Case Numbers: 2301340/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT (sitting alone)**
BETWEEN:

Mr J Henniker
Claimant

AND

Hardings Taverns Limited
Respondent

ON: **15 January 2018**

Appearances:
For the Claimant: **Ms A Furber, counsel**
For the Respondent: **Mr B Hendley, consultant**

JUDGMENT

The Judgment of the Tribunal is that:

1. By consent the judgment of 5 July 2017 is varied so that the award of costs of £160 is set aside.
2. The judgment of 5 July 2017 is otherwise confirmed
3. The respondent shall pay the claimant's costs in the sum of **£1,316.40.**

REASONS

1. This judgment was delivered orally on 15 January 2018. The respondent requested written reasons.

2. By a claim form presented on 26 May 2017, the claimant Mr James Henniker brought claims of unlawful deductions from wages, holiday pay, breach of contract and a failure to provide a written statement of particulars of employment.

3. The claimant worked for the respondent has a pub manager between 28 November 2016 on 3 March 2017. There was a dispute between the parties as to the amount of his annual salary. The respondent said it was £18,500 and the claimant said it was £22,000.

4. The ET3 was due to be filed by 28 June 2017 but was not filed by that date. Accordingly, the claimant was entitled to a default judgment under Rule 21. This judgment is dated 5 July 2017 in the total judgment sum of £3,810 plus £160 costs (predating the decision of the Supreme Court in relation to tribunal fees).

5. On 18 July 2017 the respondent made an application to set aside the judgment. The director making the application, Mr John Harding, said that he had no knowledge of the matter. The current representatives were instructed for the respondent and went on record on 21 July 2017. An application was made for reconsideration.

The issue

6. The issue for the tribunal is whether to confirm, vary or revoke the judgement of 5 July 2017 under Rule 70 of the Employment Tribunal Rules of Procedure 2013.

7. If the judgment is revoked should the ET3 be struck out under Rule 37(a) of the above Rules, as having no reasonable prospect of success?

8. On 12 January 2018 the claimant's solicitors filed a statement of costs and it is an issue for the tribunal as to whether to make an award of costs in favour of the claimant. The claimant's counsel said that the costs application would be based on the outcome of the above issues.

9. I informed the parties that if the judgment was set aside and the response was not struck out, the full merits hearing would not take place today as there had been no preparation of statements and documents on the full merits case.

Witnesses and documents

10. The respondent's client and proposed witness Mr John Harding did not arrive at the tribunal until after 11:15am. There was no witness statement for Mr Harding in support of the respondent's application. The tribunal waited for him and heard from him in evidence in any event.

11. There was a small ring-binder bundle of documents from the claimant. There were no documents or witness statements from the respondent.

12. There was a statement from the claimant. The claimant's counsel said that the claimant would not be called as his evidence did not assist with the issues before the tribunal today.

Findings

13. The respondent asserted in their application for a reconsideration that they had been unaware of the claim. The claimant's case is that his solicitors wrote to the respondent's directors at its registered office on 28 March 2017 and had a response from solicitors then acting for the respondent. These solicitors were

Downs Solicitors LLP and their letter was dated 18 April 2017 (claimant's bundle tab 3 page 11). On 9 May 2017 the claimant's solicitors provided further details of the claim and informed the respondent that they would be issuing proceedings if the money claimed was not paid.

14. The respondent accepted that there were without prejudice discussions between the parties on 15 June 2017 between Mr John Harding and the claimant's solicitor (who is also the claimant's father), prior to the default Judgment being given.

15. Pages 15-17 of tab 3 of the claimant's bundle were removed upon it being accepted by the respondent that such negotiations took place. As they were without prejudice they were not seen by the tribunal. It was also accepted that the email of 15 June 2017 refers to "*our conversation just now*" between the claimant's solicitor and Mr Harding.

16. Mr Harding in evidence asserted that he had no knowledge of the proceedings. He was shown pages 15-17 as above and recalled a telephone conversation with Mr Henniker (the claimant's solicitor). He said that prior to 15 June 2017 he opened a letter and telephoned the claimant's solicitor. It was a letter from the claimant's solicitor. He said that the letter said "something about a tribunal".

17. The respondent accepted that the correct registered office was stated in the ET1 and the ACAS EC certificate. This was the address used by the tribunal for correspondence.

18. Mr Harding is a director of the respondent and said that his wife looked after the correspondence and she became ill and Mr Harding discovered the default judgment. It was accepted that Mrs Kelly Harding was and is a director of the company and she is Mr John Harding's wife.

