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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Wladyslaw Pazur	**AND**	Lexington Catering Services Ltd

Heard at: London Central **On**:25 July and 26 September 2018

Before: Employment Judge Walker

Representation
For the Claimant: Mr R O'Keeffe, Union Representative
For the Respondent: Mr M Sellwood, of Counsel

RESERVED JUDGMENT

1 The Claimant's claims for detriment and for automatically unfair dismissal arising out of his health and safety claims are dismissed.

2 The Claimant's claim for detriment and unfair dismissal arising out of his working time claims are dismissed.

3 The Claimant's claim for breach of contract succeeds.

REASONS

Background

1. At the outset of this hearing the Tribunal reviewed the list of issues. At this point, a number of claims were withdrawn by the Claimant leaving just a few issues which remained for consideration. Essentially the Claimant was claiming unfair dismissal and relied on Sections 100 and 101A of the Employment Rights Act 1996. Additionally, the Claimant claimed detriment contrary to Section 45A and/or Section

44 of the Employment Rights Act 1996 and breach of contract on the basis the Respondent had dismissed him without notice.

Evidence

2. The Tribunal heard evidence from the Claimant himself and from Mr Alain Bouteldja on behalf of the Respondent. The parties also provided the Tribunal with a bundle of documents.

3. The Claimant was assisted by an interpreter.

Issues

4. The issues are as follows: -

Unfair dismissal –

4.1 What was the reason for dismissal?

Was it because of any of the following:

(a) On 17 November 2017, the Claimant asked Gintare Stasaityte to be reassigned to a site other than client B and on receiving no response did not attend the site as directed.

(b) On 4 December 2017, on being asked to return to client L, the Claimant complained to his manager, Vakare, about the client L not giving him any breaks or meals and trying to force him to stay longer

(c) On 4 December 2017, on being asked to return to client L, the Claimant told his manager, Vakare, that he refused to return there.

(d) On 4 December 2017, on being asked to return to client L, the Claimant told Alain Bouteldja that he refused to return there.

4.2 Whether any of those acts amount to the Claimant refusing to return to his place of work in circumstances proscribed by Section 100(d) of the Employment Rights Act 1996.

4.3 In addition, or alternatively, whether any of those acts amount to the Claimant refusing to comply with a requirement imposed in contravention of the Working Time Regulations 1998, or alleging in good faith an infringement of the Working Time Regulations in circumstances proscribed by Section 101A (a) of the Employment Rights Act 1996.

4.4 If any of these events did occur, whether they were the sole or principal reason for the Claimant's dismissal and amounted to an automatically unfair dismissal pursuant to section 100 or section 101A of the Employment Rights Act 1996.

4.5 NOTE: The Claimant does not have sufficient length of service to claim ordinary unfair dismissal.

<u>Detriment Contrary to Section 45A and/or Section 44 of the Employment Rights Act 1996</u>

4.6 Whether on 4 December 2017 Alain Bouteldja sent a text to the Claimant to the effect that if the Claimant did not attend the London Business School the Claimant would lose his job.

4.7 If so, whether this subjected the Claimant to a detriment.

4.8 If so, whether the act was done on the ground that the Claimant had done any more one or more of the acts described above in paragraph 4.1 above.

<u>Breach of contract</u>

4.9 Whether the Respondent was in breach of contract by dismissing the Claimant without notice.

<u>Facts</u>

5 The Claimant worked for the Respondent as a kitchen porter. His role was to operate within the Respondent's support team. That team send a group of kitchen porters and chefs to a variety of different locations each week as required. The Claimant informed the Tribunal that he would be sent a rota by text every Friday evening and told what hours and what location he would be working at over the following week.

