



EMPLOYMENT TRIBUNALS

Claimant: Mr H N'Goran
Respondent: United Kitchen Concepts Limited
Heard at: East London Hearing Centre (by CVP)
On: 5 April 2023
Before: Employment Judge Norris, sitting alone

Representation

Claimant – In person
Respondent – Ms J Letts, Citation

RESERVED JUDGMENT

The Claimant's claims of unlawful deductions from wages, failure to pay holiday pay and notice pay are not well-founded and are dismissed.

REASONS

Background

1. The Claimant worked for the Respondent between October 2021 and January 2022, as a Head Chef/Kitchen Manager. The exact dates, like much of the other evidence, are in dispute. The parties agree however that the Claimant did not go in to work after 15 November 2022.
2. Between 16 February and 16 March 2022, the Claimant entered Early Conciliation and on 24 March 2022, he lodged a claim for unlawful deduction from wages (including for overtime worked), a failure to pay in lieu of holiday and notice pay and unfair dismissal. His claim of unfair dismissal was struck out in a judgment issued on 22 June 2022, since he did not have two years' continuous service.
3. The Respondent defended the remaining claims in part. It acknowledged that there had been a shortfall in the Claimant's final pay so far as his wages were concerned, and that it had not paid him in lieu of his accrued but untaken

holiday. It made him a payment in respect of those items in the net amount of £942.29 on 31 December 2022. It denied the other claims.

Hearing

4. The claim was case managed at hearings on 9 September 2022 and 20 January 2023, and the Tribunal sent additional correspondence in an attempt to ensure that the matter was trial ready for the Hearing on 5 April 2023. Regrettably, it still was not. I made allowances for the fact that the Claimant was not legally represented, but it was unhelpful, to say the least, that the parties had been unable to agree a bundle and that the witness statements did not properly address the issues in the case or give the evidence on which the respective sides wished to rely.
5. The Claimant's bundle did include much of what was already in the Respondent's bundle (which it had termed the "agreed" bundle in default of receiving any concrete objection from the Claimant). However, during the course of the Hearing, the Claimant sent in a further screenshot of a WhatsApp message between him and the Respondent's CEO Mr El Jammal, which was in neither bundle.
6. The Claimant had also included, in "his" bundle, communications with ACAS, despite having been expressly told not to do so. At the start of the Hearing I explained that I would not have any regard to this material.
7. The Claimant confirmed that he had received the payment made to him on 31 December 2022. He did not accept that it fully met his claims for underpaid wages and/or holiday pay. Those therefore remained live issues for me to determine.
8. Both the Claimant and Mr El Jammal gave evidence on oath, during the course of which, in light of the failure to address the issues in their witness statements, I took an interventionist approach, asking the Claimant in particular a large number of questions in an attempt to clarify his account of the critical events during his short employment with the Respondent.
9. We had breaks in the morning and in the afternoon, as well as a slightly shortened lunch break. We did not need to hear from Miss S Dosso, who had worked for the Respondent for two days in November 2021 and had also brought a claim in relation to pay. That claim (3201304/22) had been dismissed on withdrawal once the money was paid to her by the Respondent. Ms Letts helpfully confirmed that Miss Dosso's evidence was unchallenged and accordingly Miss Dosso was released without giving oral evidence, though I take her statement (which in fact is of very limited relevance to this case) into account in reaching my decision. Following submissions from both sides, I reserved my judgment.

Findings of fact

10. I begin by explaining to the parties that this is not a decision about the Claimant's skills and experience in Middle Eastern or Mediterranean cooking or his aptitude for his role with the Respondent; nor is it a decision about whether the

Respondent is fully compliant with UK catering laws, though these topics, and others that were similarly irrelevant, were raised during the Hearing. It is a decision about whether the Claimant is owed money by the Respondent and if so, how much. As such, I have confined my findings of fact to those that are strictly necessary to determine the issues in the case.

