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EMPLOYMENT TRIBUNALS

Claimant

Mr C Bereanu

Respondents

AND

Qoot BC1 UK Ltd

Heard at: London Central

On: 22 February 2019

Before: Employment Judge Goodman

Members: Mr D Olulode
Mr S Ferns

Representation

For the Claimant: In person

For the Respondent: Ms N Owen, of Counsel

JUDGMENT

- 1.The application to postpone the hearing is refused.
- 2.The application to reconsider the order extending time to serve a response is refused.
- 3.No order on the respondent's application to strike out the claim.
- 4.The claims for unlawful deductions from wages and failure to lay holiday fail.
- 5.The unfair dismissal claims fail.
- 6.The respondent did not discriminate against the claimant because of national origin.
- 7.No order on the respondent's application for costs.

REASONS

1. This is the first day of a hearing, listed for three days, of claims for race discrimination, unfair dismissal, failure to pay holiday pay, and unlawful deductions from wages.

2. Here is a short account of the facts of the case. The Respondent runs a restaurant, and the Claimant was hired as a kitchen porter, starting on 16 April 2018. He was provided with a statement of employment particulars, and he was to be paid at the national minimum wage per hour. He was supplied with a pay slip when paid. After receiving the first one, he objected that, although the printed form provided for deductions for tax or national insurance, no such deductions had been made. He filed a grievance about this, and he was not satisfied with the answer. After three weeks he stopped coming to work, and eventually, six weeks after his start date, his employment was terminated.

3. The claims are nationality discrimination, on the basis that he is a migrant worker, and he has been underpaid, alternatively, that no deductions were made for tax and national insurance, unfair dismissal for making a protected disclosure about accounting irregularities, illegal practice and criminal offences, and underpayment, and that there is “avoidance of tax, fraud, black money and possible money laundering”; in the alternative, this is treated as a claim of unfair dismissal for asserting a statutory right. He maintains that he was underpaid by reference to the national minimum wage.

Matters Decided Today

4. The claimant had applied for a postponement, because he did not accept an earlier decision at a preliminary hearing in December 2018 to accept a response presented out of time, and wanted to appeal. That was treated as an application to reconsider, and as an application to postpone.

5. Both were refused, for reasons given in tribunal and recorded. The claimant had in the meantime left the hearing after making his representation. The respondent then applied to strike out the claim. The tribunal refused the application, and instead decided to hear the claims on the merits with the evidence available.

Claim History to Date – Response and Case Management

6. The claims were presented to the Tribunal on 20 July 2018, and on the 17 September 2018 were sent to the Respondent inviting them to respond. At the same time, as is standard practice in London Central Employment Tribunal, a letter was sent to the parties notifying a final hearing on 22, 25 and 26 February 2019, together with case management directions, and a preliminary hearing for case management on 28 November. The directions were that no later than four weeks from 17 September the Claimant should set out in writing the remedy, with evidence and documentation supporting what was claimed and how it was calculated. Then within ten weeks the parties were to send each other documents, two weeks after that the Respondent was to prepare a hearing bundle, and fifteen weeks from the date of the letter the parties were to exchange witness statements.

7. The claim was brought against two Respondents. One is agreed to be the employer, Qoot BC1 UK Ltd ('Qoot'). The other is Fourth Limited ('Fourth'), the payroll company which supplied payslips to the Claimant. By rule 16 the respondents were to file responses by 15 October. Fourth wrote explaining they

were not the employer. An employment judge directed Fourth to file an ET3 to say so, and time to do so was extended to 22 October. They complied. The first respondent, Qoot, did nothing until solicitor wrote on their behalf on 26 November seeking a postponement of the preliminary hearing, and saying they would apply for leave to respond out of time; on 27 November they did so and filed a draft response. The preliminary hearing was postponed to 12 December so as to hear the application on notice. At that hearing the Claimant was present and both Respondents appeared by Counsel. Employment Judge Hemmings identified the issues and recited the facts. He heard both sides, and then granted the application by the First Respondent to file a response out of time. He also dismissed the claim against the Second Respondent, because no claims against them had been identified for which the Tribunal had jurisdiction, as either they were not the employer, alternatively, any claim had no reasonable prospect of success.

8. The claimant wrote on 17 December explaining in detail why he considered the decision to allow an extension of time was wrong, and on 20 December asked for written reasons for the decision. The reasons were signed 8 February and sent to the parties on 20 February 2019. I cannot tell from the file whether Judge Hemmings saw the letter of 17 December.

9. At the 12 December hearing Judge Hemmings next reviewed the case management orders and extended the time for exchange of documents to 21 December, for a hearing bundle to 11 January, and for exchange of statements to 1 February. No mention is made of the schedule of loss in that order, but it is not in dispute that the Claimant had not and has not filed a schedule of loss.

10. The Claimant has done nothing to comply with any of these orders.

11. The respondents wrote to him about compliance with orders on 21 December, 3 January and 24 January. On 5 February the respondent said if he did not make contact they would apply to strike out the claim, and it did so on 7 February, stating they were reluctant to incur the costs of briefing Counsel for a three-day hearing if the Claimant was not actively engaged in proceedings. On 15 February, Regional Employment Judge Potter wrote to the Claimant notifying him that the Tribunal was considering striking out his claim on the basis that it was not actively pursued, and he was asked to respond by the 22 February.

12. The Claimant on receipt sought a postponement of today's hearing on the basis that he objected to the extension of time for the Respondent, and the discharge of the Second Respondent for the proceedings, and he wished to appeal. His letter is not specific, and it is possible to read it as an application for reconsideration. The Respondent objected to the postponement request, saying they had emailed him repeatedly about compliance, and he could not maintain he was unaware of the directions as he had been present when they were made. The Claimant was told that his application to postpone was not granted because the Respondent objected strongly to it being made, and the case was to proceed today, when he could renew his application.

13. This morning the panel was ready, and the Claimant attended. He had not brought with him a witness statement or a schedule of loss. The Respondent has brought a witness, with a witness statement and bundle, which had been supplied to the Claimant a few days ago.