6 The Respondent's evidence was given by Mr Bouteldja who was the support team operation manager. The claim centres on certain occasions when the Claimant refused to attend bookings. There is no dispute that he did refuse. Mr Bouteldja said that caused significant problems. Mr Bouteldja explained how difficult it was for the Respondent to find staff at short notice. He described a situation in September when he claimed the Claimant had been rude to an employee called Alba telling her that he had left his uniform different site and although employees should not leave their uniforms on site she agreed to collect this and return it to him but she says that the Claimant raised his voice to her and demanded to know why he had to go to a different site. The next day he said the Claimant did not turn up for

the new booking and then he was asked to go for a meeting. At the meeting he calmed down somewhat and said he had been confused and he thought that he had been accused of having done something wrong which was not the case

7 Mr Bouteldja then spoke to the Claimant and informed him that he had to attend bookings when directed by his manager and he had to make sure that he answered his telephone and texts and should not to be rude to any staff such as Alba.

Problems at Client B's site

8 When the Claimant went to work for client B in November, the Tribunal were told it was, at that time, a new site which the Respondent had only just obtained. Because of that, the Respondent was still trying to assess the position and make the arrangements satisfactory. The Claimant said that it was very hard to breath, there was lack of ventilation and a very high temperature as well as a lot of steam. At some point he complained to his manager who was at that time called Julia. She told him she could not install a fan as she would need permission from the building management. There were glass doors and the Tribunal was told that when those doors were open there were no difficulties. However, at some point the doors were locked. The Claimant was told that Julia had no problem with the staff opening the doors but he discovered that only the security personnel could open them. He did not ask the security personnel to open them. On being questioned about this, the Claimant seemed to think that this was ridiculous for him to have to go through so many hoops to get the door opened.

9 There was no evidence from the Claimant as to any specific danger he believed the heat and conditions created.

10 The Claimant continued to work for client B for another week and another manager called Alba came to visit the site with Antal. The Claimant then explained to them how difficult it was to work but no special arrangements were made to accommodate the heat.

11 The Respondent had accepted that the Claimant had complained about it being so hot and there not being any ventilation in the porter's area and agreed that he complained to Alba but as she was not his manager at the time, she could not move him but said she would pass his comments on to Gintare. He then did not turn up at the client B job on Monday 20 November.

12 The Claimant agreed that he did not turn up at client B's site on Monday 20 November. He explained that after two weeks working at client B, he left early on Friday 17 November to attend a medical appointment. When he then received a text from the Respondent asking him to go there again the following week, he emailed back asking the managers to assign him to a different site. They did not

respond. On Monday 20 November the Claimant did not go to this shift but said he rang Hackney Council to complain about health and safety arrangements. However, he did not tell the Respondent that he had contacted the Council and he was not sure that the Council ever contacted the Respondent because when they tried to contact him for more information, he was in Poland and the reception was extremely difficult and he could not understand what they were saying.

13 Mr Bouteldja understood that Gintare could not contact the Claimant as his phone seemed to be turned off and she eventually had to call his emergency contact in order to leave a message to which he then responded saying that he decided not to go back to client B because of the conditions and that he had been expecting a text message back. Thereafter the Claimant was asked to go to the Head Office on 23 November 2017, where he met with Mr Bouteldja and Gintare and was asked why he had not gone to work at client B. He explained it was dangerous and that he needed to change site. He was told that there were arrangements to refurbish the site in January and that the Respondent had had to employ an agency member of staff to cover for him.

14 Mr Bouteldja asserted that their impression was that the Claimant thought it was relatively easy for the Respondent's management to find other sites for him but Mr Bouteldja pointed out that it was hard to move somebody from a site as bookings for the following week are confirmed on the Friday immediately preceding it and the names of the employees attending are confirmed to the client.

15 On 23 November 2017, Mr Bouteldja emailed Julia referring to the client B pot wash area saying "Most of our Porters who have been there refused to come back because they find it hard to work their [sic]. They find it hot and hard to breath. Can you please see if we can buy some Fans to help the guys." On being questioned about this, Mr Bouteldja said this was not correct but he wrote it to put pressure on Julia to do something quickly.

Problems at client L's site

16 In response to the Claimant's position, after the meeting on 23 November, Gintare sent the Claimant a text asking him to go to work at client L. He was to work from 2pm until 10.30pm. He understood this was a shift of eight hours broken by a thirty-minute unpaid break. This would be standard within the Respondent organisation.

