EMPLOYMENT TRIBUNALS

Claimants: Ms Monika Prasil & Ms Stanislava Jantosikova

Respondent: Orchard House Foods Limited

HEARD AT: Cambridge on 20, 21 and 22 March 2018

BEFORE: Employment Judge Michell
Mrs K L Johnson
Mr T Chinnery

REPRESENTATION: For the Claimants: Ms Paulik (lay representative)
For the Respondent: Ms A Carse (Counsel)

RESERVED JUDGMENT

1. The Claimants' unlawful deductions and holiday pay claims are dismissed on withdrawal.

2. The Claimants' unfair dismissal claims are dismissed.

3. The Claimants' race discrimination claims are dismissed.

4. The remedies hearing listed for 3 May 2018 is vacated.

REASONS

BACKGROUND

1. The Claimants were employed by the Respondent as production operatives. Ms Paulik, the First Claimant ("**Ms Prasil**"), is Polish. She commenced employment at the Respondent on 13 April 2014. Ms Jantosikova, the Second Claimant ("**Ms Jantosikova**"), is Slovakian. She commenced employment at the Respondent on 25

July 2010. Both the Claimants were summarily dismissed on 12 October 2015 ("**EDT**") for alleged gross misconduct. Following compliance with the Early Conciliation ("**EC**") procedure, on 14 January 2016 they both presented claims alleging unfair dismissal, direct race discrimination contrary to s13 of the Equality Act 2010 ("**EqA**"), wrongful deduction of wages and unpaid holiday pay.

EVIDENCE

2. We heard oral evidence from the Claimants, and from their witness and former work colleagues Susan Tari and Mr Andrew Runcie (the latter of whom still works for the Respondent). On behalf of the Respondent, we heard from Ms Vicky Williams (Senior Production Manager); Mr Paul Armitage (Site Operations Manager); and Mr Simon Hambleton. (Senior Production Manager). We were also taken by Ms Carse to the witness statement of Mr Simon Lambert (Shift Manager), to which we gave due limited weight. We were referred to a 650-page bundle of documents. We also had the benefit of written submissions from the parties (to which the representatives spoke), for which we were grateful.

3. All witnesses gave their evidence carefully and to the best of their ability. We were particularly impressed with the Claimants as witnesses. They presented as honest, capable, open, and intelligent. We are wholly unsurprised that they both secured work elsewhere within a short time of their dismissal.

ISSUES

4. The parties agreed that at this stage we would only deal with liability issues (and any deductions for contributory fault/on **Polkey** bases), leaving remedy for a later date if necessary, and not capable of agreement between the parties.

5. The Claimants also indicated that (following payments which have been made since the issue of proceedings) no salary/holiday pay was still due to them, and that the claims in respect of the same could be dismissed on withdrawal.

6. Ms Prasil accepted that she did not have sufficient continuity to have the right not to be unfairly dismissed for s.94(1) Employment Rights Act 1996 ("**ERA**") purposes.

7. Ms Carse sensibly said she did not pursue the points taken in the grounds of resistance concerning alleged non-compliance with the EC procedure.

8. Hence, the issues still for us to determine were agreed and refined as follows:

Direct race discrimination (s.13 EQA)

a. Was the dismissal of either Claimant an act of direct race discrimination? As to this:
    i. The Claimants asserted that their nationalities meant they were dismissed in circumstance where a UK national would not have been dismissed.
    ii. They relied on UK nationals Mr Runcie, Angela Milne and Vicky Williams as 'actual' comparators.

Unfair dismissal

a. What was the reason for Ms Jantosikova's dismissal? As to this:
    i. The Respondent asserted that the reason was misconduct (i.e. a potentially fair reason for the purposes of s.98(2) of ERA).
    ii. Ms Jantosikova accepted that misconduct was the principal reason for the dismissal, and that the Respondent believed her (and Ms Prasil) to be guilty of misconduct.
b. Was the dismissal fair for the purposes of s.98(4) of ERA? In particular:
    i. Did the Respondent have reasonable grounds, founded on a reasonable investigation, for its belief that Ms Jantosikova was guilty of misconduct? (This point was effectively conceded, as the Claimants always accepted they had misconducted themselves.)

ii. Did the decision to dismiss Ms Jantosikova fall within the band of reasonable responses open to the Respondent for the purposes of s.98(4) of ERA?

iii. Was the procedure adopted by the Respondent unfair?

c. If the dismissal was unfair:

i. Should any award be reduced (and if so, by how much) having regard s.122(2) and s.123(1) ERA and/or the principles set out in **Polkey v. AE Dayton Services Ltd**?

