



# EMPLOYMENT TRIBUNALS

BETWEEN

*Claimants*

Dr A Cunningham

- (1) Dr L A McGuiness
- (2) Dr A Moon
- (3) Dr O Fuge
- (4) Dr T Suntharasivam

Mr M Penn (& others)

*Respondent*

County Durham & Darlington  
NHS Foundation Trust

County Durham & Darlington  
NHS Foundation Trust

Newcastle upon Tyne Hospitals  
NHS Foundation Trust

AND

## PUBLIC PRELIMINARY HEARING

Heard at: North Shields

On: 12 April 2017

Before: Employment Judge Johnson

*Appearances*

For the Claimants: Mr C Bourne of Counsel

For the Respondents: Mr R Gibson, Solicitor

## JUDGMENT

- 1 The default judgment promulgated on 1 March 2017 in cases 2500010/2017, 2500013/2017, 2500014/2017, 2500015/2017 and 2500016/2017 are hereby set aside, the Tribunal being satisfied that it is in the interests of justice to reconsider those judgments.
- 2 The time for service by each respondent of its Response in each case, is extended to 10 March 2017. The responses served in each case are accepted by the Employment Tribunal and copies shall be served upon the claimants' solicitor.

- 3 All of the above cases are hereby combined and shall be heard together.
- 4 A public preliminary hearing will take place at **North Shields Hearing Centre, 2<sup>nd</sup> Floor, Kings Court, Earl Grey Way, Royal Quays, North Shields, Tyne and Wear, NE29 6AR** on **Friday, 21 July 2017** at **9:45am** or as soon thereafter on that day as the Tribunal can hear it. The parties are to attend by **9:30am**. The sole issue to be decided at that public preliminary hearing shall be whether the Employment Tribunal has jurisdiction to hear the complaints brought by the claimants.
- 5 By not later than **31 May 2017** the parties' representatives shall agree (and the respondents' representative shall prepare):-
  - (a) a bundle of documents for the public preliminary hearing;
  - (b) a list of agreed facts for that public preliminary hearing;
  - (c) a list of issues to be decided at that public preliminary hearing.
- 6 Copies of the documents referred to in paragraph 5 above, together with copies of each representatives' skeleton arguments, shall be delivered to the Employment Tribunal at **North Shields Hearing Centre, 2<sup>nd</sup> Floor, Kings Court, Earl Grey Way, Royal Quays, North Shields, Tyne and Wear, NE29 6AR** by not later than **4:00pm** on **Tuesday, 18 July 2017**. Copies of any authorities referred to in the skeleton arguments must be included.
- 7 The claimants' application for costs is postponed and shall be heard at the conclusion of the public preliminary hearing on **21 July 2017**. The claimants' representative is ordered to serve upon the respondents' representative and the Employment Tribunal by not later than **31 May 2017**, a fully particularised schedule of costs. The skeleton arguments referred to above shall contain each side's submissions relating to the costs application.

## **CASE MANAGEMENT SUMMARY**

- 1 This matter came before me this morning by way of a public preliminary hearing to consider the respondents' applications for reconsideration of the default judgments issued in those claims brought against County Durham and Darlington NHS Foundation Trust in case numbers 2500010/2017, 2500013/2017, 2500014/2017, 2500015/2017 and 2500016/2017. Also before me is the file in case number 2500027/2017, which is the claim against the Newcastle upon Tyne Hospitals NHS Foundation Trust. That case is listed for a private preliminary hearing to consider whether any case management orders are required to ensure that the case is fully prepared for final hearing.
- 2 All of the claimants were today represented by Mr Colin Bourne of counsel. Both respondents were represented by Mr Robert Gibson, solicitor.