11. I have taken the issues from the Case Management Summary previously sent to the parties following a hearing at which they were both in attendance, because it was confirmed at the outset of the Hearing before me that they are the issues I have to determine. That said, I do not need to decide the Claimant's employment status (the first matter said to be in issue) because it is not in dispute that he was an employee. Further, Ms Letts did not have a copy of the ACAS certificate but when I gave her the dates of the Early Conciliation period, she agreed that complaints about conduct occurring on or after 17 November 2021 would be in time.

The Claimant's dates of employment

12. The Claimant says in his claim form that he began his employment with the Respondent on 18 October 2021 and that it ended on 1 January 2022 when he was summarily dismissed. The Respondent says that the Claimant did not begin his employment until 25 October 2021. It agrees that he was summarily dismissed on 1 January 2022. At the Hearing, the parties maintained their positions as to the start date.
13. On 11 October 2021, the Respondent sent the Claimant an unsigned letter offering him employment in the role of Head Chef/Kitchen Manager. It was common ground that the salary on offer (£42,000 per year) was an increase from what Mr El Jammal had originally intended. Hence, I infer that at the date of this letter, the pre-offer discussions must already have taken place and agreement reached as to the terms of the proposed employment relationship. The offer is expressly stated to be conditional on: a) the Claimant signing a contract of employment to be sent to him separately after signing the offer letter and being ready to join within a month of signing, and b) the Claimant having the right to work in the UK and submitting documents to that effect. The Claimant has signed the offer letter and it is dated by him 19 October 2021.
14. Both parties had included the contract of employment in their bundles. The Claimant told the Tribunal however while giving oral evidence that he had not read it, either at the time or since. He said he was reading it for the first time during the Hearing. The Respondent's version is unsigned and undated by either party and the Claimant has not included the signature page at all. However, both copies give the Claimant's (continuous) start date as 18 October 2021.
15. It is the Respondent's case that the Claimant told Mr El Jammal shortly before 18 October that he would like to delay his start date by a week, for personal reasons, and that this was agreed. The Respondent relies on the HMRC Starter Checklist completed by the Claimant and signed by him on 26 October 2021, which gives his start date as Monday 25 October 2021.

16. The Claimant acknowledges that most of the form was completed by him and he agreed that he signed and dated it on 26 October, but he said in oral evidence that he wrote only "Monday" above the boxes for "Employment start date" and that he left the boxes themselves blank. He says he did not fill in the date of 25 October 2021 and wrote only "Monday" because he knew it had been the previous Monday but not what date that had been. He says it is clearly not his handwriting.
17. On balance of probabilities, I find that the Claimant's start date was 25 October 2021. This is for a number of reasons:
 - a. The writing is not obviously dissimilar to that in an adjacent box for the Claimant's NI number, which he accepts he wrote, or on the offer letter which he has signed and dated, or the date of 26 October 2021 at the end of the form. It is particularly difficult to tell, because all there is to go on is the date expressed as DD/MM/YYYY. All I can say is that it is possible, but not probable, that the handwriting is not the Claimant's. I cannot find on balance of probabilities that it was completed by somebody else. His explanation that he wrote Monday because he did not know the date is not very convincing because it was either the day before or eight days before. Neither calculation (whether subtracting one or eight from 26) would be difficult to work out.
 - b. I asked the Claimant how he got in to work and he told me it was by train. I asked if he had tickets or a bank statement but he said he no longer has access to those as it was such a long time ago. While I accept that he would not necessarily have retained train tickets or receipts, I suggested that by early April 2023, he should still be able to access his bank statement from the middle of October 2021, and would certainly have been able to do so at the date he lodged the claim on 24 March 2022. This would show a record of train ticket purchases on a daily basis, if I was to accept that he attended work seven days a week from the beginning of his employment until 15 November 2021. The Claimant said that he could have bought a weekly one. The point remains though that he could have produced compelling evidence demonstrating that he made either one weekly or seven daily purchases in the week beginning 18 October, but he has not.
 - c. Thirdly, the Claimant has produced a letter dated 7 February 2022 from HMRC giving his employment history for 2021 to 2022. This shows that he started with the Respondent on 25 October 2021. I am mindful that this would have been taken from the Starter Checklist, so if the date was wrong on that, it would be wrong on the HMRC database, but there is no evidence that the Claimant has contacted them in the intervening 14 months to seek to correct the data they hold.
 - d. Fourthly, and the most compelling reason, is that there are WhatsApp messages, again produced by the Claimant, between him and Mr El Jammal. These are not conclusive but they strongly suggest that the Claimant did not start until 25 October. There are no messages between them at all the preceding week. Further, the messages begin on 25 October with the Claimant saying to Mr El Jammal, "Please don't