FACTUAL FINDINGS

9. The Respondent is a food manufacturing business. The wages it pays its operatives, though above the national minimum wage threshold, are not high. The majority of its workforce are Eastern European nationals. Of the 770-odd workers it employers, only about 245 are British. A greater number- about 292- are Polish, and about 57 are Slovakian.

10. We were not given a nationality breakdown of members of the Respondent's staff by seniority. Had we been given such a breakdown, it might better have informed Ms Williams' statement that the Respondent "is an equal opportunities employer". Each individual of at least managerial level who formed part of the immediate 'story' was a UK national.

11. The Claimants are good friends. They both worked at the Respondent's Factory 2, as production operatives. This meant they worked on a production line with about 6-8 others, overseen by a manager. There were a number of production lines operational at any one time.

12. The Claimants were both excellent employees- Ms Williams described them as "exceptional workers" and "key staff". Neither of them had any disciplinary record. In Ms Jantosikova's case, she had on several occasions agreed at last minute requests from the Respondent to work anti-social hours/on very early shifts.

13. Production operatives were entitled to 3 x 20 minute (or 2 x 30 minute) breaks in any 12-hour shift. Those breaks were unpaid, and were taken at the same time by the whole shift working each production line. If a worker wanted to leave the line outside of those 'official' breaks, they need to ask their manager's permission.

14. We accept Ms Williams' evidence that managers operate in a slightly different way as regards breaks. In particular, though they will only receive the same total amount of (unpaid) break time each day as operatives do, managers' breaks end up being more 'fractional'- taken in at different times and in different amounts as their duties permit. (To avoid confusion, and any perception of inconsistent treatment, this is something which might sensibly be better explained to staff.)

15. The Respondent's handbook is expressed to be contractual. It gives various examples of gross misconduct, including "leaving your place of work during working hours without your supervisor's permission"; "wilful disregard of… instructions relating to the employment"; and "refusal to obey a reasonable instruction by a supervisor". The handbook explains that an offence of such nature will normally result in summary dismissal. Those examples are repeated in the Respondent's disciplinary procedure.

16. In July 2014 the Respondent's workers (including the Claimants) were given and signed a briefing note from the Operations Manager "re: breaks and smoking breaks". The briefing note explains that "the deliberate act of taking longer than permissible on any or all breaks will be deemed as fraud… taking paid time for which you are not entitled… and therefore constitutes the very serious offence of gross misconduct, which may lead to instant dismissal".

17. Ms Carse accepted that the above part of the briefing note did not directly apply to the facts of the Claimants' case (because they did not take overly long on an authorised break). However, the principal of being paid whilst taking an unauthorised break is, we acknowledge, much the same.

18. The briefing note also explains that visits to the smoking area may only be taken as part of the allotted breaks, and that anyone caught taking an unauthorised smoking break "will be liable to disciplinary action". The author of the briefing note explains: "I will insist that Management consistently address any breach of these rules in the same manner and to the same disciplinary procedures and standards- irrespective of whosoever may be involved…"

19. Managers as well as staff received the briefing note.

20. To their credit, neither of the Claimants asserted that they were unaware of the terms of the handbook, the disciplinary procedure, or the briefing note.

Some possible comparators

21. It is clear that several of the Respondent's workers had already been dismissed for taking unauthorised breaks by the time of the Claimants' own dismissal. Unsurprisingly given the predominance of non-UK employees in the workforce, most of those who were dismissed were Eastern European. However, this was not exclusively the position.

22. In particular, UK national David Martin (production operative) was dismissed in late 2014 for taking two unauthorised smoking breaks in one day, in circumstances where he was allegedly "stressed" due to a relative's illness. (Mr Martin said at the time of his dismissal that he was "sorry and won't do it again"; he also said he "needed the job" and "knew he had done wrong". Nevertheless, he was dismissed.)

