THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Ms J Witherspoon **SGA Forecourts Ltd**

EMPLOYMENT JUDGE GARNON
HELD AT NORTH SHIELDS **ON 12th February 2018**
Appearances
Claimant in person
Respondent Mr M. Gulshan Director

JUDGMENT ON RECONSIDERATION

Under Rules 70-72 of the Employment Tribunal Rules of Procedure 2013(the Rules), I refuse the application for reconsideration of my Judgment of 9th January 2018 because it is not necessary in the interests of justice to reconsider it.

REASONS

1. On 9th January 2018 I gave a judgment on liability only under Rule 21 of the Rules finding claims of unfair dismissal, wrongful dismissal (breach of contract), sex and/or pregnancy and maternity discrimination and/or harassment contrary to the Equality Act 2010 (the EqA), unlawful deduction of wages and failure to pay compensation for untaken annual leave well founded. A remedy hearing was fixed for today at which the respondent was told it could attend to be heard on remedy only.

2. Although Mr Gulshan did not raise the point , by way of brief explanation, all claims under the EqA require an unlawful **act** and an unlawful **type** of conduct. Section 18(7) has the effect some unlawful acts may be either sex discrimination or pregnancy and maternity discrimination but not both. Section 212 includes the definition " *Detriment" does not , subject to subsection 5, include conduct which amounts to harassment "* . Section 26 defines harassment and although pregnancy and maternity is not a relevant protected characteristic under that section, sex is. No more remedy is available whatever type of discrimination occurs. In my view it is proper to issue a Rule 21 on liability and leave it to the remedy hearing to attach the correct "label" of the type of discrimination on the basis they are mutually exclusive and no more remedy is available.

3. In my written reasons for the judgment I said:

1. The claim was served by post on the address "Jet Service Station, A167 Northbound, Plawsworth, Durham DH2 3NL" on 14th November 2017. A response

was due by 12th December 2017 but none was received. A preliminary hearing had been fixed for today. In such circumstances an Employment Judge is required by rule 21 of the Employment Tribunals Rules of Procedure 2013 to decide on the available material whether a determination can be made and , if so, obliged to issue a judgment which may determine liability only or liability and remedy.

2. The text of the claim form complains mainly of the acts of a manager named Mr Miles Cole . Petrol Filling Stations are commonly operated under some form of franchise. The franchisee may change but the management remain in the hands of the same person. I know this station as I drive past it regularly. I was surprised no response had been received. On 13th December 2017 I decided to perform a search at Companies House

3. The search revealed the respondent has a registered office at Cockton Hill Service Station , Cockton Hill Road , Bishop Auckland, DL14 6JN approximately 20 miles from Plawsworth. On 16th December I caused a letter to be sent to the claimant asking her to confirm whether, to the best of her knowledge, the Plawsworth Filling Station remained operational and controlled by the respondent . Her reply on 20th December was unclear on the last point but she confirmed Mr Cole was still the manager.

4. On 28th December 2017 , out of an abundance of caution , I caused a letter to be sent to the respondent at both the Plawsworth and Cockton Hill addresses saying that if it intended to defend it must contact the Tribunal without delay and explain why it did not respond earlier. Today still no contact from the respondent had been received. I conducted the preliminary hearing with the claimant by telephone. She confirmed every payslip she had up to termination showed the respondent as her employer.

4. The service papers sent on 14th November would have arrived in the normal course of post on 16th. The letter sent to the claimant on 16th December was copied to the respondent at the Plawsworth address. The letter of 28th December was sent to both addresses. All letters from the Tribunal are endorsed with a stamp showing they are from the Tribunal and giving a return address in case of non-delivery. None of the letters have been returned.

6. The judgment was sent to the respondent on 13th January 2018 together with notice of a remedy hearing for today. That judgment would have been received by the respondent in the normal course of post by 15th January at latest. The time limit for applications for reconsideration under Rule 71 is "*within 14 days of the date on which the written record…. of the original decision was **sent** to the parties* ". It should have been received by 29th January.