19. It was suggested that Mr John Harding did not have notice of the proceedings but that his wife dealt with the correspondence and she became unwell. It was also said that she left Mr Harding. The claim is against the company and not Mr Harding as an individual. It was also accepted that there were without prejudice discussions on 15 June 2017 following the issue of the proceedings on 31 May 2017. This was between Mr John Harding and Mr Chris Henniker the claimant's father and solicitor. Mr Harding made the call to Mr Henniker. Mr Harding's evidence to the tribunal was "*I didn't think it would go any further after the phone call".*

20. Mr John Harding confirmed that he is also known as Jack. He confirmed that he sent a text message to the claimant which was at page 7 tab 3 of the bundle. This said that he could not have the claimant back and "*I'm really sorry that it hasn't worked out here but I need to make changes fast. I do wish you the very best and if you ever need a reference I would be happy to give you one. Many thanks for all you have done here".* Mr Harding said in evidence that he did not want to put the real reasons for terminating the claimant's employment into a message and he wanted to meet with the claimant instead but this meeting did not happen.

21. I find that this is a very positive message to send when terminating employment and inconsistent with the arguments put in the draft ET3 that the claimant's employment was terminated for gross misconduct for alleged dealing and taking of drugs on licenced premises. The message and the grounds subsequently relied upon are totally inconsistent.

22. In evidence Mr Harding said in relation to a letter from the claimant's solicitors about the claim: "*I didn't think it was that important. Sustaining my business was more important. I don't go into the emails and look at emails".* He said that his wife, his co-director, might have mentioned something to him about it. Mr Harding said he thought the correspondence he received from the claimant's solicitors was *"a joke"* and he also stated this in his email to the tribunal dated 18 July 2017.

23. It was put to Mr Harding that on 20 June 2017 the claimant's solicitor emailed him a copy of the claim. He said he did not recall opening an email to this effect but confirmed that it was sent to his email address. I find that the ET1 was sent to him by Mr Henniker (the solicitor). This is in addition to it being properly served.

24. Mr Hendley for the respondent accepted that the respondent was liable for 1 week's notice. He said that the question of 2 weeks notice was dependent upon whether or not the claimant was given a contract of employment and whether the respondent could justify dismissal for gross misconduct. I understood from this that there was therefore no admission in respect of notice pay.

25. The respondent also admitted that 5 days holiday pay was due. There was a day and a half in dispute. The respondent admits the gross sum of £355.77 based on their position that the salary was £18,500 and that 5 days unpaid leave was due.

The law

26. Rule 70 of the Employment respondent. Tribunal Rules of Procedure 2013 provides that a tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

27. Rule 70 gives the tribunal a wider discretion than under Rule 34(3) of the Employment Tribunal Rules of Procedure 2004, but the case law under the old Rule 34 is still considered relevant. Whilst the discretion is wide, it has been held not to be boundless; it must be exercised judicially and with regard, not just to the interests of the party seeking the review, but also to the interests of the other party and to the public interest requirement that there should, as far as possible, be finality of litigation - ***Flint v Eastern Electricity Board 1975 ICR 395 at 401***, per Phillips J. As with the exercise of any other power,

tribunals must seek to give effect to the overriding objective in Rule 2 of the 2013 Rules.

28. The respondent relied upon the decision of the EAT in ***Pendragon plc v Coupus 2005 ICR 1671*** (Burton P) which held that the absence of a good reason for a response not being entered in time was not by itself determinative and it did not rule out consideration of other matters of discretion such as the reasonable prospects of success and weighing the balance of prejudice to both parties.

Costs

29. Costs do not follow the event in employment tribunal proceedings and an award of costs is the exception and not the rule (Lord Justice Mummery in ***Barnsley Metropolitan Borough Council v Yerrakalva 2012 IRLR 78***).

30. The power to award costs is contained in Rule 76 of the Employment Tribunal Rules of Procedure 2013 which provides that:

> *(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
>
> *(b) any claim or response had no reasonable prospect of success*

31. The Court of Appeal held in ***Yerrakalva*** (above) that the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there was unreasonable conduct in bringing and conducting the case and in doing so, to identify the conduct, what was unreasonable about it and what effects it had. There does not have to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

Submissions

32. I had oral submissions from both parties which were fully considered but are not replicated here in their entirety. The claimant submitted that Mr Harding had been misleading to the tribunal and that he did not treat the proceedings with the respect they deserved. It was also submitted for the claimant that on the question of proportionality, the case needed directions and a trial and the value in dispute is around £2,700.

33. The respondent submitted that in not dealing with the proceedings, it was part of the “hurly burly of events” between Mr Harding and his wife. The respondent relied on the ***Pendragon*** case above and said that there were issues as to whether the claimant was dismissed for gross misconduct. The respondent also wished to rely on a contractual right to make deductions from wages and there was prejudice to the respondent such that the issue of gross misconduct

needed to be "thrashed out" at a hearing.

Conclusions

34. The respondent's then solicitors, Downs, in a letter dated 18 April 2017, admitted that the respondent owed the claimant 2 weeks pay. There was a dispute as to the amount of the claimant's salary. The claimant says it was £22,000 and the respondent says it was £18,500. The respondent admits the gross sum of **£711.54** and the amount in dispute (gross) is £134.60.

35. The respondent also admits holiday pay in the gross sum of **£355.77** based on their position that the salary was £18,500 and that 5 days unpaid leave was due.