23. The Claimants said in evidence they had heard 'on the grapevine' that Mr Martin had been smoking marijuana, and that he was sacked for this reason. However, there is no reference to such matters in his disciplinary notes. We therefore discount it for present purposes.

24. We were taken to the details of 6 or 7 other operatives who were summarily dismissed for similar acts in 2014 or 2015. All of those operatives worked in Factory 3 (which

was ‘over the road’, and in which the workers performed similar functions). We were shown no evidence that anyone in Factory 2 had -at least, before October 2015- been dismissed in similar circumstances. However, the above restrictions applied equally to each Factory.

25. A few workers had not been dismissed for committing what, at first, appeared to be similar misdemeanours.

26. In particular, Mr Runcie (on whom the Claimants relied as a comparator) received a final written warning in August 2015. He, too, appears to have committed an act of gross misconduct for the purposes of the Handbook, in that (amongst other things) he left his place of work during working hours without permission.

27. However, unlike the Claimants, Mr Runcie ‘clocked off’ before he left his shift. This meant that his unauthorised time off-shift was at least unpaid. This, as Ms Williams/Mr Armitage saw it, was an important distinction.

28. Moreover, Mr Runcie’s disciplinary hearing was dealt with by a different manager, Mr Hambleton, whom the Claimants described as (and who presented to us as being) particularly sympathetic and amenable. Indeed, Ms Paulik submitted to us (and we accept) that had Mr Hambleton dealt with the Claimants’ disciplinary process and determined the outcome, the outcome might have been different.

29. Mr Hambleton knew Mr Runcie well; he accepted that Mr Runcie had quite a few foibles and eccentricities, for which Mr Hambleton made allowance.

30. Another potential comparator, (UK National) Nicola Riddoch, received only a final written warning in April 2015. However, it transpires that she had only left her line in order to try and secure a handover for her shift i.e. “for a business reason”. It follows that her receipt of *any* disciplinary sanction (even more so, a final written warning) was, if anything, surprisingly harsh. However, it does again illustrate the Respondent’s generally intolerant approach towards operators who left their line.

2 October 2015

31. On 2 October 2015, the Claimants both started their shift at about 6am. Their first break was due at about 9.30am or 10am. Shortly before 7.50am they were seen talking together in the print room. They were told off by Angela Milne, Area Manager. They then both went outside and were seen by manager Judith Whiting having a cigarette in the smoking area.

Ms Prasil

32. At the disciplinary hearing on 12 October 2015 Vicky Williams interviewed Ms Prasil, who apologised for her actions. She explained that she had left her line to speak to Ms Jantosikova, who had a problem with her father "at home" and who had asked her to come outside and talk about it. She candidly accepted that the matters Ms Jantosikova wanted to discuss with her "could have waited" to the official morning break. She gave no real explanation as to why she and Ms Jantosikova did not first ask for permission before going outside.

33. Ms Prasil suggested to Ms Williams that Mr Runcie was "in the same situation" (i.e. had done the same thing) but had not been dismissed. She was assured that his situation was not the same.

34. Following her dismissal, Ms Prasil appealed. At the appeal hearing before Mr Armitage, she suggested that "a lot" of operatives took unauthorised breaks without sanction, but she "did not want to say" who. She mentioned "Vicky and Angie" as managers who had breaks.

35. In her evidence to us, Ms Prasil named others she had seen from time to time taking unauthorised smoking breaks, but not being punished as a result. She named "David" and "Slywia". The former is Slovakian; the latter is Polish.

36. Mr Armitage told us he "did not want to set a precedent" by upholding the appeal, and that he "did not want to be seen as overturning a cut and dry decision". This was of

some concern to us, because (of course) it was not for Mr Armitage to assume the original decision was “cut and dry”, and a “precedent” of considering each case on its facts is no bad thing.

37. However, it is clear Mr Armitage did make some further enquiries. He duly asked Angie Milne if she took unauthorised breaks. She appears to have told him she did not do so. Mr Armitage did not interview Ms Williams, who was on holiday at the time. He took some “random spot checking” of the CCTV footage during an adjournment of the appeal hearing, but did not see anything of note.

