



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Shenol Deniz  
**Respondent:** Aspers (Stratford City) Limited  
**Heard at:** East London Hearing Centre  
**On:** 5, 6, 7 and 8 December 2023  
**Before:** Employment Judge Barrett  
**Members:** Ms J Houzer  
Mr L Bowman

## Representation

**Claimant:** Represented himself  
**Respondent:** Mr Ramsbottom, Consultant

# JUDGMENT

The judgment of the Tribunal is that: -

1. The Respondent unfairly dismissed the Claimant and the Claimant's claim for unfair dismissal succeeds.
2. The Claimant's claims for direct race and sex discrimination are not well founded and are dismissed.
3. The Respondent shall pay the Claimant the sum of £16,345.60 comprising:
  - a. A basic award of £3,402.00;
  - b. A compensatory award of £12,943.60.
4. For recoupment purposes:
  - a. Monetary award: £16,345.60;
  - b. Prescribed element: £12,064.00;
  - c. Period of prescribed element: 15 January 2023 to 13 July 2023;

- d. **Balance of the monetary award in excess of the prescribed element: £4,281.60.**

# REASONS

## Introduction

1. The Claimant, Mr Shenol Deniz, worked as a croupier at casino operated by the Respondent, Aspers (Stratford City) Limited, from 23 August 2016 to 15 January 2023. He presented a claim for constructive unfair dismissal and direct sex and race discrimination on 27 December 2022 following a period of early conciliation from 18 October to 29 November 2022. The Claimant is white British of Bulgarian origin and a man. The Respondent denies that the Claimant's resignation constituted a constructive dismissal and resists his discrimination claims.

## The hearing

2. The hearing was conducted over four days, 5 to 8 December 2023.
3. The Claimant represented himself and the Respondent was represented by Mr Ramsbottom, an employment law consultant.
4. The Tribunal was provided with an agreed bundle of evidence numbering 149 pages.
5. The Claimant gave evidence on his own behalf on the first day of the hearing. On the second day, the following witnesses gave evidence on behalf of the Respondent:
  - 5.1. Mr Charlie Riggs, Gaming Supervisor, who provided assistance to the Claimant during an incident with a customer in July 2022; and
  - 5.2. Miss Dhrutee Shiyani, Human Resources Business Partner ('HRBP'), who provided HR support in connection the Claimant's grievance process.
6. The Respondent also provided a written statement from Ms Michaela Jaklova, Customer Service Manager, who investigated the Claimant's grievance. We were told that Ms Jaklova was unable to attend because she was on leave for family reasons and there had been a confusion as to dates. The Tribunal read her statement but placed lesser weight on its content than would have been the case had it been tested in cross-examination.
7. After the evidence had been completed, Mr Ramsbottom and the Claimant made oral closing submissions on the afternoon of the second day of the hearing.
8. The third day of the hearing was taken up with Tribunal deliberations in chambers. Judgment on liability was delivered orally on the morning of the fourth day. The Respondent requested written reasons, which are hereby supplied.
9. Remedy issues were addressed on the afternoon of the fourth day, when the Claimant gave further evidence and both he and Mr Ramsbottom made

submissions on the issue of mitigation of loss. Judgment on remedy was reserved.

## The liability issues

10. Employment Judge Buchanan set down the issues in the case at a preliminary hearing on 19 May 2023. At the beginning of this hearing, the parties confirmed that those issues were agreed to be the matters for determination in the claim.

11. The Claimant relies on 12 factual allegations in relation to his constructive dismissal claim and 10 of the same allegations in relation to his discrimination claims. The Tribunal is therefore required to make factual findings as to whether the Respondent did the following things:

(solely in respect of the constructive dismissal claim)

11.1. Fail to recognise the 5-year service of the Claimant in 2021 in the usual way by a congratulation certificate, new name badge and a £100 gift card. The Claimant asserts his voucher was misplaced and he received the recognition in the week before his employment ended namely 1 year 5 months late.

11.2. In or around May 2022, carry out a search of the Claimant's locker without proper cause.

(in respect of all claims)

11.3. Subject the Claimant to a lengthy investigation from May 2022 in respect of a grievance raised against him and fail to let him know the outcome of that grievance investigation in a timely way, or at all, thereby causing worry and upset for the Claimant. The Claimant asserts that it was only during a meeting held in December 2022 that he was told he had been cleared in that investigation. The Claimant asserts that the Respondent failed to tell him the outcome in order to intimidate him.

11.4. Fail to protect the Claimant in July 2022 from a customer who should not have been allowed to remain in the casino by reason of his behaviour.

11.5. Fail to protect the Claimant from that same customer who in July 2022 threw a gaming chip at the claimant causing injury to the right hand of the Claimant.

11.6. Fail to respond to the incident when the Claimant was injured at all or in an appropriate manner. The Claimant asserts the customer was allowed to remain in the casino after the incident and that the duty managers and security officers did not support the Claimant.

11.7. Fail to protect the Claimant from the unreasonable and aggressive behaviour of customers generally.

11.8. Fail to provide the Claimant with an adequate means of raising his concerns for several weeks after July 2022 by referring the Claimant to his line manager. The Claimant asserts he did not have a line manager at that time as the Respondent was or should have been aware.

- 11.9. Fail to reasonably investigate a grievance raised by the Claimant on 23 November 2022 and take too long to deal with that grievance leading the Claimant to resign his employment on 26 December 2022 before any outcome was known. The Claimant asserts he received the grievance outcome on 1 February 2023 and had been told initially that the outcome would be known in 2 weeks.
  - 11.10. Fail to pay the Claimant in accordance with its salary scale for croupiers generally and in particular at a rate commensurate with his skills. The Claimant asserts that the Respondent paid less qualified and newly appointed croupiers at a higher rate than the Claimant. (Insofar as this allegation relates to a difference in contractual pay, the Claimant relies on in with respect to his constructive dismissal and race discrimination claims; he does not advance a sex-based equal pay claim.)
  - 11.11. Fail to apply its salary scale applicable to croupiers reasonably or fairly.
  - 11.12. Fail to deal adequately or at all with the Claimant's oral and written requests from July 2022 onwards to alter his working hours in order that he did not have to work beyond 10pm and in relation to the concerns in respect of his level of salary. The Claimant asserts that ultimately he made a written request for a change of hours as directed but that he heard nothing about the request and so tendered his resignation on 26 December 2022.
12. In relation to the constructive unfair dismissal claim, we must then determine whether the Claimant was constructively dismissed. This involves consideration of the following issues:
- 12.1. Did such factual allegations as we have found to have occurred breach the implied term of trust and confidence? Taking account of the actions or omissions alleged in the previous paragraph, individually and cumulatively, the Tribunal will need to decide:
    - 12.1.1. whether the Respondent had reasonable and proper cause for those actions or omissions, and if not
    - 12.1.2. whether the Respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent.
  - 12.2. Did the Respondent's actions breach the implied term in the Claimant's contract of employment for the Respondent to provide a safe system of work for the Claimant? If so, was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.
  - 12.3. Was any fundamental breach of contract a reason for the Claimant's resignation?

