EMPLOYMENT TRIBUNALS

Claimant: Miss L Bell

Respondent: Kam Enterprises Limited

Heard at: Manchester **On:** 30 November 2018

Before: Employment Judge Holmes

REPRESENTATION:

Claimant: Mr Bell (claimant's father)
Respondent: Mr Famutimi, Consultant

JUDGMENT ON RECONSIDERATION

It is the judgment of the Tribunal that:

1. By consent the default judgment of 3 May 2018, sent to the parties on 8 May 2018, is reconsidered and is revoked.

2. As the claimant lacks qualifying service to complain of unfair dismissal, she withdraws her claims of unfair dismissal, which are dismissed upon withdrawal by her.

3. The claimant's remaining claims of unlawful deduction from wages and failure to pay holiday pay will proceed to a final hearing to be heard with an estimated length of hearing of **three hours** on **19 March 2019** at **Manchester Employment Tribunal, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA** commencing at **10.00am**.

4. The Tribunal makes the following Case Management Orders for the purposes of the remaining claims:

(a) The respondent has permission to amend its response in relation to the remaining claims of unlawful deduction from wages and unpaid holiday pay by **14 December 2018**.

(b) The parties are to complete disclosure by exchanging further any documents that each may have with the other by **11 January 2019**.

(c) The respondent agrees to be responsible for the preparation of the hearing bundle which is to be agreed by **19 January 2019**.

(d) The parties are to prepare and exchange witness statements by **8 February 2019**.

REASONS

1. The Tribunal convened to hear the respondent's application for reconsideration of the default judgment issued by the Tribunal on 3 May 2018 and sent to the parties on 8 May 2018 and further, in the event that such an application was successful, the respondent's application to strike out the claimant's complaint of unfair dismissal on the grounds that she lacks the appropriate qualifying service to present such a claim. The claimant was represented by her father, Mr Bell, and the respondent by Mr Famutimi, consultant. Both parties had helpfully provided the Tribunal with bundles containing their relevant documents.

2. The basis upon which the respondent sought reconsideration was that the address given for the respondent in the claim form was 117 Cornish Way, Wythenshawe, Manchester, M22 1PD. It transpired that that had formerly been the registered office of the respondent, but it had not been its registered office since 2016. Consequently the respondent, when made aware of the claims and the judgment of the Tribunal which was entered in default of any response being received, made application to the Tribunal by email of 24 June 2018 in which the Tribunal was informed that the incorrect address had been used on the claim form. Thereafter, on 3 July 2018, the respondent's representatives came on record, and made a formal application for reconsideration by email of that date. Along with that application a draft ET3 form , and particulars of response , were submitted. The Tribunal made an initial consideration of the application, and by a letter of 4 August 2018 the claimant was invited to give her views on whether the application could be determined without a hearing , and upon the application generally. By email of 8 August 2018 the claimant said that she was happy for a reconsideration of her case but she would like a hearing as she strongly disagreed with what the respondent had said. That was, perhaps in hindsight, slightly misunderstood by the Tribunal in that whilst the claimant disputes some of the contents in the proposed response, she did not dispute the basis on which the respondent sought reconsideration, namely that the claims had been directed to the wrong address. Indeed, Mr Bell on her behalf consented to the reconsideration application, and the previous judgment is accordingly revoked. This was a highly sensible and pragmatic approach by him for which the Employment Judge is grateful. Clearly there had been an error in the address of the respondent , and the interests of justice did require that the respondent be permitted to take part in the proceedings and respond to them. Consequently that part of the hearing was relatively brief and proceeded by consent.

3. That, however, was only one matter before the Tribunal, as the respondent had also made an application that the claimant's complaint of unfair dismissal be dismissed as she lacked the relevant qualifying service. The respondent's contention is that whilst the claimant in her claim form had suggested that she had been continuously employed by the respondent since 8 May 2015, so that the termination of her employment on 24 December 2017 meant that she had over two years' qualifying service, the respondent's position as set out in the response was that there was a significant and relevant gap in the continuity of her employment in 2016.Consequently when she was re-employed on 7 October 2017, she did not thereby acquire the requisite qualifying period of employment to entitle her to claim unfair dismissal when she was dismissed, (the respondent contends by in fact her resignation), on 5 January 2018. The claimant indeed agrees that this is correct, and Mr Bell withdrew her unfair dismissal claim on that basis, which the Employment Judge accordingly dismisses.

