EMPLOYMENT TRIBUNALS

Claimant: Mrs M Jakuba

Respondent: Blue Arrow Limited

HELD AT: Leeds **ON:** 1 August 2017 (in chambers)

BEFORE: Employment Judge D N Jones

JUDGMENT

The respondent shall pay a financial penalty of £100 to the Secretary of State pursuant to section 12A of the Employment Tribunals Act 1996 as a consequence of the aggravating features relating to its failure to pay the claimant her entitlement to holiday pay.

REASONS

1. On 13 April 2017 the claimant issued a claim in the Tribunal for holiday pay. She claimed under the Agency Worker Regulations she was entitled to the same basic pay and conditions as permanent employees. She worked at Farmers Boy in Cemetery Road, Bradford. The respondent submitted a response resisting the claim on 16 May 2017. It contended that a derogation from regulation 5 applied and enclosed a contract of employment which was signed by an employee on 21 May 2012, but not the employer. The named employer was Temploy Recruitment Services Limited.

2. On the day of the hearing the claimant attended. The respondent did not. At 6.09pm on 12 June 2017, the day before the hearing, the respondent's representative sent an email to the Tribunal. It stated that:

> "Due to commercial considerations the respondent would not be attending but would make a payment of the sums claimed at 9.00am."

3. It stated:

"For the avoidance of doubt, Blue Arrow admits no liability to the claim."

4. The claimant checked her bank account but no monies had been received by 10.15pm on 13 June 2017. The Tribunal gave judgment in her favour and ordered the respondent to pay the claimant's Tribunal fees.

5. By section 12A of the Employment Tribunals Act 1996 (ERA):

"Where an Employment Tribunal determining a claim involving an employer and a worker –

(a) concludes that the employer has breached any of the worker's rights to which the claim relates, and

(b) is of the opinion that the breach has one or more aggravating features,

the Tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim)."

6. Because the respondent did not attend the hearing it was not possible for the Tribunal to hear representations as to why it should not impose a financial penalty, so the Tribunal provided for the respondent to make written submissions in that respect. In an order sent to the parties on 3 July 2017 the potential aggravating features were set out.

7. By email of 18 July 2017 the respondent's representative set out its representations in relation to the potential for a penalty. It disputed there were any aggravating features but said it had paid the sum as a commercial consideration. It said that the respondent had been in communication in ACAS but that "an offer to pay a sum was ultimately delayed as a result of the time taken to communicate via ACAS, ACAS to then email the claimant, who would then respond to ACAS and ACAS then responding to Blue Arrow. Several emails were sent to ACAS chasing the claimant's response and a failure of this led to a decision being taken that Blue Arrow would pay the amounts claimed". The respondent contends that the claimant was a derogated worker and that there had been a TUPE transfer, which explained the name of a different employer on the document submitted with the response form. It added that it was regrettable that the claimant had to pay the £390 fee to bring her claim.

8. The early conciliation certificate was issued on 5 April 2017. The respondent had submitted its response by 16 May 2017. The hearing was not until 13 June 2017. There was ample time for the respondent to offer to pay the claimant the sums she sought to avoid the need for a hearing. If the claimant had unreasonably refused an offer to settle in writing, the respondent could have protected its position by expressly reserving the right to draw the offer to the attention of the Tribunal in respect of cost related matters. In short, the only offer disclosed to the Tribunal was too late. It was sent late on the afternoon before the hearing. It was too little. It did not include any reference to reimbursement of the Tribunal fees. It was also not honoured. Having checked her bank account that morning, no payment had been made.

9. This case concerned unpaid holiday entitlement. It was a relatively modest sum. Any derogation of the right must be proven by the party which asserts it. If the respondent wishes to make a commercial decision not to attend to establish its defence, it must act in a reasonable manner and give due notice of that, together with a satisfactory agreement to discharge the sums claimed and associated fees. To put the worker to the added trouble of wasting a day of her time and the cost of a hearing fee to recover a more modest sum is an aggravation of the refusal to pay the sum due.

10. In the circumstances it is appropriate that the respondent pay the financial penalty of £100, the sum being that quantified in accordance with Section 12A(5)(a) of the ERA.

Employment Judge Jones

Date: 14 August 2017