17 The Claimant arrived to work at 2pm. His evidence was that he was not allowed a break. This was catering for a special event held at client L's site. When we discussed the detail during the course of the evidence the Claimant said that he had asked somebody about the lunch and he had been taken to another room, and shown some food there but, before he was able to eat properly, somebody came for him and told him he was needed and had to go back to work. I note that the

Claimant only started at 2 pm. However, Regulation 12 of the Working Time Regulations1998 provides that where a workers daily working time is more than six hours, he is entitled to a rest break and in the absence of a specific workforce or collective agreement it shall be for an uninterrupted period of not less than 20 minutes which the worker is entitled to take away from his workstation if he has one. The Claimant understood he had a contractual entitlement to a 30 minute break and this was not disputed.

18 In the Claimant's witness statement, he said that about half way through the shift he went to the toilet and to the water fountain and sat down in a chair in the corridor for a moment when the head chef passed him and asked him if he was on a break. When he said it was not a break, rather he was going to the toilet to have some rest he was told that was a break. However, he felt that was unfair because it was well known that porters would usually take thirty minutes and leave their work stations and eat.

19 After the head porter left at 9pm, the head chef asked the Claimant how long he was staying and said it should be 10.30pm. The Claimant however had not had his half hour break and by 10pm he refused to stay any longer, saying he was leaving. He was not asked why, but there was subsequently a discussion with his line manager who was then Gintare. She was on the site at the time. She went to the kitchen and spoke to the Claimant and asked him why he would not stay until 10.30pm. He told her he had not had a break. When she investigated, Mr Bouteldja said she was told by the two chefs on site that he had a thirty-minute break and should not have left his shift early. There is no documentation provided which verified this investigation. Neither Gintare nor the two chefs gave any evidence and there is nothing to confirm that this happened.

20 On 26 November 2017 the Claimant sent an email complaining to HR manager. He complained about client L's site referring to a lack of certain supplies like washing liquids, and plasters in the first aid box. He also said "to make things worse – during my entire 8 hour shift, I didn't get any break or meal. At the end of my shift, one of the Head chefs wanted me to stay longer, when I refused he informed my line manager who was attending the event and when she came she tried to make me stay longer. This is unacceptable."

21 She sent his email on to the client support deputy manager and it was agreed that some inquiries would be made but they never took place because shortly after that other events took place.

22 On 29 November the Claimant was introduced to a new line manager, Vakare. On 2 December, Vakare asked the Claimant to go to a site for client P and then to attend a meeting with Mr Bouteldja on Tuesday 5 December.

23 On Monday 4 December the Claimant went to work at P and when he finished his shift he saw a text from Vakare asking him to work at client L on the Tuesday, Wednesday and Friday of that week. He called her and said that he had recently complained about that site and briefly told her what his complaint was. She said she would call back in ten minutes.

24 On 4 December Vakare texted Mr Bouteldja explaining that the Claimant was refusing to go to client L because after last Thursday he's not coming back. She said "I asked him nicely just to go there for tomorrow and then from Wednesday I will replace him with someone else. He said for me that if he go there tomorrow and head chef won't be nice with him, he will send an email straight away for Mike Sunley. What should I do? Replace him or keep it?" Mr Bouteldja replied asking for the Claimant's mobile number.

25 The Claimant says he then took the tube home which meant that his communication through his mobile was disrupted. When he was able to receive communications, he found a text from Mr Bouteldja

26 Mr Bouteldja admits sending a text to the Claimant which said "Hi Wlad, This is Alain. You have a choice you ether go [client L] for tomorrow or you have no job on support team". The Claimant, on seeing Mr Bouteldja's text, responded that he would rather have no job then return to client L. He then received a further text from Mr Bouteldja which said "Your P45 will be sent to you good luck"

27 Mr Bouteldja he regarded this as a reasonable response because he had make it clear to the Claimant on 23 November that he needed to attend bookings he was given.