14. The Claimant spoke to the Tribunal in dialogue for half an hour. He wished to renew his application to postpone, as he wished to appeal Judge Hemmings' decision to allow the First Respondent an extension of time to file its response. Asked about compliance with the orders made in September, he said that he did not consider that the orders had been properly made, because it was not right to arrange a date for a hearing when there was no Respondent in the action, this was not normal procedure. It was pointed out to him that even if the Respondent was struck out under rule 21 (failure to respond to a claim), the Tribunal would still need to know what his claim was for, particularly as at the core of this claim is a dispute about whether he was underpaid or subjected to unlawful deductions from his pay. He was not able to explain why he had not prepared a schedule of loss, and nor did he understand that the Tribunal needed a witness to decide his case. He repeated his complaint that it was: "weird" to set a hearing date without knowing "who was in the process", that is, before a response was filed, that the Respondent was clearly out of time to file its response, and that he had the right to appeal that decision. As to explaining what his case was for, and why there was no schedule of loss, his response was "I don't want to talk about it" and "you are trying to shut me out"; in reply to needing a schedule of loss even if the respondent was excluded, he said: "you are trying to drag me into it". He complained that Judge Hemmings' decision misrepresented what he had said, his decision was "false", and he did not wish the same thing to be done again today. He stood up to go, and was invited to stay, and he then remained standing for some time, continuing his representation, until eventually he said that he wished to leave, and left, without staying to hear the Respondent, or for the Tribunal to make a decision. He said, "I don't want to stay and have people say what I want... I did not consider that this hearing was part of the process". He was warned that there was an outstanding application by the respondent to strike out, which might be heard in his absence if he left, but he did, at around 10:30am.

15. The Tribunal then heard from the Respondent in respect of the application to postpone, and invited to respond to the claimant's 17 December document, deemed to be an application to reconsider Judge Hemmings' Judgment. They also made an application to strike out.

16. The Respondent argues that on an application to postpone made within seven days of the hearing under Rule 30(a) the order can only be made either where all the parties agree, or it was the fault of another party, which might include the fault of the Tribunal, or where there are exceptional circumstances. The Respondent argues that until yesterday the Claimant had expressed no concern about the Tribunal timetable, and that he could have expressed any concern about that either at the hearing on 12 December, or in correspondence with the Respondent, which has written to him often about compliance. While it was 'uncomfortable' that the written orders and reasons of Judge Hemmings were not sent out until this week, it was argued that the Claimant knew what was

required and what he had to do, not least because of the seven letters the Respondent had written to him between the preliminary hearing and today. The Claimant has a live strike out application against him (7 February), and the Claimant has failed to engage with it. It is argued that while the Claimant wants to appeal Judge Hemmings' order extending the Respondent's time to file a response, that decision is not perverse or an error of law, that it was a reasoned decision; in respect of the Second Respondent, there is no doubt that the Tribunal had no jurisdiction. If the hearing is postponed until after an appeal has been considered and decided, even if it is disallowed on the sift, it will be months before the Tribunal can hear this case; in the meantime the Respondent is ready and prepared for a three-day hearing and has briefed counsel and brought its witness.

17. As for the application to reconsider, the Respondent objects that this is an ambush, but argues that there is no reasonable prospect of success of overturning the decision when an Employment Judge has such a wide discretion to decide the point, and it would not be in interest of justice to revoke it, especially when it would leave the respondent unable to defend the claims.

18. On the application to strike out, the Respondent argues that the Claimant was on notice of this and (1) there is substantial noncompliance, in that the Claimant has not complied with any of the orders, whether as made in September, or as modified by Judge Hemmings in December. (2) The Tribunal must consider whether a fair trial is possible or whether some lesser sanction will suffice. (3) The Claimant, it is argued, is intelligent and articulate, both orally and in writing, in putting forward his arguments; he has chosen not to participate. (4) If there is to be a final hearing, the Tribunal and the Respondent have no detail of his claim, in particular how he calculates any shortfall in wages. If the trial was started today despite his non-compliance the Claimant might produce evidence and documents and the Respondent would be ambushed. (5) There is no guarantee that he would engage with the Tribunal or the Respondent if the claim was postponed and relisted: the likelihood is that the Tribunal would be in the same position at a later date, at a point when memories had faded, which would prejudice the Respondent; the claim demands a swift end. The Tribunal was reminded of **Burkitt v James** on default, and inexcusable delay and a substantial risk that there cannot be a fair trial; non-compliance is not excusable if there is no possibility of a fair trial, the ultimate consideration.

19. The Tribunal adjourned to deliberate. Reasons were given orally.

Reconsideration

20. First of all, the Employment Judge has reconsidered Employment Judge Hemmings decision under Rule 70 and 72 and on the basis of the Claimant's objection and application. Rule 70 provides that a Tribunal may reconsider any Judgment where it is necessary in the interest of justice to do so; on reconsideration the decision may be confirmed, varied or revoked and if it is revoked it may be taken again. Under the 2004 rules about reviewing decisions the interests of justice grounds were specified, such as that a party had not had notice of a hearing, or that new evidence had become available which could not have been brought to the first hearing, and other matters of the same kind. The

corresponding 2013 rule sets out a generic interests of justice provision as grounds to reconsider. That was considered by the EAT in **Outasight VB Ltd v Mr L Brown: UKEAT/0253/14/LA**, it was held that the rules had not broadened the scope for reconsideration, and were substantially of the same type as before. Rule 20 provides for extension of time to serve a response to be decided by an employment judge. The claimant must be notified. It can be decided without a hearing. Under rule 5 the tribunal has wide powers to extend or abridge time. All case management decisions must be made having regard to overriding objective to deal with cases justly and fairly having regard to saving costs and expense and using ways proportionate to the complexity of the issues.