- 12.4. Did the Claimant affirm the contract before resigning, by delay or otherwise? The Tribunal will need to decide whether the Claimant's words or actions showed that he chose to keep the contract alive even after the breach.
13. Mr Ramsbottom confirmed during his closing submissions that the Respondent does not contend that if the Claimant was constructively dismissed, the dismissal might have been a fair dismissal. The issues recorded by Employment Judge Buchanan in respect of the fairness of any dismissal have therefore been omitted.
14. Moving on to the Claimant's discrimination claim, the following issues are necessary for the Tribunal to consider in order to determine whether the Claimant was directly discriminated because of his race and / or his sex:
- 14.1. In relation to such factual allegations as we have found to have occurred, did the Claimant reasonably see the treatment as a detriment?
- 14.2. What was the reason for the treatment?
- 14.2.1. Has the Claimant proven facts from which the Tribunal could conclude that in any of those respects the Claimant was treated less favourably than someone in the same material circumstances of a different race and/or sex was or would have been treated? The Claimant says he was treated worse than the black female employee who complained about him in May 2022 and a male employee of a different ethnicity who was less qualified but paid more than he was during his employment. The Claimant also relies on a hypothetical comparison.
- 14.2.2. Has the Claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of his race and / or his sex?
- 14.2.3. If so, has the Respondent shown that there was no less favourable treatment because of sex and / or race?
15. The Claimant says his constructive dismissal was also an act of race and sex discrimination.
16. One of the factual allegations in the Claimant's discrimination claim occurred before 17 July 2022, i.e. more than three months before the Claimant notified ACAS of his potential claim. This is the allegation concerning being subjected to an investigation. If this allegation is upheld, we will consider whether it formed part of conduct extending over a period, the end of which fell inside the primary three month time limit, or otherwise whether it would be just and equitable to extend time in respect of this allegation.

## **Findings of fact relating to liability**

### ***The commencement of the Claimant's employment***

17. The Respondent offered the Claimant a role as a licensed croupier by letter of 13 August 2016. The letter stated that his basic annual salary would be £21,000, his

normal hours of work would be 40 per week on shifts to be directed, and that he would report to the Head of Live Table Gaming.

18. When applying for the role, the Claimant's skills had been assessed in a 'table test' where he was observed by the recruiting manager. His salary was fixed within the applicable salary band on the basis of his table test performance, his previous experience and prevailing market conditions at the time. He placed towards the bottom of the band.
19. The Claimant accepted the offer and commenced in the role on 23 August 2016.

### ***The Claimant's role***

20. As a croupier, the Claimant consistently worked 40 hours per week in accordance with his contract. He was regularly allocated to evening shifts which ended in the early hours of the morning. By the final year of his employment this was the 6pm to 2am shift. He worked in the Live Table Gaming Department. By the time of the events in this claim, the Head of Live Table Gaming was Ms Giedre Raznauskaite. Under Ms Raznauskaite in the management structure were Customer Service Managers ('CSMs'). Under the CSMs were Gaming Supervisors who looked after croupiers allocated to their section of the gaming floor in any given shift.

### ***The Respondent's pay progression processes and their application to the Claimant***

21. Until 2021 there was an element of performance related enhancement to pay in the Live Table Gaming Department, under the Respondent's Performance Evaluation System ('PES'). In order to be awarded a PES increase, a croupier would have to achieve an overall score of 4 on their regular performance monitoring assessment. The Claimant's performance was consistently good and he often scored 4 for aspects of performance monitoring but his overall performance score on each occasion was 3 so he never was awarded a PES increase.
22. In 2021, the Respondent ended the PES system. The reason for the change was because the policy was felt to be too subjective and therefore unsatisfactory. From that time onwards, there was no mechanism for performance to be rewarded in a pay increase.
23. The Claimant's pay was increased from time to time with the general pay awards made to all staff. However, his salary remained at the lower end of the applicable band throughout his employment. His last pay increase in July 2022 took his salary to £25,372 pa.
24. By the end of the Claimant's employment, the salary band for an 'Experienced Croupier' was between £25,000 and £28,000. Some croupiers were paid above that salary band. We were told that the General Manager, in consultation with the Head of Live Table Gaming, had discretion to change where a croupier's salary was fixed within the band or authorise a salary above the band.

### ***The locker search***

25. In May 2022 a venue manager and a security officer at the Respondent carried out a search of the Claimant's locker. The Respondent was entitled to do so at any time under clause 17.1 of the Claimant's statement of terms and conditions, which stated:

**“It is a requirement of the Company that you submit to a search of all baggage, personal items, lockers and car, etc when requested to do so by an authorised security officer.”**
26. The Claimant had also signed a consent form to the same effect when he started his employment.
27. At the time of the search, the Claimant was told it was a random inspection. Later on, after the Claimant brought a grievance about this and other matters, the grievance investigator Ms Jaklova wrote in the grievance outcome letter that it had been a search undertaken at random. However, during the course of this hearing, Miss Shiyani, who was the HRBP supporting Ms Jaklova, told us that Ms Jaklova had told her at the time she was investigating the grievance that in fact someone had reported a smell of narcotics (which all assumed to refer to cannabis) from a nearby locker, prompting the search. This was also the Respondent's position in its ET3 response to the claim.
28. The discrepancy has not been explained. A factual allegation raised by the Claimant is that he was subjected to a locker search without proper cause. The Tribunal does not have sufficient evidence to make a finding as to what the Respondent's reason was for searching the Claimant's locker. However, we find that the Respondent was entitled to undertake a search at any time pursuant to the Claimant's terms of employment.