38. We accept the CCTV footage would have posed something of a challenge for Mr Armitage. He explained that the CCTV footage was often grainy and not high quality. Thus, unless he knew what to look for, it would have been hard for him to make out any perpetrators. Moreover, as breaks were taken at slightly different times by different shifts, as managers took their shifts on a fractional basis, and as some workers might have asked for and got permission to take a short ‘extra’ break, it would have been difficult for him to ascertain from any CTTV footage who was/not on an unauthorised break. Potentially, he could have asked the various shift managers to look at the footage and try to identify those on their line who ought not to have been on a break.

39. He rejected the appeal.

Ms Jantosikova

40. In her disciplinary hearing before Ms Williams, Ms Jantosikova also admitted she had left her shift without permission. She acknowledged that she had committed a disciplinary offence, but said that she “didn’t think about it” at the time. She did not explain why she “just wanted to speak to Monika”, and she said nothing about any personal circumstances which might have made a break/speaking with Ms Prasil urgent.

41. Ms Jantosikova mentioned a worker called "Guntar", whom she said had committed a similar offence but had not been disciplined. Ms Williams said she knew nothing about such a person. (Ms Jantosikova clarified to the tribunal that Guntar was "non-British European".) Immediately after she was told of her dismissal, Ms Jantosikova suggested that Mr Runcie only received a final warning for unauthorised smoking[1]. She also then suggested she had been discriminated against as a non-English worker.

42. At her appeal before Mr Armitage, Ms Jantosikova declined to name any other operatives who she said had committed similar offences, or drank/took "drugs", but got away unpunished. (She explained to us this was because she did not want to get anyone in trouble.) She mentioned Mr Runcie and the managers "Vicky and Angie". She also suggested that Mr Armitage look at the CCTV footage on (in effect) random days between 8am and 8.30am and see for himself.

43. As explained above, Mr Armitage did some 'spot checking' of the CTTV footage. He then rejected the appeal.

THE LAW

Direct discrimination

Two stage test

44. Following the guidance given by the EAT in **Barton v. Investec Henderson Crosthwaite Securities Ltd**,[2] as affirmed in **Ayodele v Citylink Ltd**[3], the burden of proof in a discrimination claim falls into two parts.

45. Firstly, it is for the claimant to prove on the balance of probabilities facts from which a reasonable tribunal could properly conclude, on the assumption that there is no adequate explanation, that the respondent's discriminatory treatment of them was

[1] The notes are hard to follow- like all notes produced by the Respondent. They record the fact that C2 said "fucking", but do not set out rather more important dialogue in a clear fashion.
[2] [2003] IRLR 332.
[3] [2017] EWCA Civ 1913.

because of race. They must show that to be the answer to 'the reason why' question that arises in such claims. That is 'Stage 1'.

46. If the claimant does not prove such facts, they must fail.

47. Secondly, where the claimant has proved facts from which it could be inferred that the respondent has treated the claimant less favourably on proscribed grounds, then the burden of proof moves to the respondent.

48. It is then for the respondent to pass 'Stage 2' and prove that it did not commit or, as the case may be, is not to be treated as having committed that act.

49. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on proscribed grounds.

50. That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the relevant protected characteristic was not any part of the reasons for the treatment in question. If the respondent can do this, the claim fails.

Limits to 2 stage test

51. The '2 stage test' is often useful, but need not be rigidly applied. *Per* Elias *P* **Laing v Manchester City Council**[4]*:*

> "*71. … What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination…*

[4] [2006] IRLR 748, [2006] ICR 1519.

> *73. No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case… tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages*."

Comparators

52. Comparators are defined by s.23 of the EqA. On "*a comparison of cases*" for the purpose of s.13 EqA, there must be "*no material differences between the circumstances relating to each case*".

