

Case Numbers: 2201072/2019
2201111/2019
2201379/2019
2201380/2019



EMPLOYMENT TRIBUNALS

Claimants

Mrs M Sarnataro (1)
Mr J Lally (2)
Mr P Burton (3)

v

Respondent

Orphidia Limited

Heard at: Central London Employment Tribunal On: 21 August 2019
Before: Employment Judge Norris, sitting alone

Appearances

For the Claimants: In person
For the Respondent: Did not appear and not represented

JUDGMENT

1. No response having been entered in time, and no good reason being given to extend time as to liability in the above matters, judgment is entered for each of the Claimants.
2. The Respondent is ordered to pay the Claimants as follows:
First Claimant: £7,657.17 net of tax (deductions from wages, including employer pension contributions) plus £304 preparation time order;
Second Claimant: £5,758.36 net of tax (deductions from wages) plus £304 preparation time order; and
Third Claimant: £7,854.18 net of tax (deductions from wages including pension employer contributions, notice pay, basic and compensatory awards) plus £304 preparation time order.

REASONS

Background

1. There are four claims before the Tribunal, issued by three Claimants.

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2. Each Claimant has a claim for unpaid wages. Mr Burton also has claim for unfair dismissal which was originally thought to be out of time.
3. No response was submitted in time by the Respondent (due 8 July 2019), and subsequent responses submitted out of time (17 July 2019) did not engage with the merits or otherwise of the claims; they contended that the Respondent's director Dr Rachamim had needed more time because his wife had suffered complications of pregnancy and he was in Switzerland at her side. Dr Rachamim also contended in relation to Ms Sarnataro that she had been paid "part of the owed compensation" and that Mr Burton's complaint of unfair dismissal was out of time and Mr Burton and Mr Lally had not worked their full notice periods.
4. For the same reason (i.e. Dr Rachamim's wife's medical complications) on 6 August the Respondent had requested a postponement of the previous hearing, listed for 7 August, which was granted. Dr Rachamim had emailed saying, "Because of this terrible situation and also not been able to prepare anything for the Tribunal and have been unable to do anything since just staying in the hospital in Switzerland the last two weeks". The clear implication was that he was still in Switzerland. He emailed again on the morning of the hearing saying, "I really cannot attend today".
5. The Claimants could not be notified in time that the 7 August hearing had been postponed. An Employment Judge sent away anyone who attended and relisted the matter for a Hearing on 21 August 2019 at 10.00, at which the Tribunal was initially to hear the matters but was later converted to a Preliminary Hearing. The letter of 7 August from the Tribunal to the parties stated that the postponement was granted "because the Respondent has confirmed this morning that his wife gave birth in Basel on 1 August 2019 and he is there, so unable to attend a hearing in London".
6. Nobody from the Respondent did attend on 7 August and it was not represented, but shortly after the Claimants had left the Tribunal, Dr Rachamim was seen outside a London Tube station, in conversation with another former colleague of the Claimants. Dr Rachamim later said that he had not claimed to be out of the country on the day of the hearing itself, but that he had not had time to prepare. It was certainly the impression he had given to the Tribunal, that he was not in London (and could not be) when in fact he both could be and was; and accordingly, he could and should have attended the hearing.
7. Nonetheless as noted above a further hearing was listed for 21 August, converted to a PHCM when Dr Rachamim asked for the ET3 to be considered out of time.
8. On 21 August 2019, the Claimants attended again; the Respondent did not. The Clerk to the Tribunal rang Dr Rachamim on his mobile shortly after 10.00. When asked if that was Dr Rachamim, the person initially denied it. However, once the Clerk had identified himself, the person (now acknowledged to be Dr Rachamim) indicated that administrators had been appointed for the Respondent and they should have told the Tribunal of this. He denied having seen the email telling him the hearing was proceeding. He was told enquiries would be made.
9. Enquiries eventually revealed an email sent at 09.19 on the morning of the hearing (21 August) to the ET showing that a firm CG&Co were appointed on 12 August and

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they filed a notice of Intention to Appoint an Administrator the following day. The Respondent accordingly was not in administration as at 21 August 2019. It was still showing as “active” at Companies House. The letter emailed the previous day to D Rachamim had clearly state that if the Respondent fails to respond to directions, Judgment will be entered against it. I considered that the Respondent had failed to respond, and accordingly, converted the Hearing back to the original listing and proceeded to conduct the matter as a full Hearing in the Respondent’s absence.