### ***The grievance investigation***

29. In or around May 2022, a colleague of the Claimant's submitted a formal grievance alleging that a number of people on the gaming floor had made racist comments about her. She supplied a list of names, including the Claimant's. She said that the comments had been made in a different language but that someone who overheard them and understood them had told her about it.
30. The Respondent investigated this colleague's grievance in accordance with its grievance policy. Mr Marcus Harrison was appointed as the grievance investigator and Miss Shiyani was the HRBP who provided him with support. All of the people named in the complaint were interviewed. To Miss Shiyani's recollection, one was a woman and the rest were men. All were white.
31. Mr Harrison interviewed the Claimant on 22 May 2022. The Claimant was shocked by the allegations. He denied making any such comments. He understood from the meeting that the investigation process could result in him being fired.
32. Mr Harrison concluded that there was insufficient evidence to uphold the complaint. By the time of the investigation, the relevant CCTV footage had already been deleted. No further action was taken. However, no one told the Claimant that the matter had been closed until his grievance meeting on 12

December 2022, and therefore this unsettling matter was left hanging over his head.

33. The Claimant alleges that the Respondent failed to inform him of the outcome in order to intimidate him. We prefer the evidence of Miss Shiyani that this was simply an unfortunate oversight, albeit one that caused the Claimant unnecessary worry.

### ***The July 2022 customer incident***

34. Customers on the Respondent's gaming floor are on occasions drunk, can be frustrated when they lose money, and sometimes behave aggressively towards the Respondent's staff. It is the responsibility of each Gaming Supervisor to monitor what happens in their allocated section of the gaming floor, which might include 4 to 8 croupiers running gaming tables. The Respondent trains its staff to use a 'kiss up' system where they discreetly signal the need for assistance by making a kissing action. Croupiers are trained not to engage with aggressive customers themselves. A Gaming Supervisor should intervene and may then seek further help from a CSM and security staff if necessary. Customers exhibiting bad behaviour can be ejected and banned. However, the Respondent's preference is for situations to be deescalated if possible. On the evidence the Tribunal has heard, despite the challenges of the environment, the Respondent does have appropriate processes in place to protect its staff.
35. On a night in late July 2022 at approximately 1am, the Claimant had an angry customer playing at his table who threw a gaming chip at him. The chip hit the Claimant's hand. It did not break the skin or cause a visible injury but it was painful.
36. The Claimant alerted the Gaming Supervisor in his section, Mr Charlie Riggs, who came to the table and spoke to the customer. The Claimant had been told earlier in the evening that the same customer had tried to slap another dealer across a blackjack table. However, Mr Riggs was not made aware of this and no previous issue with the customer had been reported through the Respondent's communications system on the gaming floor.
37. Mr Riggs escalated the matter to a CSM, Ms Gina lordache, who removed the customer from the table. By this time the customer had calmed down and was not presenting aggressively. Ms lordache told the customer he was not allowed to return to the Claimant's table but he was permitted to remain in the casino for the rest of the night. Ms lordache then went to see the Claimant and asked if it was ok. The Claimant replied, "*I'll live*". He resumed dealing on the same table and worked until the end of his shift which was 2am on that day.
38. Mr Riggs told us that he had understood from what the Claimant had said that the customer had thrown the chip at the table and it had hit the Claimant's hand by accident. The Claimant says he told Mr Riggs the chip was thrown at him deliberately. We find both are telling the truth as they remember it and the slight difference was due to a natural and minor miscommunication.
39. The Claimant was more shaken up by the incident than Mr Riggs or Ms lordache realised. His usual demeanour is stoic and he does not express himself in an



animated way. His managers therefore had the impression that the incident was less serious than in fact it had been for the Claimant.

40. The Claimant has alleged that the Respondent failed to protect him from the customer. We have not made that finding. When the incident occurred, the Claimant was able to get assistance from Mr Riggs. The customer was removed from the Claimant's vicinity. As far as Mr Riggs and Ms Lordache were concerned, on the information available to the Respondent's managers at the time, the customer did not present a further threat. Ms Lordache did check on the Claimant's well-being and was reassured by his response.
41. However, the incident had an ongoing impact on the Claimant. As a result of this experience he no longer felt comfortable working late night shifts when there was a higher risk of drunk or aggressive customers being present on the gaming floor.

### ***The Claimant's line management structure***

42. Miss Shiyani explained to us that operationally on a day-to-day basis the Gaming Supervisor and CSM responsible for the zone the Claimant was working on had supervisory responsibility for him. This would change from shift to shift. Within the Live Table Gaming Department, croupiers were allocated to 'pods', each headed by a CSM. The pod CSM would be responsible for some aspects of their line management and carried out functions including conducting performance appraisals and receiving grievances. The grievance policy says that an employee wishing to bring a grievance should submit it in the first instance to their 'immediate line manager'. Other functions such as dealing with requests for annual leave were centralised and managed by HR. The overall management responsibility for the department lay with the Head of Live Table Gaming, Ms Raznauskaite.
43. The Claimant went on holiday during August 2022. When he returned he was told his pod CSM had resigned while he was away. He was not told who his new allocated pod CSM was. Sometime later, he was told he had been allocated a new pod CSM who was on holiday. Before the Claimant had any contact with that manager, he also resigned. As a result, between August and 20 November 2022, the Claimant did not know who his pod CSM was. Nor did he know who was responsible for carrying out the pod CSM's line management functions with regard to his employment.

### ***The Claimant's pay concerns***

44. In early September 2022, the Claimant discovered that a croupier colleague of his, who is of a different ethnicity and had been hired in 2021, was on a £3,000 pa higher salary than him. The Claimant told us that this colleague was less skilled than he is; the Claimant would sometimes take over this colleague's table because he could not handle bigger games. Mr Riggs said in his view this colleague was equivalently skilled as the Claimant, with different strengths and weaknesses, although he noted that this was a matter of subjective opinion.
45. The Claimant's discovery about his colleague's pay prompted him to query why after six years' employment he was still receiving a salary fixed towards the lower end of the applicable salary band. He thought it was unfair that a colleague doing the same job was paid more.