21. Is it in the interests of justice to reconsider the decision? The Claimant attended the preliminary hearing at which Judge Hemmings heard both parties and made a decision. The claimant's views were heard and considered. An Employment Judge has a very wide discretion under the rules to allow extensions of time. He must exercise discretion having regard to the overriding objective which is to deal with cases fairly and justly. As expressed in his decision, there were purely administrative reasons (rather than plain defiance) for the Respondent's failure to file a response. They had filed a draft response. The draft response was detailed and set out an arguable case. Having regard to **Blockbuster Entertainment Ltd v James (2006) EWCA Civ 684**, which is to the effect that the aim of the administration of justice is that wherever possible triable cases should be tried, I consider that there is no justification for reconsidering that Judgment. If there is an arguable case, it is in the better interests of justice that the evidence should be heard and the claims decided on their merits. The delay was not so long that it was no longer possible to keep the hearing date or prevent the claimant preparing to meet their case. In his letter of 17 December the claimant said it was unfair that the respondent was allowed to file a response out of time when he would have been barred if his claim had been late. The Claimant has raised no other matter today save to say that he has been misrepresented in the written decision, but he has not said what that misrepresentation was. He is aggrieved that the Respondent had been given some leniency, but there is still a dispute between the parties, and the Tribunal is ready to hear his case and decide the dispute. While it is right that the test of "not reasonably practicable" is applied to claims and if the respondent had had to meet that test it would not probably have met it, there is an asymmetry. If a claimant is late in claiming, a respondent is prejudiced by having to investigate it out of time when the evidence may be stale. The response was late, but not so late as to delay the hearing or prevent the claimant preparing a case to meet their arguments. Again, the strict "not reasonably practicable test" is set by Parliament in the legislation, and what that means has been discussed in case law. There is a power in the rules to extend a time set by the rules- the time to file a response. There is no discretion to extend time to file a claim, as that time limit is in the statute itself. The application for reconsideration is refused.

Application to Postpone Hearing

22. The full panel then considered the application to adjourn. Our view is that the Claimant's behaviour today gives us no confidence that if the hearing was postponed to a future date that he would attend if he had not received the

decision he wanted from this Tribunal or from the EAT. His approach to the issuing of case management directions in September, and his approach to the directions given by Judge Hemmings – failure to comply with any direction because he considers the process of setting a hearing date or even giving directions before a response is filed is just wrong- suggests that he will not be satisfied by anything less than the Respondent being struck out.

23. His failure to provide a schedule of loss, or a witness statement, and his defiance of any suggestion that he might have to provide a schedule of loss or witness statement, even if the Tribunal was hearing his claim without the Respondent because they had been debarred for being late, indicates that there must be considerable concern that if this case was postponed he would still not participate or cooperate. The Respondent would be in the same position then as it is now, of having prepared for a hearing, with the inconvenience and cost of that, and being ready for a hearing which would still not take place.

24. The only reason given for a postponement is that the Claimant wishes to appeal Judge Hemmings' order. That is something he is still able to do, and if it was successful before the EAT then no doubt the matter would be remitted and we would hear his case, provided he had complied with those orders. However, we are concerned that to wait for the EAT will require a wait of several months for the decision on the sift, and if it goes forward to a full hearing, well over a year. That is difficult for a case where the employment lasted only three weeks and where it is even now getting on for a year since it happened. The other factor to take in to account is the prospect of success of the appeal. The appeal must have little reasonable prospect of success, because both sides were heard, reasons were given, and the decision was within the margin of discretion afforded to an Employment Judge in allowing matters to proceed out of time if there appears to be a triable case. Finally, if the claimant did appeal, and succeeded, the EAT would set aside any decision made today and remit the case for rehearing. The tribunal could not have heard fully from both sides, but the only reason the tribunal could not hear the claimant is because he walked out. It is regrettable that, for reasons not known to this panel, the reasons for the decision have only just been sent to the claimant, and had he stayed it may have been possible to consider a short adjournment to enable him to regroup and prepare before proceeding.

25. A postponement is not something that in our view would be a just or fair way of disposing of this claim.

Application to Strike Out

26. We then considered the application to strike out under Rule 37, and as with the other decisions gave oral reasons. We have the power to do so if the claim or response is scandalous or vexatious or has no reasonable prospect of success, or the way he proceedings have been conducted by or on behalf of the Claimant or Respondent has been scandalous, unreasonable or vexatious. We have some concern that the Claimant's approach has been unreasonable, possibly even vexatious, in refusing to comply with orders because he thinks there should be no orders or hearing date until the response is filed. Under rule 37(1)(c) it may be struck out for non-compliance with any of the rules or of an order of the

Tribunal, by (d) if it has not been actively pursued and finally (e) the Tribunal considers its no longer possible to have a fair hearing in respect of the claim or response. Neither of the last two obtains on these facts.

27. We considered carefully whether the right approach to this, given the Claimant's behavior, is to strike out the claim on the basis that despite having had orders since September, confirmed in December, he has taken no steps to comply with them, either because he disagrees with Judge Hemmings decision, or because he does not think it was right to give case management orders before there was a Respondent. That defies the Tribunal's authority, and gives scant hope that he will comply in future. His compliance is necessary for the Tribunal to make a decision, even in the absence of the Respondent, about whether he has been unpaid, or whether he was dismissed for asserting his right to be paid the national minimum wage, or for asserting that there were accounting irregularities, and not least in respect of the race discrimination claim, where there is no information which would suggest that any different treatment of others which may be related to the national origin.

28. The only reason why we draw back from striking out at this stage is because of the delay on the part of the Employment Tribunal in sending him the written order so that he could appeal it. It is quite possible that a party might want to wait to see a written order before deciding what to do next, although it is difficult to explain why they should not write to have the Tribunal orders reset in the meantime, or to apply for postponement much earlier to save the respondent incurring preparation costs. We considered as an alternative imposing an unless order that the Claimant supply a schedule of loss and a witness statement within, say, fourteen days setting out his calculations of how he says he should have been paid, which is at the core of this dispute, and then relisting the claim for a further three day hearing later this year. The difficulty with that is that further delay is likely to prejudice the memory of the Respondent's witnesses, and that we are not confident (for reasons already set out) that the Claimant would in fact comply while he had an outstanding appeal. We concluded that having regard to the overriding objective, which is to deal with cases fairly and justly, that we should prepare to hear the case on its merits today on the basis of the Claimant's information, and the documents. The Tribunal can put what appears to us to be the Claimant's case to the Respondent's witnesses, and then reach a decision on the merits. Given that there is a dispute which needs to be decided, that would be fairer than to strike the claim out altogether. We do so have in regard to the article 6 right of both parties to have a hearing of the dispute within a reasonable time. It is now getting on for a year since the events complained of, the Respondent is ready to defend the claim and is only because of default on the part of the Claimant that he has not complied, and it is by his own choice that he has left the hearing. The overriding objective includes dealing with cases in a way that saves time and expense. The Respondent has been put to expense, while the Claimant has made no effort to substantiate his case, or to participate in this hearing.