7. The first contact from the respondent was an e-mail from a Mr Jabbar Hussein sent at 02:58 on Thursday 1st February attaching an ET3 form with no reasoned defence to the claim. All it says is that the claimant did not complain of bullying when she was employed. This was followed at 03:11 by an application for reconsideration made after 14 days of the date of reasoned judgment being sent .

8. The core of the application reads:

" Mr Mohammad Gulshan who was dealing with this matter unfortunately went off on sickness leave and we were unable to get in touch , to make matters worse all the paperwork was sent to one of our garages instead of head office
The company thought this was being taken care of by himself or a solicitor who we thought was employed by him deal with all issues regarding this matter"

9. Dealing first with the service address, a claim may be validly served on a limited company either at its registered office or any place of business. Under a previous version of the Rules, His Honour Judge Peter Clark in Zietsman and Du Toit t/a Berkshire Orthodontics-v-Stubbington found a claim had been properly served despite Mr DuToit having changed his practice address and not having actual notice of the proceedings. There is no evidence before me that the claim and notice of hearing were not delivered in the ordinary course of post and did not come to the attention of the directors of the respondent. The place of service point has no merit.

10. Kwik Save-v-Swain and Pendragon plc-v-Copus both decided under earlier and different versions of the Rules concern delay in responding, as Mummery P said in Kwik Save, " *as the result of a genuine misunderstanding or an accidental oversight* ". A Tribunal should be " *more willing to allow the late lodging of a response* " if there had been a genuine mistake.

11. This respondent operates three sites , the two already mentioned and one other close to Bishop Auckland. Mr Gulshan is one of three directors the others being Mr Sajad Hussein and Mr Asif Hussein. Mr Jabbar Hussein is the Company Secretary At all material times the manager at the Plawsworth site was Mr Cole.

12. Turning to the sickness of Mr Guishan , I accept he was sick for a time he did not specify but from the moment he was delegated by his fellow directors to deal with this claim , on or shortly after 16th November, nothing at all was heard from the respondent until 1st February**.** Mr Sajad Hussein Mr Asif Hussein and Mr Jabbar Hussein must have known Mr Guishan was prevented by illness from dealing with a claim of potentially serious consequence to the company. If Mr Cole opened post addressed to the Plawsworth site , it is not credible he did not pass it to a director.

13. Although I have a discretion under Rule 5 to extend the time limit for applying for a reconsideration. I have been given no reason to exercise it. Mr Jabbar Hussein, and probably others, must have known from the time the judgment was received urgent action was needed but he failed to take it .

14. Rule 2 of the Rules provides their overriding objective is to enable Employment Tribunals to deal with **cases** fairly and justly. That means all cases not just this one . Under the 2013 rules, the only ground for a reconsideration is whether one is necessary in the interests of justice. That means justice to both sides **and to other litigants**. The respondent had the chance to advance its arguments when it received the claim and on subsequent occasions. It **did not do so and still has not in the proposed response. The only reason it has given does not excuse the inactivity of the directors** . The 2013 Rules were clearly intended to be a modernised system . designed to do justice between the parties but requiring the respondent to the claim to put forward its arguments in a prescribed way at a prescribed time . They made greater provision than earlier for determinations without a hearing. Everyone is still entitled to a hearing if they follow the rules to avail themselves of that right.

15. The Employment Tribunals send to every respondent very detailed explanations of what they must do, how and when they must do it and the consequences of not complying. I find this claim arrived and was ignored. A procedure followed which resulted in a judgment. It would cause the claimant and the Tribunal delay and expense to revoke the judgment and start afresh. To allow a respondent, who has not taken advantage of the opportunity to defend, to do so only after a Rule 21 judgment would make a mockery of the system.

16. When I announced my decision Mr Gulshan said the respondent would appeal. Although it was decided under the 2004 Rules, the case of DH Travel Ltd -v-Foster held the respondent is entitled to be heard on remedy. I must emphasise to the respondent, as the Employment Appeal Tribunal did to DH Travel, that this is not an opportunity to run arguments about liability. For reasons I give in separate Orders , I was unable to deal with remedy today.

TM Garnon Employment Judge
Date signed 12th February 2018.