46. The Respondent's evidence, which we accept, is that after the Covid-19 pandemic, newly recruited croupiers were offered salaries placed higher in the applicable salary band than the Claimant's. This reflected the prevailing market conditions at the time, when hiring managers exercised their discretion to pay a competitive salary in order to recruit.
47. The Claimant alleges that the Respondent applied its pay policy unreasonably and unfairly. The Tribunal finds that his salary was at all times within the applicable band for experienced croupiers, which he was. There were others like him of long service towards the bottom of the band. He was not treated differently from others in the same situation. However, we do note that the absence of any mechanism for a performance-related pay increase from 2021 onwards did affect the Claimant and other long-serving staff fixed at the bottom of the pay band harshly.

***The Claimant's attempts to raise his concerns during September to November 2022***

48. After discovering his colleague's salary, the Claimant wanted to have a conversation with a decision-maker at the Respondent about his pay and whether he was being fairly remunerated. He also wanted to raise concerns about feeling unsafe on the gaming floor since the July 2022 incident and his wish to switch to working day shifts.
49. Initially, the Claimant spoke to a Gaming Supervisor situated on the Pit Desk on the gaming floor. The Claimant said that he wanted to speak to someone in management about his pay and that he did not feel safe working night shifts. He was told to speak to his line manager for any official inquiries or requests. At this time, as we have found, the Claimant did not know who his pod CSM was. He was also told by the Gaming Supervisor that no record had been made of the July 2022 incident, which exacerbated his concerns.
50. Next, during late September or early October 2022, the Claimant was closing a gaming table with Ms Lordache and took the opportunity to ask her how he should go about raising his concerns. She said she would speak to the Head of Live Table Gaming, Ms Raznauskaite, on his behalf. Approximately a week later, the Claimant spoke to Ms Lordache again and asked her for an update. She told him that he would need to speak to his line manager. This was not helpful because the Claimant still did not know who his pod CSM was. He was not directed to HR or any alternative manager.
51. On 18 October 2022, the Claimant notified ACAS hoping that this would prompt some engagement from the Respondent. This did result in the Respondent arranging for a CSM, Mr Wayne Boulton, to have a conversation with the Claimant about his concerns. Their meeting took place on 20 November 2022. At the meeting, Mr Boulton invited the Claimant to submit a grievance to him, and also informed the Claimant that he had been allocated to a new pod CSM, who had recently been promoted to that role.
52. The Claimant has alleged that the Respondent failed to provide him with an adequate mean of raising his concerns. We find that between September and 20 November 2022 the Respondent did fail to do this, given the lack of clarity around the Claimant's line management structure and lack of any alternative provision to

discuss his concerns. It is striking that the Claimant had to notify ACAS in order to have an informal conversation with a manager about issues concerning his pay and safety at work.

### ***The Claimant's grievance***

53. On 23 November 2022, the Claimant submitted a grievance to Mr Boulton. In his grievance, the Claimant complained about his salary, about the locker search and being investigated in relation to his colleague's grievance, and about the July 2022 incident and a further example of a customer who had been allowed to remain on the gaming floor who in the Claimant's view had presented risk. He suggested that if a female colleague had been assaulted this would have been taken more seriously and alleged that this amounted to discrimination and double standards.
54. Ms Jaklova was the CSM appointed to investigate the Claimant's grievance, with support from Miss Shiyani as HRBP.
55. On 29 November 2022, ACAS issued the Claimant with an early conciliation certificate. The Claimant was aware he had a month until 29 December 2022 to submit an employment tribunal claim, should he decide to do so.
56. On 30 November 2022, Ms Jaklova sent the Claimant an invitation to a grievance meeting on 12 December 2022. The Claimant sent an email in response saying he wanted things to move a lot faster, with a meeting in the next week or so. He wrote:

**“You need to understand that I have enough to take Aspers to a tribunal and there is a deadline date for that. I'm still an employee which means that Aspers has the chance to settle this fast and quietly. The entire process like meetings, internal investigation, any agreements and paperwork need to be done before Christmas. If we don't get to an understanding by then I will resign and take Aspers to tribunal and then they will decide who is right and wrong. Furthermore for me is getting extremely difficult to work the night shift and this need to be addressed as soon as possible, thanks.”**
57. Ms Jaklova forwarded that email to Miss Shiyani and Ms Raznauskaite. She was unable to bring the date of the grievance meeting forward because she was on annual leave in early December. The Respondent did not take any steps in respect of the Claimant's shift pattern in the interim period.
58. The grievance meeting took place on 12 December 2022. During the meeting, the Claimant outlined the complaints he had referred to in his grievance letter. He agreed when being cross-examined that he had been given a fair opportunity to do so. Ms Jaklova asked him if he had approached the Head of Gaming or the General Manager to ask for a salary increase. The Claimant replied that he had not had the chance to speak to Ms Raznauskaite, his line managers were changing and he did not know who to contact. In relation to the July 2022 incident, he said that he believed that because he was white and male it had just been brushed off. He said that he found these types of confrontations stressful and that he had asked for day shifts to get away from them. Ms Jaklova explained that there was a specific flexible working request policy that would have to be followed.

59. At the end of the meeting, the Claimant said he wanted to have his grievance dealt with by Christmas. He said that otherwise he would resign. He had in mind that he wanted to know the outcome before the deadline to submit a Tribunal claim. Ms Jaklova replied that she would try to get an outcome to him within 14 days and if for any reason it was not possible she would let him know that and the reasons why not. The Respondent's written grievance procedure says, "*the Grievance Officer will advise the individual of the decision in writing within 7 – 20 calendar days of the meeting, wherever practicable*".
60. Following the meeting, in accordance with Ms Jaklova's advice, on 13 December 2022, the Claimant submitted a flexible working request which said he wanted to be allocated shifts that finished before 10pm.
61. In the event, Ms Jaklova did not send the Claimant the grievance outcome until 2 February 2023. By that time, the Claimant had on 27 December 2022 given notice of resignation which had taken effect on 15 January 2023. The Respondent has not suggested and we have not seen any evidence that Ms Jaklova communicated with the Claimant to tell him that the outcome would take longer than 14 days. Miss Shiyan's evidence was that the time taken to send the grievance outcome was due to holidays and absences of other individuals from whom Ms Jaklova needed to seek information.