4. That left the claimant's only remaining claims as those for unlawful deduction from wages , and failure to pay holiday pay in the form of pay in lieu of untaken holiday at the date of termination of the employment.

5. The Employment Judge did enquire whether there was, in fact, sufficient time, given the speed with which the initial applications had been dealt with, for the Tribunal to determine these issues today. The respondent, however, was not in a position to do so. Further, the Employment Judge did note that in the response that has been filed and indeed now accepted out of time, the responses to the wages and holiday pay claims are somewhat brief , and amount to little more than bare denials. Mr Famutimi was able, however, to provide further clarification in that the respondent will accept that the claimant was not paid her final week's pay. The respondent will, however, contend that it was entitled to withhold that pay by reason of the claimant failing to return property belonging to the respondent to it. Precisely what the claimant has allegedly failed to return is unclear, given that the present pleading at paragraph 9 of the response alleges that she had failed to return a delivery bag and delivery monies which amounted to more than the outstanding wages owed to the claimant. In terms of the lawful authority for such a deduction, the respondent will contend that this is to be found in the provisions of the Employment Handbook (though not the written statement of terms of employment, which were contained in the bundle for today's hearing), which is said expressly to form part of the contract of employment. This was not before the Tribunal, nor was the respondent in a position to call evidence in relation to the factual basis for the deductions that have in fact been made. Consequently, although it may have been possible for the Tribunal to carry on to hear the merits of the claimant's remaining claims, this was not possible, and of course was not the purpose for which this hearing had been listed. Consequently, regrettable though it was, the Tribunal was obliged to list a further final hearing for the determination of the claimant's remaining claims.

6. The opportunity, however, should now be taken , as indeed was ordered, for the respondent now to plead fully its case in relation to the deduction from wages claims. The claimant had set out in schedule form at page 6 of her bundle of documents her calculation of the amounts that she is owed. The respondent apparently does not disagree with the calculation of the pay for the final week worked which the claimant sets at £213.55. Consequently the defence to that claim, if the respondent concedes that that amount is due subject to any deductions, will

depend entirely upon the legal and factual basis upon which the respondent claims to be entitled to withhold that sum. In relation to the holiday monies claim, again the claimant has calculated that in the schedule at £469.38. The total monies owed are accordingly £682.93, rounding up. The respondent's answer in relation to the holiday pay is apparently that the claimant has been paid it in full. Clearly this will require evidence to be produced of the amounts paid to the claimant , and the basis for such payments, and it appears that the respondent is not seeking to deduct from this sum any alleged monies owed by the claimant. These matters clearly, however, require clarification before the final hearing.

7. Accordingly, the Employment Judge went on to make the Case Management Orders for the final hearing above, and if necessary the claimant's claims will be determined on the next occasion. Given the modest sums involved, however, the Employment Judge expresses the strong recommendation to both sides, through the good offices of ACAS or otherwise, to seek to resolve these claims if at all possible. In terms of Case Management Orders, the Employment Judge did explain to the claimant and her father what was entailed, and in particular how reference to "without prejudice" or ACAS negotiations should not be made in any witness statements, and how indeed the claimant need not in her witness statement set out any events after the filing of the claim form.

8. Further, for guidance with any aspects of these orders, the claimant is referred to the Presidential Guidance on 'General Case Management' which incorporates Guidance Notes on a range of matters and which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/

9. With his gratitude to the parties for their pragmatic approach to these matters the Employment Judge terminated the hearing.

Employment Judge Holmes

Dated : 7 December 2018

JUDGMENT, REASONS AND ORDERS
SENT TO THE PARTIES ON

12 December 2018

FOR THE TRIBUNAL OFFICE

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.