EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss H O'Brien	**v**	**Circles Montessori Day Nurseries Ltd**

Heard at: Watford **On**: 24 November 2017

Before: Employment Judge Bedeau

Appearances
For the Claimant: In person
For the Respondent: Mr G Lomas, Employment Consultant

RECONSIDERATION JUDGMENT

The judgment sent to the parties on 14 June 2017, is confirmed.

REASONS

1. This case has been listed for a reconsideration of the judgment entered on 14 June 2017 following a hearing in the absence of the respondent held on 22 May 2017 when I found in favour of the claimant.

The evidence

2. I heard evidence from Ms Lisa Lucas, the registered owner of the respondent company.

Findings of fact

3. The facts of the case are these. The claimant presented her claim form on 15 February 2017. In it she asserted that as assistant manager she had been the victim of discriminatory treatment because of her pregnancy and during her maternity leave. In addition, that there had been accrued unpaid holiday.

4. The Notice of Claim was sent by the tribunal on 21 February 2017, by first class post to the respondent's address at Welwyn Equestrian Centre, Potters Heath Road, Welwyn, Hertfordshire. Also, sent at the same time

was a Notice of Preliminary Hearing which was scheduled to take place on 22 May 2017 at 10 o'clock in the morning.

5. It was noted by Employment Judge Southam after having read the entry at Companies House that there was a proposal to strike out the respondent. The Judge gave instructions that the claimant be written to with a copy sent to the respondent inviting her to consider whether or not she intended to continue with her claims against the respondent as there was a proposal to strike out.

6. The claimant replied on 13 April 2017, stating that she would like to continue because she had requested that Companies House should not proceed with the strike out proposal. The respondent was written to by the tribunal on 6 May 2017, in the following terms:

> "You did not present a response to the claim.
>
> Under Rule 21 of the above rules, because you have not entered a response, a judgment may now be issued. You are entitled to receive notice of any hearing but you may only participate in any hearing to the extent permitted by the employment judge who hears the case."

7. There is no dispute that the tribunal contacted the parties on or around the 19 May 2017, to remind them of the hearing on 22 May. Ms Lucas was not in this country at the time but in Cyprus. She understood, she told me, that the case was all to do with the claimant's holiday pay claim and had no indication that it was to do with discrimination. She did not, however, ask the person whom she was speaking from the tribunal, about the procedure at the hearing or indeed about the claims against her company. Be that as it may, notwithstanding the fact that she had been informed of the hearing, she did not attend nor did she instruct anyone to attend on behalf of the respondent. I am told that at the time there was a nursery manager as well as an assistant nursery manager employed by the respondent who were able to attend the hearing but neither one attended on 22 May 2017, to represent the interests of the respondent.

8. The tribunal informed the parties on 14 June 2017, of the judgment I entered, which was:

> "1. In default of a response being presented by the respondent, judgment is entered in favour of the claimant in respect of her:
>
> 1.1 pregnancy and maternity discrimination claims, s.18 Equality Act 2010; and
>
> 1.2 unpaid holiday claim.
>
> 2. The case is listed for a remedy hearing on 9 August 2017 at 10am with a time estimate of half a day."

9. That judgment and supporting documents were sent to the parties on 13 June 2017.

10. On 26 July 2017, Ms Lucas emailed the tribunal stating that she had received a telephone call from Croner, the employment specialist, about the judgment and that a remedy hearing was due to take place on 9 August 2017. She stated that she had not received any paperwork for the hearing as she had been out of the country and requested that the remedy hearing be adjourned as she was due to take legal advice. She stated that the claimant's outstanding monetary entitlements were paid up to date and she was investigating her accrued unpaid holiday claim. She disputed the discrimination claims and would like the opportunity to contest them.

11. On 28 July 2017, Mr Graham Lomas, the respondent's representative, emailed the tribunal stating that he understood that the respondent had only recently became aware that a claim had been made by the claimant and that there had been a hearing. This was a consequence, he stated of Croner contacting the respondent asking whether it would like to be represented. He referred to Ms Lucas being out of the country at the material times and that the respondent was not aware of a judgment having been sent to it. He, therefore, applied on the respondent's behalf, for the judgment to be reconsidered.

12. The application was objected to by the claimant on 1 August 2017. She challenged the assertion that the respondent was unaware of the hearing as she stated that she first informed the respondent in an email dated 8 February 2017, that Ms Lucas had failed to make any outstanding payments and had failed to engage with ACAS's early conciliation. She told Ms Lucas that she was going to present a claim before the tribunal and referred to the call from the tribunal on 19 May 2017 to remind her and the respondent of the hearing.

13. On 3 August 2017, I gave instructions that the case be listed for a reconsideration hearing before me, as I was the judge who gave judgment on 22 May 2017. I also ordered that the respondent should file a response. As the remedy hearing was listed for 9 August 2017, I gave instructions that it should be vacated and relisted.

14. During Ms Lucas' oral evidence, she told me that there were problems with receiving mail, that mail is delivered to pigeon holes stored in a shed owned by the landlord who rented out various premises including the respondent nursery. She said that she left the UK in December 2016 and returned in February 2017 for a few days. She left again for Cyprus sometime in February returning to the UK at or around 20 August 2017. She said that she believed that she had been a fair employer and had given opportunities to the claimant to return to work; to study at a college; had offered to reduce her twin children's nursery fees by 50%; and contrary to what the claimant had stated, her post of assistant manager had never been replaced. She said that she was not aware until comparatively recently that the claimant had made discrimination claims. Her belief was that the claim was to do with holiday pay and that was her belief when she spoke to the tribunal staff member on 19 May 2017. Shortly thereafter she paid all of the claimant's

outstanding holiday pay by way of instalments. She said that she would like to defend herself against the discrimination claims.