### ***The Claimant's resignation***

62. As mentioned above, on 27 December 2022, the Claimant gave notice of resignation. He did so by email stating that,
- "This is my 2 week notice of resignation. I would like my last working day to be 15th of January. When you get chance please just reply back so I know you received my email, thanks."*
63. The Tribunal finds that the trigger for the Claimant resigning was that he had not received a grievance outcome by the time his deadline to submit a Tribunal claim was approaching, and a belief that he had to resign before the deadline in order to pursue an unfair dismissal claim in the Employment Tribunal. We find that the reason why the Claimant decided to leave his job with the Respondent was a cumulative combination of the following five matters:
- 63.1. The locker search;
- 63.2. Being investigated in colleague's grievance and not told of the outcome;
- 63.3. The incident with client who had thrown a chip at him in July 2022 and his consequent dissatisfaction with working night shifts;
- 63.4. Feeling his pay was not fair; and
- 63.5. Frustration at the time taken to get a conversation with management about his concerns, to the extent that an ACAS notification had been needed to get a response, and still not having got the grievance outcome by late December.

### ***Events during the Claimant's notice period***

64. After the Claimant had put in his notice, Ms Jaklova arranged to meet him to discuss his flexible working request on 29 December 2022. During this meeting, she followed pro forma questions to discuss his request, but as the Claimant pointed out in the meeting, the exercise was to little purpose as he was shortly going to leave anyway. For that reason, the Claimant's request was not in the event decided upon.
65. During the 29 December 2022 meeting, the Claimant asked Ms Jaklova what had happened in respect of his long service award. The Respondent's practice is to recognise 5 years' service with a congratulation certificate, new name badge and a £100 gift card. The Claimant had expected to receive these in 2021. However, by oversight this was not done. The Claimant received his long service award during the week before his employment terminated on 15 January 2023.

### ***The grievance outcome***

66. The grievance outcome letter, dated 19 January 2023, was sent to the Claimant by email on 2 February 2023. Ms Jaklova did not uphold the Claimant's complaints save in the single respect that he ought to have been informed that no further action would be taken against him in relation to his colleague's grievance.

## **The law in relation to liability issues**

### ***Constructive dismissal and fairness of dismissal***

67. Section 94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer. Section 95(1) ERA provides that he is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct ('a constructive dismissal').
68. If there is a constructive dismissal, s.98(1) ERA provides that it is for the employer to show that it was for one of the permissible reasons in s.98(2) ERA, or some other substantial reason. If it was, s.98(4) ERA requires the Tribunal to determine whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.
69. The employee must show that there has been a repudiatory breach of contract by the employer: a breach so serious that he was entitled to regard himself as discharged from his obligations under the contract. The Claimant relies primarily on a cumulative breach of the implied term of trust and confidence. The applicable principles were reviewed by the Court of Appeal in *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 (at §14 onwards):

14. 'The following basic propositions of law can be derived from the authorities:

1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761.

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship (emphasis added).

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:

"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."

15. The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v W. M. Car Services (Peterborough) Ltd*. [1981] ICR 666.) This is the "last straw" situation."

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "*de minimis non curat lex*") is of general application.'

70. The Court of Appeal gave further guidance in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 (at §55):

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

71. In determining whether there has been a breach of the implied term, the question is not whether the employee has subjectively lost confidence in the employer but whether, viewed objectively, the employer's conduct was likely to destroy, or seriously damage, the trust and confidence which an employee is entitled to have in his employer: *Nottinghamshire County Council v Meikle* [2005] 1 ICR 1 (at §29).
72. It is important to apply both limbs of the test. Conduct which is likely to destroy/seriously damage trust and confidence is not in breach of contract if there is 'reasonable and proper cause' for it: *Hilton v Shiner Ltd Builders Merchants* [2001] IRLR 727 (at §22- 23).
73. Where there are mixed motives for the resignation, the Tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation; it need not be the only, or even the predominant, cause: *Meikle* (at §29).
74. The employee must not delay his resignation too long, or do anything else which indicates affirmation of the contract: *W.E. Cox Toner (International) Ltd. v Crook* [1981] ICR 823 (at §828-829).

### **Direct discrimination**

75. Section 13(1) of the Equality Act 2010 ('EqA') provides that:

**A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**
76. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.
77. The appellate courts have made clear that it is open to Tribunals to address both stages by considering a single question: the 'reason why' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see, for example, the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at §30.

78. It is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan v London Regional Transport* [1999] ICR 877 at §886).
79. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010 at §36, the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question as to their reasons for acting as they did; the test is subjective (*Nagarajan v London Regional Transport* [2000] ICR 501, *per* Lord Nicholls at 511). Lord Nicholls considered the distinction between the 'reason why' question from the ordinary test of causation in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at §29:
- 'Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach...The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'**
80. The Court of Appeal in *Coyne v Home Office* [2000] ICR 1443 makes clear that the employer will not be guilty of discrimination if an inadequate response to a grievance was demonstrably unrelated to the relevant protected characteristic of the Claimant. In a case where an employee who raises a grievance about (say) sex discrimination which is then, for reasons unrelated to his or her gender, mishandled, the mishandling is not discriminatory simply because the grievance concerned discrimination. It is not a 'but for' test; the Tribunal must scrutinise the motivation of the alleged discriminator (*Dunn v Secretary of State for Justice* [2019] IRLR 298 CA, *per* Underhill LJ at §44).
81. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if 'a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment' (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at §35). An unjustified sense of grievance does not fall into that category.
82. In relation to his discrimination claims, the Claimant is required to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an act of unlawful discrimination (*Royal Mail Group v Efofi* [2021] ICR 1263). If he does so, the burden of proof shifts to the Respondent to prove that it has not committed an act of unlawful discrimination. The burden of proof provisions are contained in s.136(1)-(3) EqA:
- (1) This section applies to any proceedings relating to a contravention of this Act.  
(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.**



83. A mere difference of treatment is not enough to shift the burden of proof, something more is required: *Madarassy v Nomura International plc* [2007] IRLR 246 per Mummery LJ at §56:

**‘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 a Tribunal ‘could conclude’ that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.’**

84. However, as Sedley LJ observed in *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279 at §19:

**‘the “more” which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.’**

85. In *Hewage v Grampian Health Board* [2012] ICR 1054 at §32, the Supreme Court held that 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 the other.

### ***Time limits in discrimination cases***

86. Section 123(1)(a) EqA provides that a claim of discrimination must be brought within three months, starting with the date of the act (or omission) to which the complaint relates, as extended for ACAS early conciliation. Section 123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. In *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation, or a continuing state of affairs, in which an employee was treated in a discriminatory manner.