- 3 The claimants bring complaints of unauthorised deduction from wages, contrary to section 13 of the Employment Rights Act 1996. The claimants are all junior doctors, who carry out work in various hospitals in the North East of England. Some are operated by Newcastle upon Tyne Hospitals NHS Foundation Trust and other by County Durham and Darlington NHS Foundation Trust. Mr Gibson submitted to me today that the legal responsibility for payment of wages to all of the junior doctors involved lies with the Newcastle upon Tyne Hospitals NHS Foundation Trust, even though technically some of the doctors may be employed by County Durham.
- 4 Claim forms were presented on 5, 6 and 12 January 2017. Those were served in each case on the respondent named in those claim forms. It is accepted by Mr Gibson that all of the claim forms were properly served and received by each respondent. By letter dated 6 February 2017, Mr Gibson on behalf of the respondents, sought an extension of time for presentation of the response form ET3, until 20 February 2017. That application for an extension of time was granted. No response form was presented by any of the respondents by that date. On 10 March 2017, response forms in all cases were presented to the Employment Tribunal. By that date, the extension of time had expired and default judgments were promulgated on 1 March 2017 in all of those cases where the respondent is the Durham Trust. No default had by then been issued in the cases where the respondent is the Newcastle Trust.
- 5 By letter dated 9 March 2017, a formal application was made by Mr Gibson on behalf of the respondents for a reconsideration of those default judgments, together with an application for a formal extension of time in which to present the response in each case.
- 6 A most helpful chronology had been prepared by Mr Bourne and marked C1, for the purposes of today's hearing. Mr Gibson accepted the accuracy of that chronology. Mr Gibson readily and honourably conceded this morning that the claimants in the cases against the Durham Trust have complied throughout with the requirements of the 2013 Rules and have what can only be described as a "regular" judgment. The respondents on the other hand, have failed to comply to those Rules, in that they have failed to present their response by the due date set out in the letter accompanying those claim forms and furthermore have failed to meet the extended deadline which was granted to them. Mr Gibson accepts that no further application was made for another extension of time and that no contact was made with the Employment Tribunal until the respondents attempted to present their response forms after the extended deadline.
- 7 Mr Gibson's explanation for that delay is simply that this is a completely unique case, which involves complex contractual arrangements between a number of junior doctors and the two respondents. Mr Gibson's firm is usually instructed by the Newcastle Trust, but does not ordinarily act for the Durham Trust. It is because of the somewhat unusual contractual arrangements between the two Trusts, that the relevant paperwork did not make its way from

the Durham Trust to the Northumberland Trust and then to Mr Gibson's firm, within the usual period of time. Even when the papers were received, Mr Gibson's firm required additional information to enable a response to be properly drafted and submitted. Meanwhile, there is an ongoing internal procedure relating to those contracts which form the subject matter of these proceedings. Mr Gibson sincerely apologised for the oversight within his office which caused the extended deadline to be missed. Mr Gibson considered it a matter of professional duty to ensure that something more than a "holding defence" was submitted.

- 8 I enquired of Mr Bourne for the claimants as to whether, and if so what, any prejudice would be suffered by the claimants if the default judgments were to be set aside, if time were extended to enable the responses to be accepted and the respondents' given permission to defend these claims. Mr Bourne, again helpfully and honourably conceded there could still be a fair trial of all of the issues between these parties in these claims. The prejudice, Mr Bourne submitted, was that the claims would be inevitably delayed and thereby the claimants would be kept out of money to which there is a contractual entitlement. I respectfully pointed out to Mr Bourne that it had been made clear by those instructing him, that the claimants are not yet in a position to proceed to a remedy hearing, because they have not yet been able to properly calculate their loss. Furthermore, even if the judgments were not to be set aside, the respondents would still be entitled to be heard with regard to remedy. On the information available before me today, it seems apparent that the arguments to be used with regard to the calculation of any loss will not be dissimilar to those which would be used at a full liability hearing. The dispute between the parties relates to a number of factors, including which shifts were worked, which shifts were recorded as having been worked, which pay band is appropriate to each doctor and whether any specific supplements may be payable to any doctor in his or her circumstances. That may (or may not) involve detailed consideration, interpretation and/or construction of the terms of doctors' contracts and would appear to be necessary whether or not the hearing is one to consider liability or simply remedy.
- 9 Following on from those latter points, it is acknowledged by both representatives that there may be an issue in this case as to whether the Employment Tribunal has jurisdiction to hear these complaints, if they require the Tribunal to construe the doctors' contracts, rather than simply apply those contracts and calculate any loss. It is the respondents' case that the Employment Tribunal does not have jurisdiction in these claims. Mr Bourne insists that the claims do not require the Employment Tribunal to construe the contracts, or any parts of them. I referred both representatives to the recently decided case in the Employment Appeal Tribunal of **Agarwal v Cardiff University** UKEAT/0210/16/RN, which was handed down on 22 March 2017. Both representatives were familiar with that decision. It was agreed that the question of the Employment Tribunal's jurisdiction to hear these claimants' complaints could not be properly dealt with today, in a two-hour hearing. That is a matter deserving of detailed consideration, preparation and legal submissions. It is nevertheless a factor to be taken into account in deciding