15. In her witness statement, she said in paragraph 7:

> "I was informed by the nursery manager that an envelope had been received from the tribunal which had not been opened. On my request that the nursery manager opened the envelope, she informed me that it had contained a notice of hearing and a preliminary hearing date."

16. In paragraph 8 she stated:

> "I did receive a telephone call from the tribunal on 19 May concerning a preliminary hearing. As outlined above I had no notification of such a hearing until this call."

17. In the response presented to the tribunal by the respondent's representatives on 28 July 2017, it states in section 6, the following in relation to the claims:

> "The respondent denies that it has discriminated against the claimant due to pregnancy or maternity as alleged or at all. The respondent denies that the claimant is entitled to any monies as alleged or at all. All monies that were owed to the claimant during 2016 have been paid and the claimant has received all maternity pay owed to her. The claimant's job is still vacant and has not been filled. The respondent wishes for the claimant to return from maternity leave. The respondent denies that it has put pressure on the claimant to return from maternity leave early or that the owner has sent stressful emails to the claimant. It is also denied that the respondent has tried to give the claimant less than her holiday entitlement. For the avoidance of doubt the respondent denies the allegations being made."

Submissions

18. In submissions Mr Lomas said that it is in the interests of justice that the judgment to be revoked and that the case should be listed in the ordinary way for a final hearing. He invited me to take into account the explanation given by Ms Lucas that the respondent did not open the mail from the tribunal and was, therefore, unaware of the tribunal's proceedings. He then referred to the merits of the response to the claims. Arrears of pay have been met and the claimant had decided that she no longer intend to pursue that claim. The respondent denied it committed any acts of discriminatory treatment and there is an argument, or may be an argument, that they are out of time. The respondent's image would suffer if there is a judgment of discrimination against it as it has repercussions for its business. A fair hearing can still take place. Having regard to the nature of the allegations, it is likely that the respondent would be calling one witness, namely Ms Lucas, and the claimant is unlikely to call any witnesses. The case can be dealt with in one day. He submitted that having regard to the merits as outlined in the response, the respondent should be allowed to put its case forward before a tribunal.

19. The claimant submitted that she did not believe that Ms Lucas was unaware of tribunal's proceedings. She had informed her that she was going to pursue a claim before an employment tribunal as she did not engage with ACAS. The tribunal did speak to both parties about the hearing on 22 May but no one attended on behalf of the respondent. She, therefore, invited me not to grant the application and to confirm the judgment.

The law

20. I have considered my powers are under rules 70 to 73, schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. I have also taken into account the judgment of the Employment Appeal Tribunal in the case of Moroak t/a Blake Envelopes v Cromie [2005] IRLR 535, a case on the old review procedure. The test to be applied is for the tribunal to have regard to the length and reason for the delay; the relative merits of the parties' case; and the balance of prejudice.

Conclusion

21. Upon the receipt of the application, I did not take the view that it stood no reasonable prospect of succeeding and allowed it to be considered at a hearing at which both parties would be present, rule 72(1). My powers are that I could either confirm the judgment, vary it, or revoke it under rule 70. I have come to the conclusion that I am not satisfied with the explanation given by Ms Lucas as to why the respondent was unaware of these tribunal proceedings. She told me that there were difficulties in the respondent receiving mail. If that be right, it would apply not only to the tribunal's mail but to mail from other sources. The respondent did not open the tribunal's enveloped containing notice and details of the claimant's claims. It was not a case of not receiving mail. It was a case of the respondent not opening the mail from the tribunal. I am satisfied of this based on the evidence given by Ms Lucas and what is contained in her witness statement. I am further satisfied that such conduct was deliberate. I take that view because she was told by the claimant that a claim before the tribunal would be pursued by her. ACAS became involved and she refused to engage in conciliation. She had a call and she spoke to someone from the tribunal about the case. No enquiry was made by her about the claims, such as: when they were presented; the nature of the allegations; to whom they concerned; and the purpose of the hearing. She did not give instructions to anyone at the nursery to attend to represent the interests of the nursery knowing full well that there was a hearing on 22 May. For those reasons, I have concluded that her behaviour was deliberate, in that she did not engage with tribunal proceedings. Such conduct does have serious consequences.

22. I considered the merits of the respondent's case but having regard to the wording of the response, they amount to bare denials. There is very little in the way of substance challenging the matters raised by the claimant in her claim form. I am, therefore, unable to form the view that the respondent has a strong case against the claimant's discrimination claims.

23. I accept that the alleged principal perpetrator is Ms Lucas and that the claimant is likely to be the only one to give evidence were I to revoke the judgment and allow the case to proceed to a hearing. The claimant is the person whose conduct cannot be faulted and is entitled to a remedy. I have concluded, bearing in mind all the matters I have taken into account, that this judgment should stand. It is not in the interests of justice for it to either be varied or revoked. I, therefore, confirm the judgment I made on 22 May 2017.

24. The only course of action now open is for me to list this case for a remedy hearing. The respondent will be allowed to attend and to cross-examine the claimant in respect of matters pertinent to issues of remedy. In the context of this case, the claimant is seeking compensation for her injured feelings. In that regard, it may be possible for the parties to settle the case prior to the hearing.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The case is listed for a remedy hearing on **Monday 30 April 2018** before me for **one day**.

2. The claimant shall serve a witness statement on **5 February 2018**.

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 Bedeau

Date: ……28 December 2017

Sent to the parties on: ...5 January 2018

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For the Tribunal Office