## **Conclusions on liability**

### ***Constructive unfair dismissal***

87. In relation to the 12 factual allegations made in the Claimant’s constructive unfair dismissal claim, the Tribunal has found as follows:
- 87.1. The Respondent did fail to recognise the 5-year service of the Claimant in 2021 in the usual way by a congratulation certificate, new name badge and a £100 gift card, which were belatedly sent to the Claimant in the week before his employment ended.
- 87.2. In or around May 2022, the Respondent did carry out a search of the Claimant’s locker. On the available evidence we could not find the Respondent had cause to do so, but no cause was needed as the Respondent was entitled to carry out searches at any time.
- 87.3. The Respondent investigated the Claimant in May 2022 in respect of a grievance raised against him and did fail to let him know the outcome of

that grievance investigation in a timely way. However, the reason for this was oversight and not to intimidate the Claimant.

- 87.4. On the facts known to the managers at the time, the Respondent did not:
- 87.4.1. Fail to protect the Claimant in July 2022 from a customer who should not have been allowed to remain in the casino by reason of his behaviour;
  - 87.4.2. Fail to protect the Claimant from that same customer who in July 2022 threw a gaming chip at the claimant causing injury to the right hand of the Claimant;
  - 87.4.3. Fail to respond to the incident when the Claimant was injured at all or in an appropriate manner; or
  - 87.4.4. Fail to protect the Claimant from the unreasonable and aggressive behaviour of customers generally.
- 87.5. The Respondent did fail to provide the Claimant with an adequate means of raising his concerns. This failure occurred from September to 18 November 2022.
- 87.6. The Claimant says the Respondent failed to reasonably investigate his grievance and took too long to deal with it. We find that the Respondent did investigate and the time taken to provide an outcome was not inordinately long. However, the Respondent did take longer to provide the Claimant with a grievance outcome than Ms Jaklova told the Claimant she would try to achieve, and longer than the usual period its own policy provided for. Ms Jaklova did not communicate with the Claimant about the delay as she had told him she would.
- 87.7. In respect of the pay allegations we have found that:
- 87.7.1. The Respondent paid the Claimant on the appropriate salary scale. The Respondent did pay the Claimant lower on the salary scale than newly recruited croupiers, for reasons connected with market forces.
  - 87.7.2. After 2021, the absence of a performance related pay mechanism would reasonably have been felt by the Claimant and other long-serving staff to have a harsh effect, but he was not treated differently from others in the application of the Respondent's pay policy.
- 87.8. In respect of the Claimant's allegation that the Respondent failed to deal with his oral and written requests from July 2022 onwards to alter his working hours and in relation to his concerns about his salary, we repeat our finding that there was a failure to provide the Claimant with a means to raise concerns between September and 20 November 2022. The Claimant made a formal flexible working request between 13 December 2022, which had not been addressed before he gave notice of resignation on 27 December 2022. We do not consider that timescale to be unreasonable.

88. In order to decide whether such factual allegations as we have found to have occurred breached the implied term of trust and confidence, we need to consider whether the Respondent had reasonable and proper cause for those actions or omissions, and if not whether the Respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent.
89. We considered each limb of the legal test in turn. In relation to the 'reasonable and proper cause' limb, we concluded in respect of the allegations we have upheld on the facts that:
- 89.1. The Respondent had reasonable and proper cause to investigate the Claimant's colleague's grievance. She had made serious allegations and specifically named him among others. In those circumstances, the Respondent had to interview him. However, there was no justification for failing to tell him that he was no longer under investigation, and the Respondent has not sought to advance one.
- 89.2. Insofar as we have found that the Claimant was justified in feeling the application of the Respondent's pay policy had a harsh effect on him, we find that the Respondent had reasonable and proper cause for making market-related pay decisions for later recruits and for withdrawing the PES system due to a perception that it was too subjective.
- 89.3. We cannot see that there was any reasonable or proper cause for the Respondent to fail to provide the Claimant with a means to raise concerns between September and 20 November 2022. While the staff turnover issues affecting his pod CSM may have been unavoidable, the Claimant could easily have been directed to a different CSM, directly to Ms Raznauskaite or to HR instead.
- 89.4. In relation to the timing of the grievance outcome, we accept that over the Christmas period it was more difficult to speak to the relevant people and this amounted to reasonable and proper cause for the investigation taking longer than Ms Jaklova had told the Claimant she would try to achieve and the usual period which the grievance policy provided for. However, we can see no good reason why Ms Jaklova did not communicate with the Claimant about this in the interim period.
- 89.5. There was no reasonable or proper cause that we have been made aware of for delaying the Claimant's long service award.
90. We then went on to address, in respect of the allegations we have upheld factually for which the Respondent had no reasonable and proper cause, did the Respondent behave in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent? We have concluded that this test is satisfied. The long-service award issue we considered to be of very minor importance. However, the remaining allegations are cumulatively of such a serious nature that we find the Claimant was entitled to resign in response. The Claimant was accused of serious misconduct and then not told he was no longer under suspicion. He then wished to raise important concerns relating to issues of fair pay and safety in the workplace but was unable to get anyone at his employer to

discuss his concerns with him until he took the serious step of making an ACAS notification. While the lack of communication around the grievance outcome would not in itself amount to a breach, it contributed to the overall picture of lack of engagement with the Claimant which understandably caused him to become severely frustrated and lose trust and confidence in the Respondent.

91. A breach of trust and confidence is by its nature a fundamental breach of contract.
92. We do not need to go on to decide if there was also a breach of the health and safety term in the Claimant's contract but given our factual findings that the Respondent had not failed to protect the Claimant on the gaming floor, we would not have found that such a breach occurred.
93. Was any fundamental breach of contract a reason for the Claimant's resignation? We have found that the Claimant's frustration at the time taken to get a conversation with management about his concerns, to the extent that an ACAS notification had been required to elicit a response, and still not having got the grievance outcome by the end of December, were all part of his reason for giving notice of resignation. It follows that he did resign in part in response to the Respondent's breach of contract and we have no hesitation in concluding that the breach of contract was an effective cause.
94. The Claimant did not affirm the contract before resigning, by delay or otherwise. To the contrary, he repeatedly tried to tell the Respondent that he was unhappy and in his email of 30 November 2022 and in the meeting of 12 December 2022 he said that he would resign if he had not received an outcome to his grievance by Christmas.
95. We therefore conclude that the Claimant was constructively dismissed. The Respondent (correctly in the Tribunal's view) does not contend that a constructive dismissal could be a fair dismissal on the facts of this case. It follows that the Claimant's dismissal was unfair.

