THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Pugal**

Respondent: **British Telecommunications Plc**

Heard at: **North Shields** **On: 15 August 2018**

Before: **Employment Judge Morris**

Members: **Mr M Brain**
Ms M Clayton

Representation:

Claimant: **Mr R Ryan of Counsel**
Respondent: **Ms C Brown, Solicitor**

JUDGMENT ON RECONSIDERATION

The unanimous decision of the Tribunal is that its decision contained in its reserved judgment in this case, which was sent to the parties on 13 February 2018, should be varied in accordance with Rule 70 of the Employment Tribunals Rules of Procedure 2013.

REASONS

Representation and Evidence

1 The claimant was represented by Mr R Ryan of Counsel. The respondent was represented by Ms C Brown, solicitor.

2 Neither party gave or called witnesses to give evidence to the Tribunal and relied instead upon submissions made by their respective representatives by reference to written skeleton arguments that the Tribunal found to be most helpful. Reference is made below to six bullet point sub-paragraphs contained in paragraph 4 of the written submissions on behalf of the claimant, which the Tribunal sought specifically to address in this decision.

Consideration and Findings

3 As was agreed between the parties and accepted by the Tribunal there is an inaccuracy in the sentence approximately in the middle of paragraph 6.27 of its original reserved judgement, "The claimant's evidence was that Ms Patten's response of 7 June had somehow been directed into her junk e-mail inbox (although the respondent questioned that given that other e-mails from Ms Patten had been received by the claimant)". The Tribunal is unable to offer any real reason for that inaccuracy. In discussion, the Tribunal members thought that it probably arose from a small aspect of the claimant's evidence as to e-mails in October 2016 (which the Employment Judge identified during the substantive hearing as being inconsistent), which may have led the Tribunal up a blind alley. Having considered these matters further in light of the reconsideration application, the Tribunal is satisfied, on reflection, that it was the e-mail dated 6 October 2016 at page 481 in the main trial bundle that had gone into the claimant's junk box and not, as stated in paragraph 6.27 of the reserved judgement, the email of 7 June 2016. Be that as it may, whatever the explanation, that sentence set out above must be deleted in its entirety. There was no dispute between the parties as to that.

4 The sentence thereafter begins, "If that is what occurred the Tribunal is satisfied ….". Obviously that sentence is predicated on that introductory phrase of whether that had occurred. Everyone accepts that it had not occurred and, therefore, the Tribunal is satisfied that the only safe approach is also to delete that sentence in its entirety given that it is predicated on the false understanding of the claimant's evidence.

5 The Tribunal recognises, however, that that leaves 'in the air' a submission made on the claimant's behalf that that sentence continues, "…. the Tribunal is satisfied that no blame can be attributed to Ms Patten who had replied fairly promptly especially given that she was on holiday for part of the intervening period".

6 The Tribunal has considered that aspect at some length. The factors that we have brought into account include that the claimant's e-mail was sent to Ms Patten on Friday, 20 May, Ms Patten did not return from holiday until the following Monday, 23 May, and replied to the claimant by email on Tuesday, 7 June 2016. That period between Ms Patten's return to work and her reply to the claimant has been variously estimated as being 2½ weeks or 15 days. By our calculation, given the Bank Holiday on Monday 30 May, there were 11 working days. In this respect, the Tribunal recognises that on return to work on 23 May Ms Patten would be facing pressures that everyone faces on return to work and would have to prioritise her work. Additionally, the evidence of Ms Lee, which was not challenged, was that she understood that Ms Patten was seeking HR advice and that was the reason for the slight delay. Another factor is that the thrust of Ms Patten's eventual reply on 7 June indicates that she was of the opinion that the claimant was asking questions to which Ms Patten had already given answers or that the claimant already knew the answers to at least some of those questions from other sources. Nevertheless, the Tribunal is of the opinion that at least a holding reply could have been given to the claimant earlier than the

actual reply of 7 June. The principal point, however, is that we are satisfied that we cannot sustain the finding in our original decision of that reply having been made "fairly promptly". In the absence of clear evidence on this point, however, we do not find in all the circumstances that the time taken by Ms Patten to respond was unreasonable. That addresses the fifth and sixth bullet points in paragraph 4 of the skeleton submissions made on behalf of the claimant referred to above.

7 As to the first of those bullet points the Tribunal is not satisfied that the submission, "The very essence of C's complaint was that the trigger for her absence was the failure to respond before 20 May and her last working day on 6 June", is borne out by the evidence. We have reconsidered the claimant's witness statement, particularly at paragraph 22 and the answers she gave during cross-examination. While it is certainly right that she referred in her witness statement and orally to the delay of 2½ weeks, she does not suggest that that delay was the trigger for her absence; rather the claimant's focus is on the performance management process being conducted by Ms Lee (the Tribunal considers, somewhat aggressively in the claimant's opinion although that word was not used by her) and her feeling uncomfortable at the fact that Mr McFarlane was managing the performance plan during the absence of Ms Patten on holiday. Neither is it suggested in the claimant's claim form, ET1, that the delay was the trigger for the claimant's absence. In addition, the Tribunal considers that the e-mail exchange between the claimant and Ms Patten on 6 June (pages 438(f) and (g) of the original trial bundle of documents) are what might be described as normal exchanges between a manager and a colleague, and although the claimant does indeed mention that she is "still awaiting reply", there is nothing there to suggest that she is particularly stressed by the lack of response or, the day before she began her sickness absence, that the lack of response was the trigger for the absence.

8 The second bullet point in paragraph 4 of the skeleton submissions made on behalf of the claimant referred to above relates to matters including when the claimant actually received Ms Patten's reply of 7 June, whether she ought to have known that the claimant would not receive it and whether she ought to have taken steps to ensure safe receipt. The Tribunal notes that these points were not explored in any detail in the evidence the substantive hearing. Ms Patten's e-mail is timed at 18:25 on 7 June, which was the first day of the claimant's absence from work due to sickness. There is no evidence, however, as to whether Ms Patten was aware of the absence or, if so, was aware of how long that absence was likely to be. In these circumstances, the Tribunal does not consider it unreasonable that Ms Patten wrote to the claimant's office e-mail address, especially given that the claimant had written to Ms Patten from that address the previous day.

9 Counsel's third bullet point in his skeleton submissions records that the Tribunal previously found that the reply had given a reasonable response to each of the ten points that the claimant had made. That continues to be our finding. The Tribunal is satisfied that Ms Patten had given a reasonable response to each of those ten points raised by the claimant.

10 Finally, there is the fourth bullet point in the skeleton submissions but that is factual and there is no suggestion in that bullet point that the original judgment of this Tribunal warrants amendment.

Decision

11 Reverting to paragraph 6.27 of the Tribunal's original decision, we repeat that the two sentences referred to above in the middle of that paragraph require deletion. In there place we insert the two sentences below, the first of which draws upon the evidence of Ms Lee at paragraph 28 of her witness statement:

> "Unfortunately but in the opinion of the Tribunal understandably, Ms Patten had replied to the claimant's work e-mail address on the day that she commenced her sickness absence and, therefore, she was not at work to see the response. The claimant was critical of the delay, which she assessed to be of 2½ weeks, in Ms Patten's response but considering all the circumstances in the round the Tribunal does not find that the time taken by Ms Patten to respond, which the Tribunal calculates to be 11 working days, was unreasonable".

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 20 SEPTEMBER 2018