Decision on Substantive Claims

29. These are the reasons for our decision on the substantive claim brought by the Claimant listed for hearing today. As with the reasons for the case management decisions, they were given orally in tribunal and recorded. Although there has been no request under rule 62 for written reasons, they are now given in writing so that the absent claimant can understand the outcome.

30. The claim form was presented in July 2018. The claims made were not precisely clear; factually arise from a dispute about the terms on which the Claimant was paid. He was dismissed after a short period of service, which precludes a claim for unfair dismissal unless there are particular circumstances, and there is a claim that he was dismissed from making a protected disclosure, possibly also to be read as a claim that he was dismissed for asserting a statutory right or the national minimum wage, and a claim for race discrimination. There are also claims for unlawful deduction from wages and for failure to pay holiday pay.

Evidence

31. The claim form provided by the Claimant sets out all we know about his case, in his absence and without his witness statement, but fortunately it is very detailed, with a twenty seven paragraph document extending over three pages, setting out a mixture of facts and submissions, but with a great deal of fact.

32. We heard live evidence from **Mr Bal Mahey**, the Respondent's operations manager.

33. There is a small bundle of documents prepared by the Respondent, previously sent to the Claimant, which contains pay slips, emails exchanged, and the contract of employment.

Factual Summary

34. The Claimant was employed by the Respondent at their restaurant "by Chloe" in Covent Garden, as a kitchen porter, on 16 April 2018. The contract of employment provides that he was to be paid £7.85 per hour, the national minimum wage rate, as specified in the contract. He was to work anything between 12 and 48 hours per week according to the rota as notified. It was explained to him that the rota might be flexible but it would not be less than this. Paragraph 5.4 of the contract provides that he agrees to work more than 48 hours if required, and if he wishes to terminate the contract he must give three months' notice. Paragraph 5.6 states that breaks will be unpaid. As to holiday, employees are entitled to 28 days per annum, which is the statutory minimum, and that calculations were based on a twelve week average period. Statutory sick pay is payable in the event of absence, and on return a self certification form must be provided.

35. The Claimant, as we can see from the documents, worked very long hours. During the first week he did over 60 hours in the week, and a similar amount the next week. He was to be paid monthly.

36. The payroll system used an iPad where an employee would enter his employee number, and then enter the date and time that he started his shift, when he took a break, when he returned from the break, and when he finished. This information was sent to a payroll company, Fourth Limited, which then calculated the hours, applied the hourly rate, calculated the tax, and emailed the Claimant a pay slip. Payment was made by bank transfer.

37. After the first week of work the Claimant emailed the Respondent on 23 April: he wanted some details about the employment contract, that is the date of salary payment, when it is displayed, when he would get the weekly timesheets calculations and pay slip and the calculation of overtime, rest breaks and night time and weekends, and what his daily subsistence expenses would be and his travel costs. The general manager at Covent Garden forwarded this to Mr Mahey, asking him to answer the questions, and we are told that Mr Bilinski the general manager then had a conversation with the Claimant, who replied on 27 April, "thank you so much for instructions about clocking in and out". He had already used the e-system, and hopefully the time after midnight was counted too. He then said he wanted a copy of the contract as signed by the Respondent, as he had signed his own copy, and he asked for his roster for the next week.

38. The Claimant says that on receiving his first pay slip on 30 April, he had "some problems with the employers "weird" pay slip wage calculation and payment," he tried to contact them and clarify these issues. He said he was ignored all the time and was told everything was fine, the same calculation was employed to all employees. On 2 May he wrote again, saying he still wanted a copy of the contract signed by the employer. He also wanted to know why he had not been paid until 2 May, when it should have been done nine days before. There was nothing in his contract about overtime, rest breaks, night or weekends and how was that to be calculated, or about expenses. As for the pay slip:

"this so called pay slip it is a false fake one, it is displaying the gross time effective calculation only, I am a PAYE worker legally employed, (a) I would like heaving the real pay slip and calculation including the clear period it is referring to, the holiday, tax, NI, expenses, overtime and bonus. (b) There are as well five hours remained unpaid for this pay slip covering the period 16-25 April 2018."

He said at the moment "the so-called 'calculation' displayed it is below NMW rate which is £7.83 for 2018". He attached the pay slip.

39. The pay slip is in the bundle. It states hours worked 67.7334 @ £7.85, making a total of £531.71, with the same figure for taxable pay and earnings for national insurance. It states his NI number and gives a tax code (1185L M1). What caused concern to the Claimant was that no tax or national insurance were deducted - both were entered as nil. We understand from the employer that the reason for this is that with a new starter there is likely to be some problem with the payroll department - either he will not already have a tax code, so it will have to be worked out, or there may be some other reason. The tribunal adds that as this was just after the start of the tax year there may have been nothing yet due.

40. The next pay slip (there are only two, the claimant having worked from 16 April to 4 May) is dated 31 May 2018, (after the claimant had ceased work) and showed 104.6333 hours, plus one day's holiday, making £1,013.06 for that period, and £1,544.77 for the year to date. There was now a small deduction for tax and a larger deduction for national insurance.

41. On 4 May the Claimant left a handwritten note about rosters, but did not speak to anyone. Later that day he emailed that he was not proposing to come to work next week (7-14 May) because he was suffering from pain and tingling after heavy work, and could not sleep. He was going to see the GP and get some rest. He added that he needed a reply to his earlier document about the contract and pay slip, and repeats the information or allegations he made in the earlier email (see above).

42. He did not thereafter attend for work.

43. On 13 May he followed this up by saying that on 4 May he had left a hand written note and sent an email about a couple of issues unresolved, he had spoken to Bal (Mahey), he had been promised a reply, but he had not had one. He then repeated (by cut and paste presumably) the text of his earlier email on 2 May and asked for an answer.