Claims

10. We first considered the complaints in each claim. All three Claimants said they were owed wages. Those complaints were all accepted.
11. The Third Claimant, Mr Burton, had had his claim partially accepted and partially rejected. In addition to wages, he also had a complaint accepted about notice pay. The complaint that had been rejected was for unfair dismissal as it appeared to be out of time.
12. On closer inspection, I considered this was not the case. The claim form, submitted on 15 April 2019, had ticked “I was unfairly dismissed (including constructive dismissal)” as well as notice and holiday pay. In the answer to question 8.2, where the background and details of the claim were set out, Mr Burton had stated among other points, “I left the company as stated on the 29th December 2019 [sic] due to a breach of contract, specifically clause 7.1.2 stating that I would be paid on the 28th of each month. On the 29th December 2018 I handed in my resignation via email to confirm that due to the breaching of this clause in my contract, I would not work for them any more and would not be serving my notice period due to the breach”.
13. I was satisfied that this constituted a complaint of constructive unfair dismissal, it being asserted by Mr Burton that the Respondent had acted in a way, without proper cause, as being calculated or likely to destroy or seriously damage the relationship between them, the payment of wages (on time or at all) being fundamental to that relationship and accordingly that his complaint had been brought in time and I did have jurisdiction to hear it. The fact that Mr Burton had subsequently obtained a second ACAS certificate (more than three months from his effective date of termination) did not, in my view, invalidate the fact that he had already complied with the requirements of Early Conciliation and submitted a claim form including a valid complaint of unfair dismissal within the prescribed time limits.

Response

14. I then considered the responses submitted by the Respondent out of time. I did not see any reason to extend time. As I have noted, they did not in fact contain any legitimate reason for the Respondent to have failed to pay the Claimants their wages, nor for the late submission. Since Dr Rachamim had said on 17 July that his passport had been stolen so that he was not able to reach his wife, I was unclear why this meant he had been out of the country most of the time in the weeks leading up to the deadline for submission of the response, or why he had not properly addressed the complaints in the responses that he submitted out of time. He was not suggesting, save to the limited extent set out above, that any of the Claimants was not owed what they claimed, and to the extent that the claims were defended at all, this went to liability.

Liability conclusion/Judgment

15. Accordingly, I entered judgment as to liability for the Claimants on each of their claims. I considered adding the Secretary of State as an additional Respondent, and initially did so, but on reflection, reconsidered that act of my own motion and removed her after the Claimants had left, on the basis that my earlier finding that the Respondent was not in administration at the time of the Hearing meant that at this stage, the Secretary of State could not be liable for any remedy sought (and she has not been served with the papers in order to submit a response). Accordingly, I concluded it is for the parties to ask me to reconsider that point if they believe the position is other than that the Respondent is liable for all the remedies to all three Claimants.

Remedy

16. I made the following findings and reached the following conclusions as to remedy:

- 16.1. In relation to Mrs Sarnataro, the Respondent has failed to pay her wages between December 2018 and March 2019 inclusive, so she is owed four months' net pay (£2,152.64 per month) which comes to £8,610.56. However, she gives the Respondent credit for the sum of £1,000 paid to her by Dr Rachamim in person by bank transfer following submission of her claim. In addition, she is owed £46.61 for employer pension contributions for March 2019 only.
- 16.2. I was satisfied that Mrs Sarnataro has spent eight hours preparing for the hearings (not including attendance at the Hearing before me) and award her £38 an hour pursuant to the Rules of Procedure accordingly, being a total of £304.00 preparation time.
- 16.3. In relation to Mr Lally, the Respondent failed to pay wages for November and December 2018 and for January 2019 until 19th, when he left the Respondent, and he has calculated his net wages for that period as £5,758.36. He had no claim for employer pension contributions as he believes these were later paid up to date. He is not claiming any money for his notice period, so it is of no import whether he worked one or not.
- 16.4. He also claims £304 for eight hours' preparation time, and I awarded him this amount accordingly.
- 16.5. In relation to Mr Burton, he was not paid for December 2018 and his net pay for that period should have been £2,129.91. He was not paid for his notice period (and nor was he obliged to, having resigned as I have found in response to the Respondent's repudiatory breach of contract) and that is a further two months' net pay, totaling £4,259.82. He is owed employer pension contributions for two months (£49.96 per month, totaling £99.92).
- 16.6. He is entitled to a basic award of £1,016, being two weeks' pay capped at the (then) applicable maximum of £508 per week.

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- 16.7. Mr Burton started a new job on 4 March 2019 and is awarded £348.53 net as his compensatory award for the three days in March when he was without work as a result of the unfair dismissal by the Respondent.
- 16.8. His total compensation is therefore £7,854.18. Finally, he is also awarded £304 for eight hours' preparation time.

Employment Judge Norris

21st August 2019

Sent to the parties on:

22/08/2019

For the Tribunal:

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