28 However, Mr Bouteldja acknowledged in his witness statement that he thought he acted a little irrationally when he sent the text and therefore he says the following day, 5 December, he sent a request letter inviting the Claimant to an investigation meeting which was arranged for 7 December but the Clamant had not attended. Mr Bouteldja said that had the Claimant attended, he would have gone through with him the question of him putting the phone down on Vakare and not answering his phone. to say that if he did not go to client L he would be sacked. The P45 was subsequently sent to the Claimant.

29 It is not disputed that the Claimant did not attend either the investigation meeting or disciplinary hearing which he was invited to attend by a letter dated 8 December which called a meeting for 9 am on 8 December. There is no covering email and clearly the Claimant would not have got that letter in time to attend, if it was in fact sent. The Claimant says he did not receive any of those letters and questions whether they were actually sent. He says that at the same time he was exchanging emails with Mr Bouteldja's deputy about his travel expenses and she never informed him about the meetings.

30 There was an email exchange with the Claimant about his reimbursement of expenses and clearly the Respondent had his email address. A further letter is in the bundle dated 9 December referring to a disciplinary hearing held today, 7 December. As noted, the invitation letter said that hearing was to take place on 8 December at 9 am and not 7 December. The letter of 9 December purported to dismiss the Claimant for gross misconduct. The decision was apparently taken by Mr Bouteldja.

31 Mr Bouteldja said that his dismissal was because, having reviewed the Claimant's recent employment he concluded that he had refused to attend bookings on several occasions and the way he went about it made it very difficult for the Respondent to be able to continue to employ and work with him. He constantly did not answer his telephone and frequently did not reply to texts which made it impossible to have confidence in him to turning up to bookings leaving his manager having to make further calls to be sure of the position which should not have been necessary. He concluded that the Claimant had been rude on several occasions to managers, which was not acceptable.

32 The reason Mr Bouteldja gave for the previous text when he said that the Claimant would receive his P45 was that he was refusing to attend a booking and that gave the Respondent problems with their organisation.

33 Subsequently, the Claimant wrote an email dated 11 January 2018 to the Respondent claiming about several issues, but notably claiming about the fact that he had been given no break. He referred to the fact that he felt that the reason for his dismissal was that he had reported many irregularities. He also mentioned frequent cases of mobbing. The email went to the Head of Human Resources, Emma Langford who passed it on to Mr Bouteldja and he replied "He is ex Omnicom KP that we inherited. Was dismissed for refusing to go work at [client B] and [client L]. We invited him to attend Meeting and he refused. Also has a history of refusing to take instructions from the management."

34 In the course of the Claimant's evidence he was asked what he meant by mobbing. He said it meant being forced to work. He described being dragged back to work away from his coffee break and said that was what he considered mobbing to be. On being questioned about his reasons for not wanting to return to client L'S site and why he told Vakare that he didn't want to go back, he referred to two occasions when the head chefs at client L had been unpleasant towards him, the second occasion being the events on 23 November.

35 It seems nothing further took place and thereafter the Claimant brought this claim.

The Law

Section 44 Employment Rights Act deals with detriment in Health and safety cases.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(4) . . this section does not apply where the detriment in question amounts to dismissal (within the meaning of [Part X]).

Section 45A of the Employment Rights Act deals with detriment in Working time cases.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker—

(a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,

(b) refused (or proposed to refuse) to forgo a right conferred on him by those Regulations,

(2) This section does not apply where a worker is an employee and the detriment in question amounts to dismissal within the meaning of Part X.

Section 100 addresses automatically unfair dismissal in Health and safety cases

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

Automatically unfair dismissal in working time cases section 101A

[1] An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,

Breach of Contract claims

An employer is required to give the employee the notice provided for in their contract of employment which must be at least the minimum notice set out in section 86 of the Employment Rights Act 1966 unless the employee has breached their contract so fundamentally that the employer is entitled to accept that breach as a repudiatory breach.

Submissions

Claimant's Submissions

36 The Claimant referred to the health and safety legislation and to section 44 of the Employment Rights Act 1996 which is largely repeated in section 100.

37 The Claimant argued that part of client B where he worked was hot and had no ventilation and that this amounted to circumstances of danger which he, as the employee, reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert.