44. Mr Bal replied on 14 May. He sent his reply to the manager of the shop saying: "send this to Cristian" (the claimant). It said:

"having had many conversations and previous correspondence with you about your salary see below our last and final responses. We no longer believe there is anything further to discuss and conclude the matter from this point. We do not as a company provide any expenses for travel, subsistence or other meal allowance other than what you are already receiving, travel expenses are only provided if you are working in any one of our other sites following express agreement with the operations manager. Your normal place of work does not constitute for any travel expenses."

He then explains the salary is calculated from the 22 or 23 of each month, which is the payroll period, and then paid on the last working day of the same month or the first of the following month.

"You will always be paid for the hours worked during the payroll period on the salary payment date. You may feel the pay slip is 'weird' but I can assure you that it is legally compliant, contains the information you need and is provided to us by one of the most reputable payroll software companies in the country. This is a real pay slip and the only one we provide - there are no other pay slips. There are no bonus payments due, hence not showing. We do not pay an overtime rate - all hours are paid at your normal rate of pay at £7.85 per hour. Tax and national insurance calculations are included. Your hourly rate is £7.85 it is above the national minimum wage and legally compliant. Check link below",

and he sent a link to the gov.uk website on national minimum wage rates.

45. This was forwarded to the Claimant on 15 May by Mr Bilinski. The Claimant replied on 16 May:

“I’m unhappy with it. I addressed my queries to... Human Resources Department. Someone from company has chosen you for delivering the answer because you are young and don’t know how things works and the employment law. They are hiding behind you just because you are ambitious and you think it is your responsibility as manager, no matter what. Things don’t work out like that. There are certain people trained inside the company (HR) who carried this job and if you are sent they have to answer by the law, no other. Concluding, at the moment I will ask ACAS for a 3rd opinion before and if necessary the employment tribunal”.

46. On 22 May the Claimant had not made further contact, and Mr Belinski emailed him –

“Hi Christian, taking aside all the concerns we have been emailing about earlier you haven’t showed up quite a few times. I don’t know if you are in contact with anyone from by Chloe, however I am assuming you are not coming back to work? Please let me know as soon as possible”.

47. As far as we know there was no response. The claimant does not say in his detailed grounds of claim that he did go to the doctor, or that he was unfit for work, or that he had a medical certificate. He did not send any doctor’s note or ask for a self-certificate. He only says that at the end of the third week (4 May) he started not feeling well, unable to sleep and numb, and that told them the respondent he could not come in to work in the fourth week as he needed “to rest a bit and probably get legal advice”. He says there was “no contact from the employer to ask how he was feeling, they were only interested in I get back next week”. He was waiting for a reply to which he was entitled by law in writing. By 15 May, he says, he had contacted ACAS for support.

48. The only other communication after the respondent’s 22 May enquiry as to when he would be coming to work was an email from the Claimant to the Respondent and the payroll company on 31 May, after getting the 31 May pay slip, saying he could not check the calculation because he did not have a password to open it, and:

“monthly worker’s money are retained abusively as well, for about 10 days, by the payroll company”.

The respondent

“is paying the workers wage on 22nd 23rd of May 2018 each month, but through the payroll company Fourth Limited is using those money for the next 10 days till effectively transferring to workers bank accounts on 2 June 2018 of next month. Why is that these?”.

He repeated the last basic calculation was missing 5 hours holiday expenses tax and national insurance.

49. The respondent terminated the Claimant's employment on 31 May, when they sent a P45 with the 31 May payslip. The reason for this stated in the ET3 response was that he was not attending work and they had no idea when he intended to return to work.

50. The claimant went to ACAS on 31 May about the first respondent, and on 23 July about the second respondent.

Unlawful Deductions from Wages

51. Section 13 of the Employment Rights Act provides that a deduction from wages is the difference between what is "properly payable" and what is paid.

52. It is not clear from the claim form itself what the underpayment is, but we know from the emails of 23 April and 2 May he said he had been underpaid 5 hours, and in paragraph 11 of the grounds of claim, 6 hours underpaid in April. We do not know the basis of the dispute. There is a reference to paying for work breaks. By saying he is being paid below the national minimum wage rate it is assumed that the Claimant has calculated his own assessment of hours worked and divided that into the gross payment, and this may be a claim for rest breaks, but without an explanation this is speculative. In any case, absent a provision in the contract an employer is required to allow minimum rest breaks, but is not required to pay them. We asked Mr Bal if the respondent had a practice of requiring a trial shift, sometimes unpaid in the hospitality industry. He said they only did this for chefs, not for unskilled staff. The claimant does not say how this has arisen or what is wrong with the hours or give his own breakdown. Against the evidence of a reasonably robust system for recording hours worked, we do not find the claim for 6 hours underpaid to be proved.

53. The claimant refers to overtime. In some employments there is an agreement to pay an enhanced rate for overtime, but this contract stated that all hours would be paid at the basic rate, and there is no evidence to the contrary. The claimant does not say what the claim for overtime is for – which hours, what rate, and so on. He seems to have been paid for hours recorded, as stated on the pay slips. The claim is not proved.

54. He also says he was not paid a daily subsistence or travel allowance. There is no reference in the contract to subsistence or a travel allowance. Employers do not pay for travel to work except, in some workplaces, and under a specific expenses policy, if travel is required at unsocial hours, say by taxi, or an employee has to travel to somewhere that is not his normal place of work. Neither obtains here. As for subsistence, asked about meal breaks, Mr Mahey said that there was a meal break, that staff were entitled to claim a beverage from the restaurant and also either soup or a side order or chips to eat. Subsequently, they have extended this concession to any item from the menu. In the claim form the claimant mentions that it is "weird" that a vegan restaurant "is throwing to the bin so much food at the end of the day, not providing it to its own employees" but it is not said that they were not provided with food at work, and this can be read as a complaint that employees could be allowed to take it home rather than out it in the bin.