forget to send me the procedure for the opening and closure of the kitchen". It was common ground that opening and/or closing the kitchen were among the Claimant's tasks (he was given a set of keys for that purpose, to which I return below) so I find it unlikely that the Claimant would have worked for the Respondent for a week without knowing the procedure for doing so.

Hours of work completed/overtime pay

18. The offer letter says that the Claimant is required to work 40 hours a week "unless more hours are required from you due to business needs". The contract also says 40 hours a week are the normal hours, to be worked between the hours of 05.00 and 00.00. It also says that normal hours "may be varied from time to time to meet the operational requirements of the Company". Neither of these documents makes any reference to pay for overtime worked.
19. The Claimant does not address overtime pay in his witness statement. I asked him in oral evidence what, if any, discussions had taken place about it. First, the Claimant said that in any kitchen, when you do extra time, you get paid for it. Then he said that before he accepted the offer, he had discussions about the hours and the pay with Mr El Jammal. The original salary offered was £35,000. The Claimant had assessed the work that was involved and says he told Mr El Jammal that he would be working significantly more than 40 hours a week, so he wanted £50,000. He said Mr El Jammal responded that he would pay £42,000 and if the Claimant worked beyond his 40 hours, he would get extra pay, based on his weekly salary divided by 40. Mr El Jammal does not recall the Claimant mentioning £50,000. He said the Claimant told him what he was previously earning and he agreed to pay the Claimant more than that.
20. It is the Claimant's case that he did indeed work well beyond his core hours and hence is entitled to overtime payments for each of the days he worked. Further, he says in his witness statement that he worked seven days a week from 07.00 to close (22.00) because the Respondent told him those hours were necessary "as per contract". He said he asked for time off but that the Respondent refused it. I infer that by "the Respondent", he means Mr El Jammal.
21. The Claimant's schedule of loss says he "regularly" worked extra hours and he gives a breakdown of payments in which he is claiming that he worked 15 hours a day (06.30 to 22.30) between 18 and 31 October 2021, with an occasional 10-15-minute break on some days (unspecified). For each of the months of November and December however, he is claiming only £3,500 gross, based on a 40-hour week.
22. In evidence, the Claimant said on the contrary that he never had a break and indeed, he said, there was nowhere to take one. He said that Mr El Jammal told him he would get paid from 07.00 so he is not claiming before that. Further, although he told me he had not read the contract, he nonetheless said that he has taken off 60 minutes each day from the claim for overtime. I note that the contract provides for an unpaid break of 60 minutes each day.

