Case Number 2501315/17

THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Ms L Henderson **Stessa Leisure (Tynemouth) Ltd**

EMPLOYMENT JUDGE GARNON
HELD AT NORTH SHIELDS **ON 7th December 2017**

JUDGMENT (Liability and Remedy)
Employment Tribunals Rules of Procedure 2013 –Rules 21 and 48

1. The respondent's name is amended to that shown above without the need for re-service. This judgment will be sent to the address of the respondent as shown on the claim form and to Newfield House, 9 Field House Close. Hepscott, NE61 6LU .

2. The claim of unfair dismissal and for a protective award are dismissed on withdrawal.

3. The claim of failure to pay compensation for untaken annual leave is well founded. I order the respondent to pay compensation to the claimant of £ 486.80.

4. The claim of unlawful deduction of wages is well founded. I order the respondent to repay to the claimant £ 128.

5. The claims of harassment as defined in s26 (2) of the Equality Act 2010 (the EqA) and victimisation as defined in s27 are well founded . I order the respondent to pay compensation of £7440 to the claimant but I award no interest.

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REASONS (" Rule" means those in the Employment Tribunal Rules of Procedure 2013)

1. The claim was first presented on 9th October 2017. I rejected it because the name of the respondent on the claim form was "Adam Thompson" which differed from that on the Early Conciliation (EC) Certificate which named "Stessa Leisure Ltd". Rule 12 (1) (f) obliged me to reject in such circumstances unless the difference could be called a "minor error" which it could not. I did not perform a search at Companies House at that time. Both the claim form and EC Certificate gave as the respondent's address "Fit4less, Preston Avenue, North Shields , Tyne and Wear NE30 2BE."

2. When notice of rejection was sent to the claimant, she replied by return of e-mail on 10th October saying Adam Thompson was the owner of Stessa Leisure Ltd . and applied to amend the name on the claim form to Stessa Leisure Ltd. The application was

granted by Employment Judge Buchanan . He accepted the claim as amended. He also ordered a preliminary hearing as it appeared to him a claim for a protective award was misconceived. That hearing was listed for today and notice of that sent to the respondent on 12th October 2017. The claim was served separately .on the same day.

3. No response was received by the due date of 9th November. An Employment Judge is required by Rule 21 to decide on the available material whether a determination can be made and , if so, obliged to issue a judgment which may determine liability and remedy. He may also defer his decision and require further information from the claimant. Employment Judge Buchanan issued a detailed Order on 16th November requiring further information which the claimant provided on 20th November .

4. Her reply was reviewed by Employment Judge Shepherd. He clearly felt it was not sufficient to issue a Rule 21 judgment on all aspects of liability and remedy in each of the claims. He ordered the preliminary hearing to remain listed to afford an opportunity for her to clarify some matters. The respondent had been given notice of that hearing was entitled to attend and participate fully A letter to that effect was sent to the respondent as well as the claimant on 22nd November. The respondent did not attend.

5. There has been no contact at all by the respondent with the Tribunal though the claimant told me today ACAS informed her they had a discussion with Mr Thompson. She also told me “Fit4lees” was the name of the gym at which she worked and, although the name may have changed recently, it continues to be operated by Mr Thompson probably through a limited company .

6. Employment Judge Buchanan had performed a Company Search before issuing his Order and found no current company named Stessa Leisure Ltd. The claimant told me today she was never given a written statement of terms of employment or payslips. I too performed a Company Search and found a few companies starting with the words “Stessa Leisure”. North Shields is in the area of Tynemouth and one such company was called Stessa Leisure (Tynemouth) Ltd . Its registered office is Newfield House, 9 Field House Close. Hepscott, NE61 6LU . The claimant told me this was the company which employed her and the address was the home of Mr Thompson.

7. A claim may be validly served on a limited company either at its registered office or its place of business. I am convinced the claim has come to the notice of the respondent and no injustice is done by amending simply to add the word (Tynemouth) to the title.

8. Employment Judge Buchanan had said in his Order the claimant lacked two years continuous employment to claim of unfair dismissal. She had also claimed a “protective award”. The Trade Union and Labour Relations (Consolidation) Act 1992 provides that where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, it shall consult prescribed persons Failure to do so may lead to a “protective award” . The claimant had misunderstood the term so withdrew that part of her claim. She also withdrew her unfair dismissal claim.