55. Mr Mahey's evidence was that there was no arrangement to pay expenses except when a worker was asked to go to a place which was not his normal place of work. There is no suggestion in the claim form that the claimant worked other than at Covent Garden or had to travel other than from home to work.

56. We concluded there was no evidence the respondent was liable to pay subsistence or travel. We wondered if the claimant was using some general guidance on tax which included guidance on whether such payments were taxable and had concluded he must be entitled to such payments.

Holiday Pay

57. By this contract, as under the Working Time Regulations 1998, the claimant is entitled to 28 days holiday a year. If not taken, they are paid on termination pro rata to days worked in the relevant holiday year. The claimant does not say whether he took holiday in the three week period and we assume not. The 31 May payslip included one day's holiday, presumably paid in lieu as a leaver. On three weeks' work that is what he was owed. It is possible that when he filed the claim he had still not read his pay slip – we do not know whether he overcame the password difficulty – but he had been sent a hard copy on disclosure.

58. We conclude that it is not shown the claimant was not paid for accrued holiday.

National Minimum Wage

59. The respondent says it paid for all hours worked at a little over the relevant national minimum wage, setting the rate to allow for increases and to give slight competitive advantage. The claimant does not state what hours he worked or how he makes his calculation of underpayment. The stated rate on the pay slip is above the minimum rate. The claim is not proved.

Unfair Dismissal and Race Discrimination

59 We move on to the dismissal. The claim is either that he made a protected disclosure in respect of alleging that the payroll system was fraudulent or involved tax evasion, or because he asserted the statutory right to be paid the national minimum wage – as the claim form puts it: "as a result of the claimant reporting the set of circumstances to the respondents, the claimant's employment was terminated".

60. There is also a claim that he was discriminated against on ground of national origin, is a race discrimination claim.

61. In these claims, under section 103A (protected disclosure) or 104 (assertion of statutory right) or 104A (national minimum wage), as he worked for under two years it is for the Claimant to show that the reason for dismissal was the protected reason.

62. A reason is a set of facts or as the case may be, beliefs, which operate on the mind of the employer and cause him to dismiss. The tribunal must assess the evidence of the facts surrounding the dismissal to decide as a matter of fact why the employer dismissed, recognising that it may not be the stated reason.

63. Section 43B of the Employment Rights Act 1996 provides that a disclosure qualifying for protection is “any disclosure of information which in the reasonable belief of the worker making disclosure is made in the public interest and tends to show one or more of the following – (a) a criminal offence has been committed, is being committed, or is likely to be committed (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject..” and there are four other grounds which seem unlikely to apply here.

64. What was the disclosure? We considered the text of 2 May grievance, which is to some extent duplicated in the emails of 4 May and 13 May. It consists of a number of questions about how his pay is calculated, and when he can get a contract of employment; it is hard to say that he is conveying information, except that he is conveying the information that he is not sure why he is paid what he is paid. What *is* conveyed is that the pay slip is fake, false and displaying gross time calculation only – there is an implication that is because it does not show a deduction for tax. There is no complaint that money is being withheld for tax but not paid to Revenue and Customs. It is presumably to be read as an allegation that his employment is not being declared to the Revenue or that he is being employed illegally. Other than that, what might be taken to be an allegation of wrong doing is that there was delay of nine days between calculating the end of the payment period and actually paying it to the worker.

65. Was a belief in this wrongdoing reasonable? We comment that as a matter of fact this is relatively common practice to pay some days after the end of the calculation period to allow for administrative processes to be carried out. We add that to assert illegal employment on the basis of one payslip for just over a week’s earnings, which while it did not state deductions clearly showed a national insurance number and tax code, was jumping the gun. We do not know of the claimant had earned other money in the UK before, or in the 10 days of the 2018/9 tax year preceding his employment which had begun on 6 April, or had shown his employer a P45 from previous employment or notice of coding. The most likely explanation was that he had not earned enough that year or the coding for a new starter was as yet unclear. His belief that he was being illegally employed (i.e. without proper tax and national insurance deductions being made) was in our view not reasonable. His explicit queries were answered, and the general denunciation of the payslip as a fake was not understood by Mr Mahey as a complaint there had been no tax deductions – he understood it as a complaint that the gross pay had not been correctly stated. Had he made this clear on his disclosure it is likely (judging by the answers he did get to the explicit queries) he would have had reassurance.

66. If we had held the belief in wrongdoing was reasonable, we would have also to consider whether it was made in the belief that it was in the public interest. We do not know enough about why he said this, but a disclosure that proper PAYE deductions were not made is capable of being in the public interest, as public

services depend on honest declaration of earnings for tax. The changes to the law in 2013 were designed to remove from the protection of this provision workers who complained about their own contracts of employment and breaches of legal obligation. In this respect it is hard to read the Claimant's pay slip or indeed anything else he said before his ET1 as suggesting that there was a public interest in this, or that other people were being treated the same. In **Chesterton v Nurmohamed** a salesman who complained about the calculation of commission was permitted to bring this as a claim for protected public interest disclosure on the basis that at least a hundred or so salesman were affected, and that this was referred to in his disclosure. Here the Claimant has made no complaint about anyone other than himself. At best we could say that it is in the public interest that employers should cooperate with HMRC in making lawful tax deductions. For reasons already given we do not hold the belief that the payroll did not operate PAYE was reasonable.

67. As for whether there is an assertion of infringement of a statutory right, he asserted that holiday did not feature on the payslip. It is not clear from his email that this was an assertion of an infringement of that right, as required by section 104. The claimant had not taken any holiday. The regulations do not permit any payment in lieu. In any event by 30 April he had not accrued any, as he had worked for less than one month. By 31 May he had accrued a day (it is 1.33 days per month) and he was paid in lieu as his employment was terminated. There was no assertion of statutory right.

68. There is also the allegation that the calculation is wrong, leading to the assertion that he has been paid less than the national minimum wage, and the five, or six, hour shortage. Underpayment of wages is a claim that can be brought under the 1996 Act and so is covered by this. Here there is an allegation of underpayment.

69. By section 104A, which specifies the national minimum wage, this protects those in respect of whom enforcement action is taken or prosecution, or dismissal because he qualifies for particular rate. Simply stating the pay falls below the minimum wage is hard to see as a proposal for enforcement action, but he is in any case covered by section 104.