23. In the Claimant's bundle there is a message from him to Mr El Jammal, dated 2 November 2021, in which the Claimant says, "Last week I work open to close, the whole week". There is no reply from Mr El Jammal. It is not possible to tell whether the message has been received or read. (However, this message further supports the finding that the Claimant had not, by 2 November, been working since 18 October, i.e. for a fortnight, without a break, since he refers only to having worked the previous week).
24. When the Claimant was being cross examined about his start date, he was asked whether there was any evidence that he had worked on 18 October. He replied that the Respondent did the rotas and he had no copies. When he was answering questions from me, he said, more than once, that there was no rota. I reminded him of his earlier evidence that Mr El Jammal did the rotas, and he then said there was a rota but his name was not put on it because, as he was the Head Chef, he had to be there. I asked him about a message from him to Mr El Jammal, to which I return below, sent on 17 November asking, "Can I know if I'm on the rota for today?" The Claimant then said that there was a rota, and that it did have his name on it, but it did not have his start or finish times, just his name, every day.
25. Mr El Jammal gave evidence that the Claimant was supposed to work an eight-hour shift, five days a week, and had a one-hour break each day. He said in supplemental questions in chief that he had never asked the Claimant to work overtime and nor was there any need for him to do so. He refuted the Claimant's evidence that there was nowhere for him to take his breaks, saying that there was an office within the kitchen with two desks in it. This was the Claimant's office and was also used by Mr El Jammal himself when he was on the premises. Mr El Jammal said it is not possible for anyone to work for more than four hours without a break.
26. Mr El Jammal agreed that on 25 October and on the following two or three days, the Claimant came in to the kitchen much earlier than his shift start time but said he left at the end of his shift. His evidence was that the Claimant expressed the wish generally to come in much earlier – at 06.00 - and to leave earlier, but this would not have fitted with the Respondent's opening hours, which were from 10.00 to 23.00. Mr El Jammal recalled that during the first week, he was training the Claimant and he gave the details of what was covered during the first three days. Mr El Jammal said he would arrive at 09.00 normally, but that he came in earlier in the week when the Claimant had just started.
27. Before the Claimant joined, Mr El Jammal said, he completed the rotas himself, but once the Claimant started, this was to be one of his tasks. He did not expect the Claimant to be staying for additional hours because it was the Claimant's role to plan adequately and for others to execute the plan. He did not accept that the Claimant was required to do tasks like washing the dishes or mopping the floor. He said if the Claimant had done those things, it would have been as part of training others in using the cleaning equipment and detergents. He denied recalling the other team members saying that the Claimant might as well have a bed upstairs. Mr El Jammal said he was aware that the Claimant has a disabled child and denied that he would require someone in such a situation – or indeed anyone - to work seven days a week and throughout opening hours. He said that he never asked the Claimant to work overtime and never saw him working it.

28. It was common ground that the Claimant had a key to the kitchen. There was however considerable dispute about who else had one. The Claimant said it was just him and Mr El Jammal. Mr El Jammal refuted this, saying there were five sets, each registered with Verisure.
29. Mr El Jammal denied in supplemental questions in chief having had any discussion about overtime pay with the Claimant. However, overall his evidence on this point was confusing. He said in answer to my question that the contract says anyone who works overtime will be paid for it. I asked him to show me where in the contract this appears. He took me to the offer letter but could not find any mention of pay for overtime. He then said that if the Claimant was working additional hours, this would be reflected in the productivity bonus. Reference to that is in the contract, as follows: "There is a non-guaranteed bonus scheme in operation in respect of your employment, payment of which is subject to Company performance".
30. In light of the witnesses' conflicting accounts of any discussion as to overtime pay and Mr El Jammal's evident belief that there was a provision for it in the contract, I have found it difficult to resolve this point. However, I find that:
- a. Mr El Jammal intended originally to offer the Claimant £35,000 but increased this to £42,000, an increase of 20%, before he started. I do not accept on balance of probabilities that he also told the Claimant he would receive paid overtime. The Claimant would very quickly have exceeded the pro rata equivalent of the £50,000 that he says he asked for.
 - b. The Claimant's witness statement and schedule of loss both claim for overtime only up to 31 October 2021. Thereafter, he claims at "flat" rate for his November and December pay. However, his message of 2 November 2021, an extract from which is set out above, suggests on balance of probabilities that he had worked all the days of the previous week, i.e. since (on my finding) his employment started, without a day off, and had done so from opening to closing. It does not suggest that Mr El Jammal had required him to do so, or that the Claimant was expecting to be paid any additional amount for the extra hours worked. On the contrary, the Claimant continues, "This week, the next two days, I need to start at about 11.00 am, and at least ONE DAY OFF".
 - c. In evidence, Mr El Jammal said he did not recall seeing this message, though he confirmed it was sent to his number. I find on balance of probabilities that it was sent and that the contents are accurate. Mr El Jammal accepted in his evidence that the Claimant had come in early in the first days of his employment and that he, Mr El Jammal, was pleased as he saw this as a sign of the Claimant's eagerness to get started. He also said that the Claimant would leave and then come back in to see if the staff were doing well. Again I find this is likely to have been the case as the Claimant was starting in a senior position in a new role. That is not the same as the Respondent requiring the Claimant to work overtime.