36. I am satisfied that the respondent had notice of the proceedings. The proceedings were correctly served at the respondent's registered office. The proceedings were dealt with by a director, Mrs Kelly Harding.

37. The argument that the respondent did not have notice of the proceedings is unsustainable. My finding is that the respondent did have notice of the proceedings in order to enter a response by 28 June 2017 and it failed to do so.

38. The respondent had the benefit of legal representation by Downs Solicitors who wrote on their behalf on 18 April 2017 in relation to the subject matter of the claim.

39. I find that the respondent took a conscious decision not deal with this matter. Mr Harding thought it was a joke and he did not think the matter was going to go any further after his phone call with the claimant's solicitor. This was a risk that he took.

40. I find that the reality of this situation is that the respondent had notice of the proceedings. Mr Harding contacted Mr Henniker (the solicitor) and attempts were made to negotiate, prior to the deadline for the ET3. These negotiations were not fruitful. My finding is that the respondent company had proper notice of the proceedings and Mr Harding knew about the proceedings when he spoke to Mr Henniker on 15 June 2017, nearly two weeks before the deadline to file the ET3. Mr Henniker (the solicitor) also sent Mr Harding a copy of the claim on 20 June 2017. If Mr Harding did not open that email, that was a risk that he took.

41. Mr Harding said in evidence that he did not think the matter would go any further after he spoke on the phone to Mr Henniker the solicitor. He said he did not think it was that important and sustaining his business was more important. This was a choice he made. Mr Harding said in evidence that all he wanted was a chance to put his case. He had this chance. He made a decision not to deal with it at the time.

42. I have also considered prospects of success as I am urged to do by the

respondent based on the ***Pendragon*** case. On the merits, the respondent admits that there is no signed contract of employment. They say that a contract was issued to the claimant and he did not sign it. To the extent that the respondent seeks to rely on any contractual authority to make deductions from wages in relation to stock inconsistencies, their own case is that there is no such contractual term as no contract was ever signed by the claimant. There is no reasonable prospect of defending the claim on such grounds. There is nothing to satisfy section 13(1)(b) of the Employment Rights Act 1996. On breach of contract, no employer's counter claim was put forward.

43. On holiday pay all that is in dispute is 1.5 days and this depends on the claimant's start date. On notice pay and entitlement, I have set out above that there is a complete inconsistency between the text message terminating employment in a very positive tone and very serious matters that the respondent now seeks to rely upon. I find that the respondent does not have good prospects of success in terms of defending the claim for notice pay.

44. I also take account of proportionality. Based on the amounts conceded, the amounts in dispute and the prospects, there are issues of proportionality and cost in setting aside the part of the judgment that remains in dispute and allowing the case to proceed to trial. This goes alongside the findings as to the prospects of success.

45. By consent the costs part of the judgment of 5 July 2017 is set aside as to the award of £160, as the claimant can recover this under the Government scheme.

46. Otherwise the judgment of 5 July 2017 is confirmed in the sum of £3,810, in respect of which £1,067.24 is admitted in any event.

The claimant's costs application

47. The claimant's application for costs was made both under Rule 76(1)(a) that the respondent has acted unreasonably in the way it had conducted the proceedings and in relation to some aspects of the claim, under Rule 76(1)(b) that the (draft) response had no reasonable prospects of success.

48. The claimant submitted that the respondent was unusually unreasonable. The claimant said that it was flippant for the respondent to say that it did not have notice of the proceedings when it did. It was submitted that Mr Harding did not bother with the claim and has pursued this application for reconsideration when he must have known about the claim. This has generated these costs. The costs application was made in respect of the whole claim as well as the costs of the reconsideration application.

49. The tribunal was told that an enforcement of this judgment has taken place and money is being held pending the outcome of this application. An execution has already been carried out by bailiffs.

50. The respondent submitted that Mr Harding was going through a difficult time in

his personal life which was some explanation for what happened. Avensure was instructed in July 2017 and "tried to put the case back on course".

51. My decision was that an award of costs was justified. The argument that the respondent had no notice of the proceedings was completely unsustainable and the costs of this reconsideration hearing have been incurred as a result of this. This was unreasonable conduct in the circumstances. In relation to the entire proceedings, I exercise a discretion not to award costs, taking account of Mr Harding's difficult personal circumstances.

52. I informed the parties that on a claim of this value and the jurisdictions involved, it did not in my view justify the paying party paying for a Category A fee earner at £300 per hour. I did not criticise the claimant for instructing a Category A fee earner but this is not proportionate for an award of costs against the paying party. Counsel for the claimant took the tribunal through the figures and amounts claimed in the light of this.

53. Based on a Category C fee earner at £165 per hour and including counsel's fee of £800, the amount claimed, including VAT, was **£1,316.40**. The respondent did not wish to say anything in response to this amount claimed and I therefore awarded that amount.

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Employment Judge Elliott
Date: 15 January 2018