### ***Direct discrimination***

96. Other than the locker search and long service award allegations, the Claimant relies on the same factual matters in respect of his discrimination complaints and we refer to the factual findings set out at paragraph 87 above. The list of issues asks us to decide in relation to such factual allegations as we have found to have occurred, did the Claimant reasonably see the treatment as a detriment? This is a low bar and we conclude that all the matters found to have occurred were detrimental in the sense that the Claimant reasonably viewed them as being to his disadvantage.
97. The crucial question, in relation to the factual allegations found to have occurred, is what was the reason for the treatment? This involves consideration of the following tests:
  - 97.1. Has the Claimant proven facts from which the Tribunal could conclude that in any of those respects the Claimant was treated less favourably than someone in the same material circumstances of a different race and/or sex was or would have been treated? The Claimant says he was treated worse than the black female employee who complained about him in May 2022 and a male employee of a different ethnicity who was less qualified but

paid more than he was during his employment. The Claimant also relies on a hypothetical comparison.

- 97.2. Has the Claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of his race and / or his sex?
- 97.3. If so, has the Respondent shown that there was no less favourable treatment because of sex and / or race?
98. Taking each allegation that we have upheld factually in turn:
  - 98.1. The Respondent investigated the Claimant in May 2022 in respect of a grievance raised against him. We are content that the reason why the Claimant was investigated was because the complainant had made a serious allegation against him, among others, which the Respondent was obliged to investigate. There is no evidence to suggest a person of a different sex or race would not have been so investigated and we accept Miss Shiyani's evidence that one of the other interviewees was female. The Respondent also failed to let him know the outcome of that grievance investigation in a timely way. However, we have made a factual finding that the reason for this was oversight and not to intimidate the Claimant. There is no basis on which we could find that he would have been kept properly informed had he been a woman, or of a different race, and we conclude that the reason for the treatment had nothing to do with race or sex.
  - 98.2. We have found that the Respondent did not fail to protect the Claimant on the gaming floor in respect of the July 2022 incident or more generally and therefore this allegation falls away on the facts. The Claimant did allege that the Respondent took more care of women dealers because they were more likely to be subject to customer abuse; we heard no evidence of any particular instances of this and note that a responsive application of the Respondent's safety protocols to differing levels of threat as they arose, if this did occur, would be unlikely to amount to unlawful discrimination.
  - 98.3. The Respondent did fail to provide the Claimant with an adequate means of raising his concerns from September to 18 November 2022. As a result he was unable to have his concerns about pay, safety or working hours addressed. However, we have no evidential basis to suggest that a woman or a person of a different race in materially similar circumstances would have been able to raise concerns more easily, and there is no material from which we could draw an inference that the reason for the treatment was the Claimant's sex or race.
  - 98.4. We have found that the reason for the time taken to complete the grievance outcome was the availability of people Ms Jakuta needed to speak to over the Christmas period. This had nothing to do with the Claimant's sex or race. We have not had any evidence as to Ms Jakuta's reasons for failing to communicate with the Claimant during the intervening period. However, neither have we heard any evidence from which we could conclude that a hypothetical comparator would have been treated

differently or that the reason for the treatment had anything to do with race or sex.

- 98.5. The Respondent did pay the Claimant lower on the salary scale than newly recruited croupiers. We have found that this was for reasons connected with market forces after the pandemic. This explains the difference in the Claimant's pay in comparison with his colleague of a different race who was recruited in 2021. We conclude that it was not because of the Claimant's protected characteristics.
- 98.6. We have also found that after 2021 the absence of a performance related pay mechanism would reasonably have been felt by the Claimant to be harsh. However, the Claimant was not treated differently from others in the application of the Respondent's pay policy and there were other long-serving staff in the same situation. We do not have an evidential basis to find that there was a difference in treatment and we conclude that the application of the Respondent's pay policy to the Claimant was not because of sex or race.
- 98.7. We have found that the Respondent did not deal with the Claimant's flexible working request between 13 December 2022 and his resignation on 27 December 2022, but that timescale was not unreasonable. For completeness, we add that there is no basis for finding a woman or a person of a different race would have received an earlier outcome or that the time taken had anything to do with race or sex.
99. We have found that the Claimant was constructively dismissed, but none of the matters giving rise to the breach of trust and confidence were done because of race or sex. Therefore, the dismissal did not amount to an act of discrimination.

## **Remedy**

100. The Claimant does not seek reinstatement or reengagement, but solely compensation.
101. The only issue between the parties in relation to compensation is mitigation. The Claimant seeks compensation for the six-months' loss of earnings which occurred before he found new employment. The Respondent contends that the Claimant ought to have applied for casino jobs earlier and his compensation should be reduced to reflect this failure. The questions for the Tribunal to determine are:
- 101.1. Whether the Claimant acted unreasonably in failing to take reasonable steps to mitigate his loss of earnings by applying for casino jobs earlier; and
- 101.2. If so, what difference would it have made to the Claimant's losses if he had taken such steps?

## ***Findings of fact relevant to remedy***

102. The parties agreed that the Claimant's gross basic pay was £487 per week, in addition to which he received on average £80 per week in tips. His total weekly gross basic pay was £567. His net pay, including basic pay and tips, was £464

per week. The Respondent paid £14.60 per week in employer pension contributions in respect of the Claimant.

103. After the Claimant left the Respondent's employment, because of the experiences he had had leading up to his resignation, his strong wish was to find alternative employment that was not in a casino. He had successfully studied for a Level 3 ICT diploma whilst working for the Respondent and his preference was to find an entry level job in IT or, ideally, an IT apprenticeship that would allow him to study towards a degree. He was prepared to undertake short-term or casual work in the meantime to provide an income while applying for IT jobs, so long as it did not involve working in a casino.
104. The Claimant began applying for jobs in early February 2023. He applied for two IT apprenticeships but found that these were usually advertised at the beginning of the year and he had missed the application window for most of them. He applied for several junior IT support and technician roles over the period February to June 2023. He got as far as the interview stage for at least one of these roles but unfortunately was not successful.
105. In the meantime the Claimant also applied for a significant number of unskilled roles that he thought might provide an income while he continued to for work in the IT sector, including warehouse operative, retail and meter-reading jobs. He was unsuccessful in all his applications, finding that the job market for unskilled workers was fiercely competitive.
106. By June 2023, the Claimant was unhappy being unemployed and experiencing financial pressures. He was receiving Job Seeker's Allowance but had no other income. Against his strong preference, he decided that he would have to apply to casinos for work. However, he did not apply for any roles as a licensed croupier in live table gaming, given how stressful he had found this type of work at the Respondent. He found a casino role as a Deck Poker Dealer, which did not involve live gaming, for which he successfully applied.
107. The Claimant's new role started on 13 July 2023. He had by then spent 26 weeks out of work. When he started the new role he was on an equivalent salary as he had been with the Respondent. Since then, he has received a pay rise and his salary is higher than it was in his old role.