'Reasonableness'

53. As regards 'unreasonableness' of the respondent's conduct and discrimination, the ET is not entitled to draw an inference of discrimination from the mere fact that the employer has treated the employee in a certain way, or unreasonably, and the employee has a protected characteristic. **Bahl** *per* Elias J:

> "*94. ... Employers often act unreasonably... it is the human condition that we all at times act foolishly, inconsiderately, unsympathetically and selfishly and in other ways which we regret with hindsight. It is, however, a wholly unacceptable leap to conclude that whenever the victim of such conduct [has a protected characteristic] then it is legitimate to infer that our unreasonable treatment was because [of that characteristic]. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim [has a protected characteristic]. In order to establish unlawful discrimination, it is necessary to show that the particular employer's reason for acting was one of the proscribed grounds. Simply to say that the conduct was unreasonable tells us nothing about the grounds for acting in that way*".

54. The requirement necessary to establish less favourable treatment is not one of less favourable treatment than that which would have been accorded by a *reasonable*

employer in the same circumstances, but of less favourable treatment than that which had been or would have been accorded by the *same* employer in the same circumstances towards another employee, actual or hypothetical, whose relevant circumstances are not materially different. **Bahl** (§93).

Motive

55. In determining whether there has been direct discrimination, it is necessary in all save the most obvious cases for the ET to determine what was in the mind of the alleged discriminator, making appropriate inferences from the primary facts which it finds. **Bahl** (§ 84).

56. The discrimination need not be conscious. Sometimes a person may discriminate on these grounds as a result of inbuilt and unrecognised prejudice of which he or she is unaware. **Bahl** (§ 82). However, as regards 'unconscious discrimination':

> "*127. ... it is a significant finding for a tribunal to hold that they can read someone's mind better than the person himself, and they are not entitled to reach that conclusion merely by way of a hunch or speculation, but only where there is clear evidence to warrant it*".

(1) Unfair dismissal

57. The following principles are material:

    a. When considering whether or not a dismissal was fair for s.98(4) ERA purposes, a tribunal must not substitute its own judgment as to what would have been a fair outcome. Rather, it must consider what was within the band of responses reasonably open to the employer. See for example **London Ambulance Service NHS Trust v. Small**[5].

[5] [2009] IRLR 563, CA, §43 *per* Mummery LJ.

b. The same 'band of reasonable responses' test (and prohibition on substitution by the tribunal) applies to the investigatory process adopted by an employer. **Sainsbury's Supermarkets Ltd v. Hitt**.[6]

c. As regards that process:

   i. It is sufficient for the employer to have a genuine belief that the employee has behaved in the manner alleged, to have reasonable grounds for that belief, and to have conducted an investigation which is fair and proportionate to the employer's capacity and resources. **Santamera v. Express Cargo Forwarding t/a IEC Ltd**[7].

   ii. It does not follow that an investigation is unfair because individual components might have been dealt with differently, or were arguably unfair. A "*forensic or quasi-judicial investigation*" is not required. **Santamera.**

   iii. An employer does not need to pursue every line of enquiry signposted by the employee in the context of a disciplinary process. The question for a tribunal when considering the reasonableness of an investigation for misconduct is not, could further steps have been taken by the employer? Rather, it is, was the procedure which was actually carried out reasonable in all the circumstances? **Rajendra Shrestha v Genesis Housing Association Limited**[8].

d. An employer will find it easier to justify a dismissal for a particular single act of misconduct where a rule explicitly states that breach will or may lead to a dismissal than where such a rule is absent. Effectively the rule acts as a substitute warning, in the case where the absence of the rule might have led a court to hold that dismissal is too harsh a sanction. See e.g. **Meyer Dunmore International Ltd v Rogers**[9].

e. In the event of a finding of unfair dismissal:

[6] [2003] IRLR 23, CA.
[7] [2003] IRLR 273, *per* Wall J, at §35 & 36.
[8] [2015] EWCA Civ 94.
[9] [1978] IRLR 167.

ii. If the dismissal was 'procedurally unfair' but the tribunal is satisfied that the employee would or could have been fairly dismissed at a later date or if the employer had followed a fair procedure, this may merit a reduction, of up to 100%, to any compensatory award under s.123(1) of ERA.

iii. If the tribunal finds that a claimant by his own culpable or blameworthy conduct contributed to his dismissal, compensation may be reduced under s.123(6) of ERA -by as much as 100% in an appropriate case.

iv. Any basic award also falls to be reduced, by up to 100%, under s.122(2) of ERA if it is just and equitable to do so having regard to the conduct of the employee before the dismissal. (The test is different to that set by s.123(6) of ERA, which requires a 'blameworthy' causal link with the dismissal.)