60. Before examining the employer's reason for dismissal, we discuss the claim that dismissal was an act of race discrimination, or that underpayment or failing to make PAYE deductions were detriment for race reasons. The claim arises in paragraphs 25-27 of the claim form. He says that MLTW's (Migrant Legal Temporary Workers) employees "are struggling, surviving, working hard, living on street, looking for job, paying taxes, national insurance, transport, accommodation, others such as the Respondent through payroll company Fourth Limited are stealing money, ripping off, self service, from workers earning an employment rights". He said that stealing money from migrant workers 'just because you can' was "abusing the position held, pure and simple thieves, black money, possible money laundering but as well large-scale tax-evasion-fraud, ripping off migrant workers in any language chosen to judge". In paragraph 27 which is headed "the discrimination" he said that this was happening with regard

to those being paid less than £7 per hour below the national minimum wage, not being paid holiday, and that that was applied to migrant workers and not to British workers. He said that as a migrant worker he was treated less favourably than British workers. Discriminatory practice was not only “illegal but also a criminal offence and was applied strictly to, but all hundreds of migrant workers employed with this company and for a long time now”. It is not made explicit that dismissal was because of race, and the various emails he sent about payment practice do not mention difference in race or national origin..

61. The Tribunal put these questions to Mr Mahey following the Claimant's ET1 claim form, for example asking him questions about the ethnic and national origin of his work force, and to examine whether there were any differences in treatment. The evidence of Mr Mahey is that the company employed between fifty five and sixty people at the time the Claimant was employed there, slightly fewer now. The work force was mixed, with some British workers, some EU and some non-EU; all workers other than team leaders and managers were paid at national minimum wage rate, whether front of house or in the kitchen. The six or seven team leaders - some were British and some were EU, he was not precisely clear on that - are all paid at between £9 or £10 per hour. It is further denied by the Respondent that there was any fraud, money laundering, black money, theft, tax evasion or other criminal practice, or that staff are paid by recording the hours worked and then sending the information to a payroll company to make the calculations and the payments.

62. We understand the claimant to be Romanian, so an EU citizen entitled to work here. There is a bare assertion that British staff are properly paid, but no mention of why the claimant believes this.

63. Under s.13 of the Equality Act 2010, discrimination occurs when a person A treats another B less favourably than he treats or would treat another because of a protected characteristic, in this case race, and the definition of race includes national origin as relied on by the claimant. Because these days people rarely admit to discriminating, and because a discriminator may not even recognise that he is in fact discriminating, the Equality Act 2010 provides a reverse burden of proof, that it is for the Claimant to show facts from which the Tribunal could conclude that discrimination had occurred and if so it is then for the Respondent to provide an explanation why there was not discrimination.

64. On the detriment claims, we cannot hold there is any evidence of less favourable treatment. As found, we do not hold that he has shown he was underpaid, or paid other than in accordance with the contract, or that the respondent did not or did not intend to make statutory deductions for tax and national insurance. The claimant says nothing to substantiate his assertion that other workers were treated differently. We know that low pay and long hours are very common across the board in catering.

65. We move on to the reasons for dismissal. According to the Respondent the Claimant's employment was terminated because he did not attend for work and there was no explanation of why not, after the initial explanation that he might be going to see his GP and getting some rest. There was no further information from the Claimant at the time. There is no evidence even now why he did not

attend. He did not tell his employer he was not attending because he believed his pay was incorrectly calculated, though the claim form with its reference to legal advice suggests that was a factor. He does not say to the tribunal nor did he say to his employer he was unfit for work beyond saying he was going to see his doctor and would not be in the following week (i.e to 14 May). We know that the complaints on 2, 4 and 13 May were answered by the Respondent, first orally and then in writing. The Claimant may have been upset that he did not get the answer he wanted to hear but his concerns were in fact answered. One week after the answer was given, the Claimant was asked in a plain email by Mr Bilinski if he was intending to return. This suggests that his job was open and he had not in fact been dismissed, despite complaining, and there is no reason to think that had he gone back to work at that point he would not have been taken on and continued as normal, though not paid for his absence unless he produced a medical certificate. He had worked long hours, and attended for work regularly.

66. Based on the sequence of events and the employer's actions we have no hesitation in finding that the reason for the dismissal was the stated reason, namely that the Claimant had not attended work for some time, had not explained why he was not coming to work, and not replied to a specific request for information on this point. In such circumstances it is reasonable for an employer to assume that the employee, especially if he has only recently started, does not wish to work any further. It is reasonable because it is difficult to make up adequate shift rotas not knowing if someone is coming to work or not, and adds to administrative complexity to keep staff on the books if they do not attend work and do not communicate on why this is. We are unanimous in our finding that is the reason for dismissal, and not because the Claimant had queried his pay slips, asserted that they were false or fake pay slips, or there was some breach of PAYE, or that he had claimed that he was not getting the national minimum wage. The Respondent had explained those points and a week after was apparently still waiting for him to come back.

67. We comment further on the race discrimination. The evidence showed that there was a mixed work force, that all were paid the national minimum wage on the same terms as the Claimant, that is without premium rates of overtime or paid breaks, and that only a small group of team leaders and managers who received a slightly higher rate. The Claimant has said why he believes British workers were being paid differently. He did not raise the point when he was employed by the Respondent, in his face to face meetings with Mr Bilinski and Mr Mahey or in writing. The first time race was raised was when he presented his claim to the Employment Tribunal. We conclude that he has established that there is a difference in nationality or national origin between workers in the Respondent's employment, but has not established that he has been treated less favourably than British workers, let alone that the reason for any different treatment was the difference in race. The Claimant fails to prove even what is required under s.13, and we do not need to proceed to the Respondent's explanation, but on the information available to us we have no reason to think that the Respondent would have treated a British worker who did not attend for work without providing any explanation, other than that he was suffering sleeplessness and tingling in the arms after long hours and needed rest, and would not be in the next week, who did not attend without further explanation for

another three weeks or four weeks, would be treated any differently. He too, after being asked when he was coming back to work and not answering, would have had his employment terminated and be sent a P45.