- d. I find that the Claimant had the autonomy, in line with his seniority, to decide in early November that he would go in later in the morning, to make up for having worked so many hours the previous week. He was telling Mr El Jammal that he intended to do so in the message of 2 November, without any negative (or any) response; he is not asking for Mr El Jammal's permission.
- e. I accept that Ms Dosso's unchallenged evidence was that the kitchen staff, including Mr El Jammal, joked that the Claimant should have a bed upstairs above the kitchen. I do not consider that this assists me in determining his actual hours worked or whether he was entitled to be paid for any hours in excess of 40 per week. It suggests on balance of probabilities that the Claimant was there when Miss Dosso arrived for the two days of work that she carried out for the Respondent and that he may also have been there when she left, ten hours later; at any rate, it certainly suggests that the Claimant's hours were long. I do not consider it takes the point any further. He was the most senior member of staff other than Mr El Jammal himself, and he was salaried rather than hourly paid like Miss Dosso.
- f. As a matter of fact, and notwithstanding Mr El Jammal's evidence, the contract is silent on overtime pay. Its provisions envisage the Claimant working additional hours according to business need, but do not provide for extra pay. This is not "charity" or "slave labour" as the Claimant contended, but reasonably common for someone in a senior and salaried role. As Mr El Jammal notes, the Claimant would have been in line to receive a bonus if the business was profitable as a result of his endeavours. I find that there was no entitlement to any additional pay.
- g. I do not accept the submission that the Respondent has been shown to be a "serial underpayer". I accept that it paid Miss Dosso late, and only after she raised a claim under the same multiple as the Claimant. Again, it proves nothing more than that. Other employees, who also worked for the Respondent at the same time as the Claimant, have not had to bring claims for their wages. As I note below, while the Claimant was paid late for November, it is not suggested that the Respondent failed to pay him at all. It is the correct amount that is the subject of this claim.
- h. In any event, a claim for overtime carried out between 25 and 31 October is out of time and the Claimant has not shown that it was not reasonably practicable to bring a claim in this regard within the time limit. There is no reliable evidence before the Tribunal to determine the hours that the Claimant did work between 31 October and his last day of work just over two weeks later.

Notice

- 31. Once more, there was great confusion and disagreement between the parties over the circumstances that led up to the termination of the Claimant's employment. I am heavily dependant on the messages in the bundle as contemporaneous records of what occurred, because the Claimant's oral evidence in particular was inconsistent, sometimes changing from one sentence to the next.

32. It is the Claimant's case according to his witness statement that at 03.05 on 15 November, Mr El Jammal rang and told him to come to work at 10.00 and did not respond to the Claimant when he said he still had to leave at 16.00 because of "an arrangement with [his] children".
33. In oral evidence the Claimant said that the "arrangement" in question was that he had to go to hospital with one of his children. He said that he had gone to see Mr El Jammal the previous afternoon (14 November) and told him he needed to leave by 4 pm on 15 November to go to the hospital with his child. The Claimant said Mr El Jammal did not answer but the Claimant sensed he was not happy. I asked how he formed that impression. The Claimant said Mr El Jammal looked "sombre". Initially the Claimant said Mr El Jammal was not happy and shook his head when the Claimant told him, but then the Claimant said that Mr El Jammal nodded his head. There is no evidence about this discussion in the Claimant's witness statement.
34. There is no evidence of any contact between the two men before 04.14 on 15 November. At that time, the Claimant messaged Mr El Jammal and said, "I'm on my way. As I say, I still leave at 4pm today, for the reasons already explained. Let me know please" [typo corrected for ease of reading].
35. It is entirely unlikely that if Mr El Jammal had told the Claimant he did not need to be in until 10.00 on 15 November, the Claimant would have left his home at 04.14. Accordingly, I find there was no such discussion.
36. It is clear however that there had been a conversation, which I infer took place the previous day, in which the Claimant had told Mr El Jammal that he would need to leave at 16.00 on 15 November, and that was not refused. This is based on the fact that at 08.02, Mr El Jammal replied, saying, "Good morning chef, please have it [as] an off day", accepting that the Claimant needed to leave early and indeed not only agreeing that he could do so but advising him he could take the whole day.
37. The Claimant replied shortly afterwards saying he was already on the premises and had been since 06.30. He asked whether he should get dressed and leave or wait for the team to arrive. Mr El Jammal replied, "It's fine Chef, you can leave, I will be there by 09.30". The Claimant replied at 08.24 saying he was leaving.
38. This was a cordial exchange between the two men. I reject the Claimant's assertion that this indicated to him the Respondent was trying to replace him. That is not a reasonable inference anyone could draw from these messages. The Claimant said that he knew of former colleagues who asked for the day off and were refused, so it was a case of "déjà vu". He said that Mr El Jammal told them if they took the time off anyway, they would not be allowed back. He said this happened to several colleagues, in different roles. Initially he said he did not have their names. Then he said there were two of them, that he has their phone numbers and that he is still in touch with them. I asked how he is still in touch with them, 18 months later, but without knowing their names. He then gave me three names.