whether it is in the interests of justice for the default judgments referred to above, being reconsidered and if appropriate, set aside.

- 10 I am satisfied in this case that I am required to balance any prejudice to the claimants in granting the application for reconsideration, against the prejudice caused to the respondents by denying them the opportunity to fully defend these claims. I am satisfied that any delay is minimal in all the circumstances of this case. I am satisfied that it is likely that the issues to be taken into account at a remedies hearing will be little different to those which will be taken into account at a full liability hearing. Mr Bourne readily concedes that the total value of these claims will run into tens of thousands of pounds. There are internal appeal procedures which remain to be resolved. The claimants are not yet in a position to properly quantify their losses. In all the circumstances, I am satisfied that the potential prejudice to the respondents far outweighs any potential prejudice to the claimants. I am therefore satisfied in all the circumstances that it is in the interests of justice for the default judgments to be set aside. I so order.
- 11 I enquired of Mr Bourne and Mr Gibson as to whether they would agree to all of these cases being combined, so that they will be heard together. Mr Gibson agreed, but Mr Bourne submitted that the claimants preferred to have their cases dealt with separately. However, Mr Bourne did agree that it will be in accordance with the overriding objective if the cases were combined at this stage so that the jurisdiction point could be considered at one hearing. Thereafter, if appropriate, the Employment Tribunal will consider whether the cases should again be separated and dealt with at different hearings.
- 12 It was agreed that there should be a one day hearing before a Judge alone, to consider solely whether the Employment Tribunal has jurisdiction to hear these complaints. The principal point is whether or not the Employment Tribunal is required to construe the claimants' contracts of employment, or simply apply those contracts in formulating a calculation of any wages unlawfully deducted. If the Employment Tribunal does not have jurisdiction, then the claimants will have to present their complaints to the Civil Courts.
- 13 Mr Bourne and Mr Gibson most helpfully agreed that there will be no need for any witness evidence to be given at the hearing to decide the jurisdiction points. They will be able to agree a bundle of documents, an agreed list of facts and an agreed list of issues. The case management orders set out above and the dates for their compliance were then agreed.
- 14 At the end of the hearing Mr Bourne on behalf of the claimants made an application for costs, on the basis that the respondents had acted unreasonably in failing to present their response by the due deadline or indeed by the extended deadline fixed by the Employment Tribunal. Mr Bourne submitted that this amounted to "unreasonable conduct in the way that the proceedings have been conducted". Mr Bourne seeks costs in the total sum of £2,014.80, including solicitors costs and counsel's fees. Mr Gibson opposed that application, submitting that the respondents' application for a

reconsideration had in fact been successful and that a hearing had only been necessary because of the claimants' refusal to agree to a reconsideration. Furthermore, Mr Gibson maintained that this is a case where the Employment Tribunal does not have, and indeed never did have, jurisdiction to hear these claims and that the claimants should have realised that before issuing their proceedings.

- 15 I am satisfied that the question of costs is one which is best dealt with at the conclusion of the public preliminary hearing to consider the jurisdiction point. I therefore postpone the claimants' application for costs until the end of that hearing. The claimants should serve upon the respondent (and copy to the Employment Tribunal) a detailed schedule of costs, together with the basis upon which the respondents are said to have acted unreasonably in the conduct of the proceedings.

### **CONSEQUENCES OF NON-COMPLIANCE**

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

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**Employment Judge Johnson**

**Date 18 April 2017**

**Sent to the parties on:**

**27 April 2017**

**For the Tribunal:**

**G Palmer**