### ***The law on remedy for unfair dismissal and mitigation of loss***

108. Section 118 ERA provides that an award of compensation for unfair dismissal shall comprise a basic award and a compensatory award.
109. A basic award is calculated in accordance with the formula at s.119 ERA and is equivalent to a statutory redundancy award. Its purpose is to compensate the Claimant for the loss of employment.
110. The purpose of a compensatory award is to compensate the Claimant for financial losses including loss of earnings and (if relevant) pension losses. Section 123(1) ERA provides that the compensatory award shall be:

**...such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in**

**consequence of the dismissal insofar as that loss is attributable to action taken by the employer.**

111. Under s.124(4):

**In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law ...**

112. The duty to mitigate loss referred to in that subsection means the Claimant is expected to take reasonable steps to minimise the losses suffered because of the unfair dismissal. The burden of proof lies with the Respondent to show that the Claimant has unreasonably failed to take steps he ought to have taken to mitigate his losses: *Wright v Silverline Car Caledonia Ltd* UKEATS/0008/16.

### **Conclusions on remedy**

113. The parties were content for the Tribunal to calculate the Claimant's basic award on the basis of the agreed figures they had supplied. We calculate the basic award to be **£3,402**, being one week's gross pay of £567 in respect of each of the Claimant's six complete years of employment.

114. In respect of the compensatory award, the Claimant claims compensation for loss of earnings and loss of pension contributions over the 26-week period he was out of work and £500 in respect of his loss of statutory rights.

115. With respect to the period of loss for which the Claimant should be compensated and the issue of mitigation:

115.1. The Respondent submits that given the Claimant had at least 10 years' experience in casino work, it was unreasonable of him not to apply for jobs using that skillset until June 2023. Although there was no evidence of specific jobs that might have been available had he focussed his job-seeking in this area earlier, Mr Ramsbottom suggests that the fact it only took the Claimant around a month to secure a casino role once he did start looking, was a basis for inferring that the Claimant could have been just as successful in the earlier part of the period when he was unemployed.

115.2. The Claimant argues that it was reasonable for him to initially seek an IT role given his qualification in this area and desire to build a new career path. He says he also acted reasonably by looking widely for any kind of job he could do in the meantime. He submits that it was reasonable for him to want to avoid similar employment after being unfairly dismissed by Respondent. Even though he was now working in a casino, he was no longer a live gaming croupier, because of the impact of his difficult experiences with the Respondent.

116. The Tribunal considers that it was reasonable for the Claimant to initially seek employment in his preferred sector of IT, a sensible career change building on his qualification in that area. As time went on and it became clear that the jobs market for both entry-level IT roles and casual unskilled jobs was so competitive that the Claimant was not able to find a job within the short to medium term, it became more imperative for the Claimant to look again at casino roles, despite



his reluctance to do so. The Claimant might have reached that decision sooner than June 2023. We accept Mr Ramsbottom's submission that the Claimant's success in obtaining his current role relatively quickly, shows he probably would have been able to find a casino role earlier had he been looking. However, we do not find it was *unreasonable* for the Claimant to have focussed on non-casino vacancies until June 2023. He had genuine reasons for wanting to avoid similar experiences in the future to that he had had while in the Respondent's employment. The period of approximately five months spent looking for alternative types of roles was not so long as to have been unreasonable. We therefore make no reduction to his compensatory award in respect of failure to mitigate.

117. Over the period of 26 weeks when the Claimant was out of work, he lost **£12,064** in net pay (26 x £464) and **£379.60** in employer pension contributions (26 x £14.60).
118. The Respondent does not dispute that the Claimant should recover **£500** in respect of his loss of statutory rights and the Tribunal considers this proper to award.
119. Neither the Claimant nor the Respondent, having been given the opportunity to do so, sought any adjustments to the compensatory award in respect of ACAS compliance, contributory fault, or for any other reason. There is no basis for making any deduction to reflect the chance of a fair dismissal (*Polkey v AE Dayton Services Ltd* [1987] IRLR 50).
120. This gives a total compensatory award of **£12,943.60** (£12,064 + £379.60 + £500). Together with the basic award of £3,402.00, this makes the total judgment sum **£16,345.60**.

### ***Recoupment***

121. The Claimant received Job Seeker's Allowance during the period he was out of work. These sums are not set off against the compensatory award because they are susceptible to recoupment by HMRC. As discussed during the hearing, where the Claimant has received state benefits which are potentially recoupable from a Tribunal award by the Secretary of State for Work and Pensions, the Tribunal is obliged under reg.4(3) of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 to record the following information:
  - 121.1. the monetary award;
  - 121.2. the amount of the prescribed element, if any;
  - 121.3. the dates of the period to which the prescribed element is attributable;
  - 121.4. the amount, if any, by which the monetary award exceeds the prescribed element.
122. The prescribed element for the purposes of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 is **£12,064.00**. This represents the Claimant's loss of net earnings from the date of his dismissal on 15 January 2023 until he started his new job on 13 July 2023.

Payment of this part of the award is deferred to allow the Secretary of State time to serve a recoupment notice or notify the Respondent that no recoupment notice will be served.

123. The prescribed period is the period over which the Claimant received relevant benefits, namely from 15 January 2023 to 13 July 2023.
124. The total amount of the monetary award is, as set out above, **£16,345.60**.
125. The balance of the award is **£4,281.60**, being the difference between the total award and the prescribed element. This part of the award is immediately payable by the Respondent to the Claimant.
126. The parties' attention is drawn to the Annex to this judgment which explains the effect of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996.

**Employment Judge Barrett**  
**Date: 8 December 2023**