39. I do not accept the Claimant's evidence on this point, which was internally inconsistent and appeared to be being made up as he went along. I note that in the scenario he gave, a colleague who asked for time off and was refused but went off anyway would be absent without leave, which is an entirely different scenario from one where they just ask to leave early and are given the day off. It is therefore not relevant, and even if it did occur, the Claimant could not reasonably have inferred from Mr El Jammal giving him the day off that he was being replaced.
40. In oral evidence, the Claimant said that Mr El Jammal rang him around 04.30 or 05.00 on 16 November and told him to stay home again that day. He said Mr El Jammal did not tell him why he was to stay home, and the Claimant did not ask. This is not mentioned in the Claimant's witness statement and there is no written confirmation of the call. I find it is an inherently unlikely discussion to have taken place.
41. This is also another area where the Claimant's oral and written evidence conflict, because the Claimant says in his statement that he tried for two days to try to find out about the rota but Mr El Jammal did not answer either his mobile or office phone. It is unclear what two days these could have been. Mr El Jammal's evidence is that the Claimant did not come in on 16 or 17 November because those were his days off. I find on balance of probabilities that this was the true position.
42. What is certain is that on 17 November, the Claimant messaged Mr El Jammal at 08.04 to say, "Good morning, can I know if I'm on the rota for today? Let me know before I leave my home. Many thanks". Mr El Jammal replied at 08.10, "Hi chef, no it's fine. I will call you later". Again, this is an entirely cordial exchange with no animosity displayed from either side. It is also inconsistent with the Claimant being required to start work at 07.00, because at least on 17 November, he had not left home by 08.00.
43. Both the Claimant and Mr El Jammal claim that they tried to ring the other numerous times over the next few days. On the Claimant's case (in his witness statement), on 15 November, Mr El Jammal had texted him "to get changed and leave the restaurant" and on 17 November Mr El Jammal texted him, "ordering" him to remain at home. I consider those are not accurate reflections of the interactions between them. As I have said, those interactions were, on the face of it, pleasant. The Claimant asked on 15 November whether he should wait for the team to arrive before he changed and left, and Mr El Jammal said he did not need to; Mr El Jammal did not tell him he had to change and leave. Nor, on 17 November, did Mr El Jammal order him to remain at home.
44. On the Respondent's case, Mr El Jammal was expecting the Claimant in to work on 18 November. When the Claimant did not come in, Mr El Jammal tried to call him on numerous occasions. The Claimant did not answer. On 26 November, Mr El Jammal messaged the Claimant to ask if he could come and see him at 13.00 the following day (Saturday). The Claimant replied saying if Mr El Jammal wanted to see him, he could come on Sunday, to which Mr El Jammal said, "Yes please", asking if the Claimant could make it between 15.00 and 17.00. The Claimant said only, "Will keep you posted".