APPLICATION TO THE FACTS

Direct discrimination

58. We do not accept that the Claimants' nationalities had any material impact on the fact they were dismissed, or on the process followed. The 'reason why' they were dismissed was misconduct, and not race-related. Hence even if the Claimants' cases can pass 'stage 1' they both fail at 'stage 2'. In particular:

a. We accept the evidence of the key decision-makers, Mr Armitage and Ms Williams, that race did not play a part in their conscious thought process. (We do not think there is evidence before us which would make it appropriate for us to infer unconscious bias.)

b. The mere fact that their decision-making was arguably draconian in outcome (as to which, see below) does not of itself make out the Claimants' case. See §53 & 54 above.

c. Mr Runcie was not in fact an apt comparator. See further §26-29 above, which meant there were important distinctions between his case and the Claimants'.

The benign impact of Mr Hambleton's involvement strikes us as particularly important.

d. Similarly, for the reasons set out at §30 above, Ms Riddoch is not a helpful comparator for the Claimants, Mr Martin *was* dismissed in circumstances similar to those of the Claimants.

e. On the Claimants' case, several other operatives went 'unpunished' for the same 'crime'. All the operatives to which the Claimants referred were non-UK nationals.

f. We do not consider it helpful to the Claimants' case to compare themselves to Angie Milnor or Vicky Williams, because (a) the two woman were mangers, with different break 'rules'- see further above; (b) no specifics were given of any alleged breaches by either of them; and (c) we accept the Respondent's evidence that (for better or worse) either manager would have been sacked, had they taken an unauthorised break.

Unfair dismissal

59. Our decision as regards Ms Jantosikova's unfair dismissal claim was far harder to reach. We had great sympathy with both Claimants.

60. We would also like to make it clear that no member of this tribunal would, if in the employer's shoes, have dismissed either of the Claimants. Given their excellent performance as workers, and clean disciplinary record, we consider it would have been a better use of resources to have given them a (final written) warning. Sadly, though, what we would have done in the employer's position is not the test we must apply.

61. Given:

a. the Claimants' admitted misconduct;

b. the fact that:

i. their misconduct fell within the definition of gross misconduct in the Handbook and disciplinary procedure;
ii. unlike Mr Runcie, they had (in effect) taken "paid time for which [they] were not entitled";
iii. many other workers (albeit from Factory 3) had already been treated in a similar way;
iv. the limited mitigating circumstances; and, importantly

c. the need for us to abjure a "substitution mindset" for these purposes

we consider the dismissal to have been (just) within the range of reasonable responses open to the employer.

62. As regards process followed, there were some imperfections. In particular:

a. Ms Williams could perhaps have probed the Claimants further as to why they took the break (even though it seems that matters could in fact have waited for the official break. See §32 above.)
b. We think Mr Armitage's mindset was perhaps not as open as it ought to have been. He might, for the avoidance of doubt, have spoken to Vicky Williams to assure himself of her compliance. He could have asked managers to view CCTV footage on a 'random' recent morning. (However, we do not think this would have any difference to the outcome in the Claimants' case, and we consider- in the absence of specific examples being given by the Claimants of other 'wrongdoing'- this was something of a 'counsel of perfection'.)

63. But, bearing in mind the matters set out above at §57(c)(ii), we do not think the process was sufficiently procedurally flawed to render Ms Jantosikova's dismissal unfair.

64. Even if we had found otherwise, we think it likely that a very significant (90%) **Polkey** reduction would have been made, and/or that it would have been just and equitable

for a deduction of at least 50% to be made pursuant to both s.123(6) and s. 122(2) of ERA.

OTHER MATTERS

65. It follows that the **3 May 2018** hearing date which was provisionally set for remedy may now be vacated.

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Employment Judge Michell, Cambridge
12 / 4 / 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS