunal that:-**

**1. All claims fail and are dismissed.**

**2. Any application for costs must be made in writing within 14 days of the date of this Judgment.**

## REASONS

1. By a claim form presented on 31 August 2016, the Claimant brought claims of unfair dismissal, race discrimination, notice pay and holiday pay. The Respondent resisted all claims. At a Preliminary Hearing on 24 October 2016, Regional Employment Judge Taylor gave leave for the claim to be amended to include a claim that the Respondent had failed to allow him to be accompanied at the hearing which led to his dismissal.

2. In compliance with Case Management Orders, solicitors then acting on behalf the Claimant disclosed statements from the Claimant and Ms Grace Cheatle, a former colleague. Neither statement was signed. At 16:47 on the day before the hearing, the Claimant's solicitors informed the Tribunal that they should be removed from the record. The Claimant attended the hearing acting in person. He brought with him an

amended statement for himself as well as further statements from Ms Nirvana Shibchurn (his sister and a former employee of the Respondent) and Mr Sanjaye Brijmohun (a chef still employed by the Respondent). Mr Brijmohun's statement was signed but he did not attend to give evidence. The additional statements had not been disclosed to the Respondent.

3. The Respondent produced statements from Ms Deborah Gibson (owner and director); Mr Oliver Lefaux (chef), Mr Stefan Georgiev (commis chef); Ms Grace Cheatle (waitress) and Mr Arnauld Sebille (former waiter). Mr Sebille's statement was signed but he did not attend to give evidence.

4. An unusual feature of this case is that the statements provided by Ms Cheatle flatly contradicted each other on the key issue in dispute. Ms Cheatle confirmed that her signed statement on behalf of the Respondent was correct and was to stand as her evidence in chief. She stated that she had not provided any statement to the Claimant or his solicitor, she had not seen the statement drafted in her name until it had been disclosed to the Respondent by the Claimant's former solicitors and had never been asked to confirm that its contents were true. The Claimant's explanation was that Ms Cheatle had refused to return his telephone calls and the statement in her name was what he thought she would tell the solicitor. It is a matter of great concern that this statement was disclosed as evidence from a witness without her knowledge, input or confirmation of its accuracy. Further, on instruction, Mr Bryan stated that Mr Brijmohun denied signing any statement on behalf of the Claimant. The Claimant maintained that it had been signed by Mr Brijmohun in his presence on 19 February 2017 as dated.

5. We were provided with a bundle of documents and read those pages to which we were taken in evidence and submission.

**Law**

*Unfair Dismissal*

6. The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. The Respondent relies upon conduct within section 98(2)(b). The legal issues in a conduct unfair dismissal case are well established in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

> (1) did the employer genuinely believe that the employee had committed the act of misconduct?
> (2) was such a belief held on reasonable grounds? And
> (3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

7. Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

8. In an unfair dismissal case it is not for the Tribunal to decide whether or not the

Claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the Tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses (although these should not be regarded as 'hurdles' to be passed or failed).

9. The range of reasonable responses test or, to put it another way, the need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA. As confirmed in **A v B** [2003] IRLR 405, EAT and **Salford NHS Trust v Roldan** [2010] ICR 1457, CA, in determining whether an employer carried out such investigation as was reasonable in all the circumstances, relevant circumstances include the gravity of the charges, their potential effects upon the employee, the extent to which the allegations disputed and the nature of the defence advanced.

10. The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the Tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the band of reasonable responses is not infinitely wide and it is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

11. In deciding whether the dismissal was fair or unfair, the Tribunal must consider the whole of the disciplinary process and whether any procedural defect was sufficient to render the dismissal unfair. If it finds that an early stage of the process was defective, the Tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

12. The Tribunal must also have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency. This includes the requirement that employers carry out necessary investigations to establish the facts of the case.

13. Where an employee reasonably requests to be accompanied at a hearing, the employer must permit the worker to be accompanied by a trade union representative or fellow worker, s.10 Employment Relations Act 1999.

*Breach of contract - notice*

14. The Claimant's claim for notice pay is brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, article 3. It is, in general,

for the Respondent to show on the balance of probabilities that the Claimant was in fact guilty of the misconduct alleged to amount to a repudiatory breach of contract entitling it to dismissal without notice or pay in lieu. To be sufficient, the conduct must so undermine the trust and confidence inherent in that particular contract of employment that the employer should no longer be required to retain the employee.

*Discrimination*

15. Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Race is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that race had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

16. An alternative to the **Shamoon** "reason why" approach is to apply the burden of proof provisions in accordance with s.136 Equality Act 2010 and the guidance given in **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove on the balance of probabilities that the treatment was in no sense whatsoever on the prohibited ground. If the Respondent cannot provide such an explanation, the Tribunal must infer discrimination.

17. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination; they are not, without more, sufficient material from which we could conclude that there had been discrimination, **Madarassy** at paragraphs 54-57. The protected characteristic must be an effective cause of any less favourable treatment. We must take care to distinguish between unfair or unreasonable treatment and discriminatory treatment as the two are not the same.

**Findings of Fact**

18. The Respondent is a single establishment, privately owned restaurant selling European cuisine. The Claimant, a Mauritian national, was employed as a waiter in the restaurant. In his amended witness statement, the Claimant states that his employment started on 10 January 2009 whereas the claim form, exchanged witness statement and the contract of employment all give a start date of 28 May 2013. As the Claimant had sufficient continuous service to bring his claim in any event and nothing turns on this discrepancy, we make no finding of fact on the precise start date.

19. The Claimant's contract of employment entitled him to four weeks holidays and bank holidays, in other words 28 days, per annum. The holiday year ran from 1 January to 31 December. In January 2016 the restaurant was closed for refurbishment and the Claimant was required to take 10 days annual leave for which he was paid.

20. There was a contractual disciplinary procedure which provided that for misconduct and poor performance which was not minor, the employee would be invited to a disciplinary meeting at which the matter could be properly discussed. The employee would be allowed to bring a work colleague and the outcome of the meeting would be communicated to them. A separate procedure for dismissal provided that there would be a written statement of the misconduct, a meeting to discuss the same, relevant evidence provided if possible, a decision communicated and a right of appeal offered. The most recent contract, signed on 6 October 2013, envisaged that in a few cases of gross misconduct there could be dismissal without investigation.

21. The Respondent keeps a number of books to assist with the efficient running of the business. For any given day: (a) a bookings report records the number and details of on-line reservations and walk-in guests; (b) a record of all drinks served at each table over the course of a sitting; (c) a kitchen diary, showing numbers of guests and meals cooked in each sitting; (d) order pads with sequential numbers record the table number, the food ordered by the guests, the top copy being provided to the kitchen to prepare the food and the carbon duplicate being retained by the front of house staff to prepare the bill; (e) a bill prepared for each table itemising the food and drinks provided and their prices; (f) end of day balances of payments by credit card. Ms Gibson would reconcile the records every few days.

22. On Sunday 1 May 2016, the Claimant and Ms Cheatle were working front of house. Both were serving food and clearing tables, the Claimant was taking food orders using the same order pad both lunch and evening sittings; Ms Cheatle was serving drinks and raising bills. The credit card machine was not working on the supper sitting, although it had been working at lunchtime, so guest payments were taken in cash. The Claimant texted Ms Gibson to inform her of the problem, adding that they had had 21 guests that evening. The same night, Mr Georgiev was in the kitchen and texted Ms Gibson to inform her that they had had 23 guests that evening. In other words, there was a discrepancy between the number of guests given by the Claimant and by Mr Georgiev.

23. Ms Gibson was concerned about the discrepancy, particularly as credit card records of payment were not available due to the problem with the card machine. She carried out a reconciliation of the various records, obtaining the bookings report, drinks record, kitchen diaries, bills and front of house food order records. Ms Gibson was not able to locate the kitchen copies of the food orders initially but, after speaking to Mr Brijmohun, found them in the bin where they had been erroneously discarded. Each of the available records confirmed 23 orders although the front of house copy of the order for table 5a was missing.

24. The kitchen copy of the order for table 5a was number 9 in the order pad and recorded two starters (prawns and crab), two main courses (fillet cooked rare and mushrooms) with side orders of potatoes and vegetables. The bar record for table 5a showed an order of soft drinks. The bookings report recorded two walk-in guests for table 5a; this entry was made just under a record of two walk-in guests for table 5. The order for table 5 (number 15 in the pad) was for three starters (prawns, antipasto, pasta), two main courses (fillet medium) and bream) and one order of potatoes.

25. As the discrepancy appeared to relate to table 5a, Ms Gibson telephoned Mr

Georgiev and asked whether the table had been occupied on the night in question. He told her that it had been occupied by friends of the Claimant and that kitchen orders were definitely taken from the table. Ms Gibson then telephoned Ms Cheatle to confirm the number of guests and tables occupied; Ms Cheatle positively confirmed that table 5a had been occupied and its guests had made orders for food. Mr Georgiev and Ms Cheatle confirmed in evidence to the Tribunal that they had both given Ms Gibson this information prior to the Claimant's dismissal. The Claimant's case is that Mr Georgiev could not have seen table 5a and that Ms Cheatle had confirmed to him that Ms Gibson had not asked her or anyone else if there were guests at the table. Ms Cheatle denied giving any such confirmation to the Claimant. We reject the evidence of the Claimant and prefer the evidence of Ms Gibson, Mr Georgiev and Ms Cheatle and find that this investigation had been undertaken and the information given to Ms Gibson before she reached her decision to dismiss.

26. On the information available to her, Ms Gibson was concerned that table 5a had received food and drinks without paying and she decided to speak to the Claimant who had taken their order as she was concerned that the Claimant may be responsible for the discrepancy and an act of misconduct. Ms Gibson suspected the Claimant rather than any other member of staff because he had taken the order and was the only member of staff who had stated that there had twenty one guests. Moreover, Mr Georgiev had told her that the occupants of table 5a were friends of the Claimant.

27. The Claimant attended work as usual on 4 May 2016. Ms Gibson did not inform the Claimant in advance that she wished to talk to him about the discrepancy in guests as she wanted to ensure that he attended in order to recover his keys to the restaurant and believed that he would not do so if forewarned. Ms Gibson arrived at the restaurant at 5:30 pm and asked other staff to leave the kitchen in order that she and the Claimant may discuss her concerns. She asked Mr Lefaux to remain as a witness. The Claimant was not advised of his right to be accompanied nor did he request a companion or witness of his own.

28. Ms Gibson informed the Claimant that a serious discrepancy existed between the kitchen and dining room orders taken on 1 May 2016 in respect of table 5a for which the takings were missing. The Claimant's response was that there had been no table 5a on the night in question. Ms Gibson did not show the Claimant the records which she had obtained showing that there had been a table 5a, although she did challenge his denial by telling him that he knew full well that there had indeed been guests at that table. The Claimant maintained his denial. Given the stance taken by the Claimant and the contradiction with the contemporaneous records, Ms Gibson concluded that the Claimant had committed an act of misconduct, either in retaining payment for the tables mail himself or in treating his friends to a meal which they had not paid. Ms Gibson considered either to amount to an act of gross misconduct and she orally informed the Claimant that he was dismissed without notice. Ms Gibson's evidence, supported by that of Mr Lefaux, is that she also informed the Claimant of his right of appeal. The Claimant denies that appeal was mentioned. On balance we prefer the evidence of Ms Gibson and Mr Lefaux.

29. The Claimant was an unreliable witness whom we considered was prepared to tailor his evidence to best suit his case rather than provide an honest recollection of what had happened. A striking example of this approach was demonstrated by an amendment to his witness statement on the central issue of whether table 5a had been

occupied on the night of 1 May 2016. In his statement exchanged by his solicitor in accordance with the Case Management Orders, the Claimant stated:

> **"I was the waiter and can confirm that there was no one at table 5A. The fact that there were no kitchen orders or restaurant orders for table 5a is clear evidence that there was no table 5a. Had there been a table 5a then the kitchen orders would have confirmed this and what they had ordered, even if the restaurant order pad was missing."**

30. In an amended witness statement provided to the Respondent for the first time on the morning of the hearing, the Claimant's evidence had changed materially with regard to table 5a. He now stated that:

> "**I was the waiter and can confirm that there was a change to table 5A. The fact that there were no restaurant orders for table 5A is clear evidence that there was no table 5A served."**

In cross-examination, the Claimant further stated that the guests at table 5A had moved to table 5 after being seated and their food order taken. The Claimant maintained that he had told his solicitor this account but that the solicitor had told him that it would not be accepted and declined to put it into the Claimant's statement. When questioned about the discrepancy between this new account of a table change and the order pads showing different meals, the Claimant's explanation was that after being re-seated and some 30 minutes after their original order, the guests had also changed their food order which he recorded on a different chit in the order pad. We note that the bookings report shows tables 5A and 5 as separate walk-ins and that the food orders are markedly different.

31. On balance, we find that that the evidence given by the Claimant today is neither credible nor reliable. It appears to us designed to counter the copy of the kitchen order for table 5A which, contrary to the Claimant's original statement, existed and was considered by Ms Gibson at the time and by the Tribunal during this hearing. The inaccuracy goes beyond frailty of human memory or mistaken interpretation of events and we find on balance that the Claimant has given evidence which he believes will support his case even if not true. In reaching this finding, we also had regard to the fact that he was prepared to advance and rely upon a statement in the name of Ms Cheatle which she had not seen, let alone signed as being true, merely on the belief that this was what she would say.

32. Ms Gibson confirmed the dismissal in a letter incorrectly dated 4 April 2016. The letter stated that the Claimant had been immediately dismissed for gross misconduct and gave reasons for her belief (including the kitchen orders and confirmation from kitchen staff) that the bill for table 5A in the estimated value of £50-£70 was missing. The valuation was based upon the menu price for the items shown on the kitchen order and we accept was reasonable by comparison to other bills that evening where guests had a meal for two. The Claimant was advised of his right of appeal. The Claimant denies receipt of this letter. It was sent to 43a Woodland Road E4 7ET, the same address as given on the Claim Form. On balance, we prefer the evidence of Ms Gibson to that of the Claimant and find that it was sent. In any event, when the Claimant emailed on 22 July 2016 asking for reasons for his dismissal, Ms Gibson responded the same day by email attaching the earlier letter and repeating the reasons

as before.

33. The Claimant's evidence was that another waiter, Mr Arnaud Sebille, had been accused by a kitchen porter in December 2015 of stealing money. The Claimant's case was that Mr Sebille, who was white, had not been disciplined or dismissed by Ms Gibson. Ms Gibson's evidence was that the kitchen porter had told her that he thought that he 'may' have seen Mr Sebille steal from the restaurant. Ms Gibson endeavoured to obtain more information from the porter who could provide no details, simply his 'gut' feeling. In the absence of sufficient evidence and due to concerns about the reliability of the porter's accusation, Ms Gibson decided that she could not proceed. The Claimant did not raise any challenge to Ms Gibson's evidence with regard to Mr Sebille and the porter's accusation. On balance, we accept her evidence as set out.

34. Ms Shibchurn, the Claimant's sister, gave evidence alleging discrimination on grounds of race against her when she was employed by the Respondent. Ms Shibchurn stated in cross-examination that if she had had a grievance against the Respondent, she would have raised it before. Ms Shibchurn raised no such grievance and presented no claim to the Tribunal when her employment ended in 2015. As her statement was provided only on the day of the hearing, the Respondent had no opportunity to consider in detail her factual allegations but generally denied them all. In particular, Ms Gibson denied saying that she was looking for white Italian waiting staff or had kept non-white staff in the kitchen (an allegation which appeared rather inconsistent with Ms Shibchurn's other evidence that kitchen staff were valued more than front of house staff). We consider that Ms Shibchurn's evidence was not reliable due to its late provision, her family relationship with the Claimant and lack of prior complaint when her own employment ended. We do not accept that her evidence safely permits us to draw any inference of discrimination in the Claimant's case.

## Conclusions

*Unfair dismissal*

35. Based upon our findings of fact, we conclude that Ms Gibson genuinely believed that the Claimant had committed an act of misconduct in respect of table 5A's meal on 1 May 2016. This belief was reasonable and based upon a reasonable investigation. Ms Gibson reached the belief by considering the different oral accounts of the presence of guests at table 5A and the contemporaneous documents recording who had been served that evening and what food they had ordered. The reasonableness of an investigation depends in part upon the defence put forward by the employee. Here Ms Gibson was faced with a flat denial by the Claimant that there had even been guests at table 5A. The discussion in the kitchen took place only three days after the evening in question. The Claimant did not suggest that he could not recall who had been present and on the night had reported only 21 guests. The kitchen book recorded 23 meals being prepared. In all of the circumstances, and despite the severity of the allegation of misconduct, we are satisfied that this investigation fell within the range of reasonable investigations.

36. The Claimant did not ask to be accompanied when the alleged misconduct was discussed, nor did he request copies of the evidence or a postponement. We bear in mind that the Respondent is responsible for ensuring that a fair procedure is followed and that the disciplinary procedure anticipated a statement of misconduct, with time to

consider the allegation and supporting evidence, before a disciplinary hearing was convened. We also bear in mind that we should consider the fairness of the dismissal procedure overall and take into account the size and administrative resources of the employer.

37. Overall we are satisfied that the dismissal was fair in all of the circumstances of the case within s.98(4). This was a very small employer without dedicated Human Resources support. Ms Gibson carried out an investigation of the allegations which disclosed evidence entitling her reasonably to convene a disciplinary hearing. Whilst it would have been better to suspend the Claimant initially, then convene a hearing on notice with provision of evidence, fairness is not a counsel of perfection and we must take into account the circumstances of the case. The contract of employment envisaged exceptions to the ordinary procedure in some circumstances. We have found that the Claimant was advised of the detail of the allegation against him and was offered an opportunity to respond. His response denying guests at table 5A was in direct contradiction with all of the other evidence available. He was given an opportunity to reconsider his response during the hearing but chose not to do so. He did not appeal nor advance the explanation given today about the guests changing table. The issue of whether or not table 5A had been served food was within his knowledge even without site of the documents obtained in the investigation. The absence of forewarning and copies of the investigation documents did not have the effect, on the particular circumstances of this case, render dismissal unfair. Given that the allegation of misconduct was one of dishonesty and given the Claimant's defence was one of flat denial, we consider that the sanction of summary dismissal fell within the range of reasonable responses. The claim of unfair dismissal fails and is dismissed.

38. As the Claimant did not ask to be accompanied at the disciplinary discussion, strictly s.10 Employment Relations Act 1999 was not breached. If he had asked at the outset of the discussion for a companion it would have been a reasonable request, but as he did not do so his claim under this head fails also.

*Breach of Contract*

39. Based upon our findings of fact, the Respondent has shown that the Claimant committed an act of gross misconduct entitling it summarily to dismiss. Even with sight of the documents obtained by Ms Gibson in her investigation, the Claimant's evidence about whether or not there were guests at table 5A for whom he failed to bill was not credible for reasons which we have set out above. The Claimant was in a position of trust, holding keys to the restaurant and being left in charge without supervision when Ms Gibson was not present. His conduct was in repudiatory breach of his contract of employment and the claim for notice pay fails.

*Race Discrimination*

40. On the basis of our findings of fact, the Claimant was treated less favourably than Mr Sebille; the Claimant was dismissed and Mr Sebille was not. We are not satisfied that Mr Sebille is a proper comparator as his circumstances were materially different. Ms Gibson investigated the Claimant's conduct and obtained credible primary evidence of wrongdoing on his part. By contrast, Ms Gibson was not able to obtain such evidence in respect of wrongdoing by Mr Sebille despite her efforts to obtain more

information. The Claimant has failed to establish primary facts from which we could conclude that there had been an act of discrimination. On the evidence, we are satisfied that if there had been similar evidence of dishonesty by Mr Sebille, he would also have been dismissed by Ms Gibson. Any difference in treatment was entirely due to the availability of credible and reliable evidence, not due to race. The race discrimination claim fails and is dismissed.

*Holiday Pay*

41. By the effective date of termination of employment, the Claimant had accrued holiday entitlement of 8.5 days (the rounded up pro rata entitlement for the holiday year to date). As he had already received 10 days paid holiday, he was not entitled to any further payment in respect of accrued but untaken annual leave at the date of his dismissal. The holiday pay claim fails and is dismissed.

## Costs

42. Following the Preliminary Hearing, the Respondent indicated that it intended to apply for its costs of the amendment. The parties were informed that such application would be considered at the conclusion of the final hearing. The Tribunal reserved its decision on liability and, therefore, costs were not addressed. If either party intends to make an application for costs in respect of all or part of the proceedings, such application must be made in writing within 14 days of the date of this Judgment and Reasons being sent to the parties. The application must set out the grounds upon which the costs are being sought, provide a schedule of costs claimed and state whether the application may be determined without a hearing. If any application for costs is opposed, that party must set out in writing its reasons within 14 days of the date of the application, provide any evidence relevant to means which it wishes the Tribunal to consider and state whether the application may be determined without a hearing.

Employment Judge Russell

03 March 2017