45. However, on Sunday 28 November, the Claimant messaged again saying, "Thank you for inviting me today; I shall not be able to see [you] today, as I need to spend today with my children". He continued, "...I shall see if I can make it tomorrow, Monday in the afternoon if that suits you". Mr El Jammal replied that that would be fine and that if the Claimant could not make it, he should try to arrange sending back his key, as Mr El Jammal really needed it. The Claimant said if that was what he needed, that could be arranged.
46. In light of this exchange, I find that Mr El Jammal's evidence is more persuasive than the Claimant's. I have said above that the Claimant's explanation for not going in to work is implausible. Mr El Jamal, by contrast, said that the Claimant told him he had other work and had not yet decided whether he wanted to commit to working for the Respondent. The Claimant initially denied in cross-examination that he had worked anywhere else. He was taken to the HMRC letter in his own bundle, in which it states he commenced work for Change Recruitment Group Limited on 15 November 2021 and ended on 21 November 2021. First he said that this was not his work but work carried out by his own company. I reminded him that this is a document from the PAYE and Self-Assessment department of HMRC, giving his personal employment history at his own request. He then said it was possible that he had worked for one day. I find that is in keeping with the earnings detail given on HMRC's letter (£89.00 with £17.80 tax paid) and that the Claimant did indeed work for another employer in the week of 15-21 November 2021.
47. I find that on his own account, the Claimant was in a very senior position with the Respondent, being required to work seven days a week for 15 or 16 hours at a stretch, entrusted with the keys to open and close the workplace and in charge of a busy kitchen. Yet, having been given no rational reason to suppose that he was not required at the Respondent's workplace, he simply stopped going in. He could not have supposed he was suspended; there was nothing in the messages with Mr El Jammal to have indicated that he was. On the contrary, the Claimant was being asked expressly to come in and see his manager. However, he did not send a message to ask when he was next on the rota, and when he was specifically asked to come in, repeatedly prevaricated, even missing the time that he had suggested himself; and he carried out work for somebody else, notwithstanding the express contractual clause requiring him to spend the whole of his working time and attention to Company business.
48. On 29 November, at 11.25, the Claimant messaged Mr El Jammal to say, "...I can be there between 12 and 1pm. Are you there?" Mr El Jammal replied, "...I'm really sorry but I have a busy day. Can we confirm tomorrow at 12?" The Claimant responded, "Today is my free day. My next day free after new year. Thanks. Next free day is after 1 Jan 2022. Thank you". Again this is totally inconsistent with a) someone believing himself to have been suspended for any reason and b) someone who is still actively working for the person with whom they are corresponding; in effect, he was telling the CEO of his employer that he was not free and hence not coming in for the whole of the month of December. I accept Mr El Jammal's evidence in his witness statement when he says that it was apparent to him at this time that the Claimant was not returning to work.

49. Although neither man deals with this in his witness statement, I gather that at some point, the Claimant did briefly attend the Respondent's premises and gave his key back to Mr El Jammal. Also, on 6 December, they had a telephone discussion in which the Claimant said he would leave if he was paid a month's salary and a week's notice. He followed this up in a message that evening. Mr El Jammal agrees that they had a discussion that day and that this was the proposal that the Claimant made, but he did not agree to it. He says that the Claimant said he was not resigning.
50. Accordingly, Mr El Jammal took legal advice and on 27 December, he wrote to the Claimant inviting him to a disciplinary hearing on 29 December 2021. The allegations were a failure to comply with a reasonable instruction to attend work, in that the Claimant had been absent without authorisation since 18 November and had failed to follow absence reporting procedures. Mr El Jammal advised the Claimant of his right to be accompanied and that if he did not attend, one outcome might be his summary dismissal. He also explained that the Claimant's absence was both unauthorised and unpaid.
51. The Claimant replied to the letter later that day saying that his time was consecrated to his family and his next free day was not until 5 January 2022 when his children re-started their school classes. The disciplinary hearing duly took place in his absence on 29 December, and both parties agree that the Claimant was dismissed with immediate effect from 1 January 2022. Mr El Jammal wrote confirming his reasons by letter of 13 January 2022.
52. A previous Judge at one of the PHCMs has recorded that the Respondent said the Claimant had been invited to a disciplinary hearing, failed to attend and was dismissed. They have also recorded that the Claimant said "this" was an invention of the Respondent made with the knowledge that the Claimant was pursuing or intending to pursue a claim. It is unclear what the "this" is in the sentence. I asked the Claimant about it but his answer was vague. He referred to discussions that preceded his employment in which he said the Respondent was not compliant with UK catering law, and to ACAS Early Conciliation. However, the latter did not start until 16 February.
53. It then seemed to me that the Claimant was saying that the "invention" was that he was absent without leave. I find however that that was not an invention. The Claimant was indeed absent without leave or authorisation for the period from 18 November onwards.
54. The Claimant told me that he had actually considered his employment to be at an end on 6 December, provided the Respondent paid him a month's pay and a week's notice. It is wholly unclear to me on what basis he would legitimately ask for a month's pay or a week's notice, in the circumstances.