68. We concluded that race was not the reason for the dismissal.

69. As for the assertions of fake pay slips, underpayment, and so on, the Claimant had an answer both oral and written to his grievances and queries. They may have not have been the answers he wanted to hear but he had an answer, which was reasonably thorough, firm but polite, and not abusive. We could not see any reason for holding that this was detrimental, let alone that it was by reason of race, and as stated, after answering the respondent was still keeping the job open.

70. All the claims fail. We regret that the Claimant was not here to put his case, we have carefully examined what is said in his claim form and what he said to the Respondent in writing at the time in order to take his case at the highest, but we find that it has not been proved.

Costs

71. After delivering the reasons why the Claimant's claims failed the Respondent made an application for costs.

72. Rule 76 of the 2013 Rules of Procedures provides that a Tribunal may make a costs order and shall consider whether to do so where it considers that (a) a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either of the bringing of the proceedings or the way the proceedings have been conducted or (b) any claim or response had no reasonable prospect of success, or a hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the hearing begins, and we may also make such an order where a party has been in breach of any order in practice direction.

73. Rule 84 provides that in deciding whether to make a cost preparing time or wasted costs order and if so in what amount the Tribunal may have regard to the paying party's ability to pay.

74. We heard the Respondent's application and in the absence of the Claimant we considered whether we should in fact decide it today or postpone the hearing of the application to be decided at another hearing or on written representations. We have decided to proceed today on the basis that it would save costs not to require the Respondent to make a further written application or have a further hearing, and knowing that the Claimant did attend this morning, and also that he had been notified by the Respondent that if he did not withdraw his claim by 28 January that they would proceed to apply for costs at the hearing on the basis that the claim was misconceived (that is, had no reasonable prospect of success) alternatively that he had acted unreasonably in failing to comply with any orders despite their correspondence urging him to do so.

75. The Respondent argues that the Claimant's conduct has been unreasonable in that he has failed to comply with any of the orders made whether in September or December 2018. He has not done so despite their frequent urging him to do so - seven letters in recent weeks. He would not say whether it was actively pursued and did not respond to the Respondent or the Tribunal on this. The Respondent sent him the documents bundle; he would not confirm that he had anything to add. He did not reply to the costs warning letter on 23 January. day later he was sent the hearing bundle, so he had an opportunity then to peruse the documents to consider his options. He was warned that there would be a strike out or costs application on 5 February. There were two more emails on 7 February, and 14 and 15 February. Today he attended for half an hour but made it plain by his behaviour that he did not consider that the Tribunal directions should be complied with because they were premature and that he does not accept the authority of the Tribunal. As for there being no prospect of success, it is argued that he should have known that it lacked merit in that, as had been pointed out to him by the Respondent, the key issue was a lack of causative link between the reason for dismissal and his assertions as to the protected disclosure and national minimum wage.

76. If the claimant had acted reasonably, he would have studied the Respondent's documents when the bundle was provided and reassessed the prospect of success in his claim in the light of that. If he had still not seen the 31 May pay slip he saw it then.

77. There is no evidence about the Claimant's ability to pay. The Tribunal has been provided with a schedule which amounts to some £15,000.

78. We have considered whether the Rule 76 threshold is crossed; we hold that it was crossed, on both limbs. The Claimant's conduct has been unreasonable in failing to comply with the orders; he does not give any reason why he could not comply with the orders, just that they were premature and wrong. His only explanation is that he was waiting for the written confirmation of the case management hearing on 12 December so that he could appeal the judgment that the Respondent should be given an extension of time, and so they should not be heard on the grounds of their response. We also consider that he probably had no reason of prospect of success in his claim - if he was concerned at the end of April or beginning of May about the lack of tax and national insurance deduction from his pay, that fear would have been removed by the end of May when he was provided with a pay slip which should that there had been albeit a small deduction for tax and national insurance, and holiday pay, and he was also provided with a P45, which would convince most people that the pay was above board and was known to HMRC. In addition, even if he was satisfied then that his previous assertion had been mistaken, the fact of his failure to attend for work for nearly a month without providing any sick note or explanation would have made it reasonable to think that a reasonable employer would have dismissed him for that reason, rather than because he was asking questions about his pay or asserting illegality.

79. We further considered whether the claim was malicious, meaning that he brought it to harass the Respondent because of a unjustified sense of grievance. The Claimant's sense of grievance may stem from very long hours worked in

April, that it was heavy and physical work, and he was disillusioned that the pay seemed so low for the effort expended, especially if he had to wait for the next pay period for some of it. He may have been mistaken as to being below national minimum wage, but it was genuine, not done to harass the respondent. Once started, he was aggrieved that the Respondent had been given not one but effectively two extensions of time to file the response. He does not seem to have received advice or talked to anyone else about what the case is about and the merits of it.

80. On ability to pay, we have not seen the correspondence to know if he was required to produce this for this hearing. We simply say that we note that he is apparently in good health, that he can write and speak English, and although he may have few formal qualifications we assume that he is capable of obtaining and performing work at national minimum wage. That leaves very little to live on, particularly in London. We know nothing about his family commitments or whether he has savings; he refers to himself as a migrant worker, so perhaps he has no family here. We would assume that he has few, if any, savings here and that he is finding life difficult.

81. We have therefore to exercise discretion, given that we think the threshold is crossed, whether we should in fact be making an order. We take into account that there has been delay on the part of the Tribunal service in providing Judge Hemmings order. He did attend today, so there is not total disregard for the Tribunal process. His belief in the strength of his claim was misplaced, and his suspicions were unfounded. The claim was not brought to harass or vex the Respondent, though on the facts known to him it was borderline unreasonable, His means are probably very slender. Even if we were to make an order, he would struggle to pay any sum that would make much difference to the Respondent's costs bill. The Respondent has had this claim resolved in one day rather than three; the preliminary hearing was to some extent their fault for not answering the claim in time, though there would have had to be case management. We concluded there should be no order for costs.

Employment Judge Goodman

Dated: 8 March 2019

Judgment and Reasons sent to the parties on:

14 March 2019

For the Tribunal Office