9. The law of unlawful deduction of wages is in Part 2 of the Employment Rights Act 1996 (the Act). A failure to pay wages due is deemed an unlawful deduction. The claimant has set out the amount of the deduction clearly. Regulation 14 of the Working Time Regulations 1998 says where a worker's employment is terminated during the leave year, and on the date termination takes effect the proportion she has taken of the leave to which she is entitled in the leave year differs from the proportion of the leave year which has expired, her employer shall make a payment in lieu of untaken leave calculated by a formula which the claimant has correctly applied.

9. I am still empowered by Rule 21 to decide on the available material whether a determination can be made and, if so, obliged to issue a judgment which may determine liability and remedy. I have in the claim form and further information supplied by the claimant in reply to the Order of Employment Judge Buchanan sufficient to enable me to find three claims proved on a balance of probability and to determine the sums to be awarded in two of them. On the first two claims Employment Judge Buchanan said in his Order a Rule 21 judgment would be issued in the amounts claimed . I agree. In the claims under the EqA, all I need to determine remedy as well as liability is evidence of the claimant's loss of earnings and her injury to feelings. I would not normally take evidence at a preliminary hearing but Rule 48 says *A Tribunal conducting a preliminary hearing may order that it be treated as a final hearing.. if the Tribunal is properly constituted for the purpose and if it is satisfied that neither party shall be materially prejudiced by the change.*

10. Section 26 of the EqA includes

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

Section 40 makes harassment unlawful and s 109 renders the employer liable for the acts of its employees .

11. Section 27 of the EqA includes

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

12. The facts alleged in the claim and exhibited texts attached to the further information provided by the claimant are clear and simple. The General Manager , Mr Paul Langley, and a Personal Trainer named Mr Andy McLean, both ,in their late thirties, engaged in discussion with the claimant during which they asked if she had undertaken bawdy sexual acts with others on a holiday to Greece. Mr Langley also passed comment on her figure when she was wearing leggings and about her eating a baguette which he likened to a "dildo" . Coming from people many years her senior and especially from a person in managerial control, she found these comments violated her dignity, and created an embarrassing, degrading, humiliating and offensive environment for her .

13. She complained in a long text to her then line manager Mr Donagh Farren with whom she is now , but was not then, in a relationship. He shared this information with the Director of Operations , Mr Woodhouse, who would have been likely to tell Mr Thompson. Informal warnings were, according to Mr Farren , given to Mr Langley and Mr McLean. Following this, the claimant noticed a strained atmosphere at work . Shortly after another incident of harassment took place she complained to the new Cluster Manager Mr Savage. He did not seem to take it seriously and shortly afterwards dismissed her for no given reason. She infers, as do I , the reason was, at least in part, to rid the respondent of a complainer and potential claimant .That is victimisation.

14. At all material times the claimant was a student and this part time job, which earned her on average £170 per week net, helped her live during her studies . She brought with her today supporting evidence of her attempts to find other work. She found none for 13 weeks and did not qualify for benefits . That loss would be £2210. She has earned £60 a week for the last 3 weeks so has a further loss of £330. She expects to earn more over the next 4 weeks as she can do more hours in the university vacation so will have loss of £50 per week = £200 . Then she will return to losing £110 per week until about May when her university course ends. This is about 20 weeks . Then she hopes to find better paid work. The final element of loss = £2200. The total loss = £4940. Interest on this sum would be small and awkward to calculate so the claimant was content I award none. She was also so content relating to the remaining element of the award which is for injury to feelings.

15. Awards are made by reference to guidelines issued by the President of the Employment Tribunals. There are in three bands of award and this case is in the lowest band which is from £800 to £8400 . The claimant's feelings were injured. The least sum any Tribunal would award having regard to the evidence is £2500.

16. In respect of this, and her loss of earnings , she could have argued for more compensation . There is also enough information to make an increase to the awards under s 38 of the Employment Act 2002 because the claimant was not given a statement of terms and conditions of employment, but I do not make an increase because there is no forewarning to the respondent in the claim form, one may be made.

17. However, every other aspect of this judgment can not possibly be said to take the respondent by surprise. The choice facing both the claimant and myself today was between using Rule 48 to finalise the claim or incurring delay by giving directions for, and fixing, a remedy hearing at a later date which would cause additional public expense in a case where the respondent had chosen to take no part. If the respondent applies for a re-consideration and its application is granted, the decision may be taken again. That may result in a greater rather than a lesser award.

TM Garnon Employment Judge
Date signed 8th December 2017.