Pay

55. According to the payslips in the bundle, the Claimant was paid on or around 30 October 2021 in the net sum of £828.97. He was next paid the net sum of £1,267.08. Although the payslip gives the payment date of 30 November 2021, Mr El Jammal said in evidence that the second payment was made on 5 December 2021. The Claimant appears to agree that a payment was made

around that date, because he says in his witness statement that on 9 December, he sent a message to the Respondent (again, presumably Mr El Jammal) thanking him for the “partial payment” of his wage. That message was not in either bundle, but the Claimant did not suggest that the net figures shown on the payslips were inaccurate.

56. As noted above, the Claimant was subsequently paid further amounts for his accrued but untaken holiday (5.26 days’ pay) and a shortfall in his wages. His contract stipulates that his rate of holiday pay is by reference to his normal basic rate.

Law and Conclusions

57. The burden of proof is on the Claimant to show that he has been paid less than was properly payable, in order to succeed in a claim for unpaid wages. He also has to show that the claim has been brought in time.
58. On the time point, I have concluded above at paragraph 30(h) that the Claimant’s claim for overtime pay was brought out of time. On the basis that he was underpaid on 30 October 2021 for work carried out up to that date from 25 October 2021, he had until 29 January 2022 to enter ACAS Early Conciliation, but he did not do so until 16 February 2022. He has not shown that it was not reasonably practicable to start his claim (by contacting ACAS) within the time limit. Accordingly, he does not have the benefit of an extension of time and his claim was not submitted until 24 March, nearly two months late.
59. However, I have also concluded that the claim for overtime pay, even had it been brought in time, would be unfounded in any event because the Claimant has not shown on balance of probabilities that he was entitled to be paid extra for overtime worked.
60. The remainder of the claims were brought within time. So far as holiday pay is concerned, the Respondent concedes that the Claimant was not paid in lieu of his accrued holiday on termination. The proportion of the leave year during which he accrued holiday was the period of his employment, i.e. 25 October 2021 to 1 January 2022, which I calculate means he was entitled to a total of just over five days. He was paid for 5.26 days and hence has been paid for all of his accrued entitlement.
61. The Claimant was paid for his work from 25 October to 17 November. Thereafter he was absent without authorisation, in breach of his contract. During that period, he was not entitled to be paid any wages. He was in breach of the “wage/work bargain”.
62. So far as the Claimant’s notice pay claim is concerned, I conclude that the Respondent has shown the Claimant was in repudiatory breach of contract by his conduct in failing to attend work, without good reason or authorisation, between 18 November 2021 and 1 January 2022, and thus it was entitled to dismiss him without notice or pay in lieu.

63. Since there is no amount payable to the Claimant by way of compensation, the fact that the Respondent did not enable him to pursue his appeal against dismissal (in contravention of the ACAS Code of Practice) does not entitle him to any award, because that is parasitic on the Claimant succeeding in another claim. Accordingly, the Claimant's claims are not well-founded and fail.

Employment Judge H Norris
Date: 8 April 2023