38 The second part of the Claimant's claim relates to his working time. He argued that Section 45A provides in working time cases that a worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker (a) refused (or proposed to refuse) to comply with the requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998 or (b) refused (or proposed to refuse) to forego a right conferred upon him by those regulations. The Claimant submits that he believed he was refused a break when he went to client L.

39 It was submitted that the Tribunal had to consider whether the list of acts occurred. The Claimant pointed out that these were largely undisputed. The Respondent accepts that on 23 November the Claimant refused to stay at London Business School beyond 10pm. However, there is a factual dispute as to whether he had not been permitted to take a break. There was an issue that Alba and the

Claimant said that he assumed that she would pass on the message to Vakare. The Respondent admits that the other events occurred.

Respondent's submissions

40 The Respondent says in relation to the claim under section 44/100 of the Employment Rights Act 1996, the key question is whether the statutory language applies to this situation and in particular to the Claimant refusing to return to work under circumstances set out in Section 44(1)(d). For that purpose, he had to have a reason to believe that there was danger that was serious and imminent. The Claimant had stayed on for two weeks. The conditions were not serious enough for the Claimant to ask security guards to open the doors.

41 The Respondent also argued that the Claimant could have been expected to avert the danger. He was intelligent and proactive and if the danger had been serious he would have done something about it. Therefore there was no health and safety risk and the matter was not serious and imminent.

42 As for the working time claim, the Respondent undertook an investigation. There was very little evidence but the two chefs said that he had had a break. The Respondent referred to the Claimant's witness evidence. In the witness evidence the Claimant talked about a second possible break and he said in the client L site it was normal for everyone to take lunch all together and then said he went to the buffet and been ushered away by the head porter. Section 45A Employment Rights Act addresses detriment and the Respondent argued the only detriment which had occurred was the text message. The Claimant's case was that on page 30 of the bundle the first text was a detriment and the second was a dismissal. The Respondent said that if you accept that proposition, it cannot be a detriment because it was one second before the dismissal.

43 Regarding the Claim under Section 45A (2) regarding the Working Time Regulations, the Respondent argued that Mr Bouteldja had been clear that it did not form part of his thinking. The Claimant's reason for not attending was that the chef would not be nice to him. There was no reason for Mr Bouteldja to have thought it was due to the working time issue. It was part of their process and not a detriment. There was a lack of evidence from the chefs.

44 In terms of unfair dismissal, the language was very similar but the matter relied upon had to be the sole or principal reason for the dismissal. The Respondent argued that the Claimant refused to accept management instructions and that was gross misconduct and the reasons was not that he had not been given breaks or had been in danger.

45 The Respondent argued that there was implied term of the contract that the Claimant should use his phone and be available and in practice he was refusing to attend work.

Conclusion

46 It was necessary for the Tribunal to consider whether the events concerned took place.

46.1 On 17 November 2017, the Claimant asked Gintare Stasaityte to be reassigned to a site other than client B and on receiving no response did not attend the site as directed. There was no dispute this had occurred.

46.2 On 4 December 2017, on being asked to return to client L, the Claimant complained to his manager, Vakare, about the client L not giving him any breaks or meals and trying to force him to stay longer. The wording of Vakare's text to Mr Bouteldja indicates the Claimant did complain.

46.3 On 4 December 2017, on being asked to return to client L, the Claimant told his manager, Vakare, that he refused to return there. This is admitted.

46.4 On 4 December 2017, on being asked to return to client L, the Claimant told Alain Bouteldja that he refused to return there. This is admitted.

Claim under section 44 of the Employment Rights Act – health and safety.

47 This required the Claimant to show first that there were circumstances of danger which the employee reasonably believed to be serious and imminent. Secondly, he had to show that he could not reasonably behave been expected to avert that danger. Thirdly he had to show he left or proposed to leave or while the danger persisted he refused to return to that place of work.

48 The Claimant relies upon a situation which was clearly uncomfortable but there was no evidence from the Claimant as to precisely what danger he believed he was in. While the Tribunal do not doubt the Claimant found the circumstances and environment were unpleasant and uncomfortable, there was no reference in any of the evidence provided by the Claimant as to what the danger was, how serious it was or how imminent it was.

49 It is clear that the Claimant would have had little difficulty averting the problems caused by the heat. On his own evidence, he would have had to go to the security personnel to ask them to open the door. However, he could have done so. His only reason for not doing so, on being questioned about this, was that the Claimant

seemed to think that this was ridiculous for him to have to go through so many hoops to get the door opened.

50 In a situation where the perimeter of premises must be kept secure, it would be entirely reasonable for the security staff to have the keys and it would be reasonable to expect them to have to provide those keys in order for the door to be opened. Therefore, the Claimant's evidence that he was told he would have had to go to security is entirely plausible. In all the circumstances it does not appear that there was any actual danger and certainly none that the Claimant reasonably believed to be serious or imminent. Further it is not clear that the Claimant believed he could not avert the danger. He merely thought it was excessive to expect him to go to security to ask them to open the door.

51 It was accepted that the Claimant refused to return to that place of work but his situation does not meet the criteria required by the provisions relating to both the detriment claim and the automatically unfair dismissal claim so the claims based on circumstances of danger which the Claimant reasonably believed to be serious and imminent fail.

Claims under section 45(A) of the Employment Rights Act 1996 – working time.

52 The first question was whether the Claimant had refused to stay at the client L's premises beyond 10pm, having not been permitted to take a break in the course of his shift. It was common ground that the Claimant had refused to stay beyond 10pm. It was not agreed that the reason for this was that he had not been permitted to take a break although it was clear that the Claimant had complained about that. The Respondent said he had taken a break. There was, however, no evidence to verify that. The only person giving evidence for the Respondent had no first-hand knowledge of that. The Respondent admits the Claimant complained to the manager about it on the night and gave that as his reason for leaving at 10 pm. In these circumstances, as I have no reason to doubt the Claimant and given the Claimants insistence that he was not allowed a break, the weight of the evidence favours the Claimant. It indicates he left because he had not been given the full thirty-minute break that he was normally entitled to. Even if, having left for the purposes of going to the toilet, he sat down briefly in a corridor, or tried to go and get some food, he had not been allowed to stay in the situation where he had a clear twenty or thirty-minute break. That had led to a dispute between him and the chef.

53 It is not disputed the Claimant complained to Emma Langford about the position although that was part of a longer list of complaints.

54 On 4 December he complained to his manager Vakare. She texted Mr Bouteldja about this saying after last Thursday he's not coming back. That was a reference to Thursday 23 November which was the date when the Claimant was not

allowed a proper break. The Claimant told his manager Vakare that he refused to return to client L. Finally, he told Alain Bouteldja that he refused to work at client L.

55 As I have noted the requirement under the law is for there to be a failure to permit the Claimant to take his break. The legislation provides that the Claimant has a right not to be subject to any detriment by his employer on the ground that he refused to comply with the requirement which the employer imposed or proposed to impose in contravention of the working time regulations or refused or proposed to refuse to forego a right conferred upon him by this regulation.

56 It was clear that the Claimant's leaving work was because he refused to forego his break and that complied with the requirements of the legislation. It is not clear that the Claimant's refusal to attend again was because he expected the Respondent would continue to apply any such imposition on him. He did not explain his reasons in his witness statement and it only arose in the course of the questioning. The evidence he gave was mixed but it was clear that he talked about the chef being unpleasant to him and he feared some unspecified bad treatment from him.

57 When Alain Bouteldja sent a text to the Claimant saying he would lose his job, this was a response to the Claimant refusing to attend for work at the location notified to him. The question therefore is whether or not the Claimant's refusal to attend for work related to the working time provisions. It is also clear that the Claimant had refused to attend to work at a previous location, client B, and this increasingly frustrated Mr Bouteldja. Mr Bouteldja was influenced by the fact that on both occasions the Claimant had caused difficulties for the Respondent in not attending for work.

58 I simply have insufficient evidence from the Claimant about why he was refusing to go back to client L to conclude this was because he expected the chef to refuse him his breaks again. As I say, this was not explained in his witness statement and his oral evidence was unclear but referred to the chef being unpleasant to him. In the circumstances the claims arising out of the Working Time Regulations also fail.

<u>Breach of Contract</u>

59 The claim for breach of contract is primarily a matter of common law. In common law, the Respondent is only entitled to dismiss the Claimant without notice if the Claimant has committed an act of gross misconduct which is a repudiatory breach of contract which is accepted by the employer.

60 The dismissal took effect when Mr Bouteldja sent the Claimant the text message about his P45. This was a clear dismissal. It is that text which gives rise to this claim for breach of contract.

61 The subsequent effort to clean up the position with an investigation followed by a disciplinary hearing was patently a sham. As Mr Bouteldja admitted, he had acted rather irrationally and quickly. Further there is the question of whether the letters were ever sent. The disciplinary invite letter was dated the day of that “so called” hearing. The dismissal letter referred to a hearing a day earlier, which was the date of the investigation meeting. There was a total shambles around that. The Claimant subsequently wrote to the Respondent on 11 January and said he had never had a dismissal letter. In the light of this and as the letters themselves do not make sense, I doubt the letters were ever sent, but in any event the dismissal had already occurred.

62 Mr Bouteldja’s reason for the dismissal appears in his explanation to Emma Langford and is apparent from the situation. It was quite simply because the Claimant had refused to attend client sites as instructed twice, being his refusal to go to client B and client L’s sites.

63 The question which arises is whether or not the Respondent was entitled to do so in the circumstances where the Claimant was refusing to attend work when the Respondent knew why he was refusing and there was on each occasion a reason.

64 There were no circumstances where the Claimant refused to attend work without there being a background problem which the Claimant had raised with the Respondent. On the first occasion the problem was the heat and conditions. The conditions were extremely hot and although the Respondent attempted to dispute the argument that other porters had protested, the documentary evidence shows that Mr Bouteldja believed the conditions were not suitable and a fan was needed.

65 When the Claimant then refused to return to client L, it was because he had been refused his break and there was a breakdown in the relationship between the Claimant and the chef. Mr Bouteldja ignored that. I do not think it mattered to him what had happened. He did not carry out any proper factual investigation to find out precisely when or what breaks the Claimant had actually had. This was despite knowing that this was a particular busy occasion. His main concern was that it caused him and his team problems when the Claimant refused to go to the site they had decided upon.

66 On the previous occasion when the Claimant refused to go to client B, he was called in for a discussion but no disciplinary action took place. The second time, he was simply dismissed. It was clear that Mr Bouteldja was frustrated by the Claimant’s behaviour and that in sending his instruction that the Claimant would receive his P45, it was because he was frustrated by those refusals.

67 Those refusals were not without any basis. It was suggested to me that there were several reasons for the dismissal and I accept those are referred to in the disciplinary letters but as I have said, those letters were sent after the event and the

real reason was the one operating on Mr Bouteldja's mind when he sent the text about the P45 to the Claimant.

68 It is not gross misconduct in circumstances where the Claimant had specific grounds which he raised on each occasion and of which the Respondent was aware. This was not a refusal to act on a reasonable instruction. The Claimant's refusal to attend the client's premises was based on the poor working conditions and the Respondent did not see the need to carry out a formal disciplinary the first time the Claimant refused to go to a site. The second time the Claimant had been clear about the problems he encountered and the Respondent knew that there had been a breakdown of trust and confidence between the Claimant and the chef which was sufficiently serious that the Claimant had difficulty working there. The Claimant had asserted that he had been treated improperly in a manner which would be tantamount to bullying. In all the circumstances the Claimant did not commit an act of gross misconduct entitling the Respondent to dismiss him and therefore the failure to pay notice is a breach of contract.

69 The ``Remedy Hearing is being listed for 10am on 1 November 2018 for a half day.

Employment Judge Walker

Dated: 26 September 2018

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Judgment and Reasons sent to the parties on:

27 September 2018

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For the Tribunal Office