EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss P Ross	**v**	**(1) Mr O Opiah**
		(2) London Recruitment Ltd (t/a LDN Recruitment)

PRELIMINARY HEARING

Heard at: **Watford** **On: 13 November 2019**

Before: **Employment Judge Andrew Clarke QC**

Appearances:
For the Claimant: **In person**
For the First Respondents: **In person**
For the Second Respondent: **Attendance by the First Respondent**

JUDGMENT

The judgment of Employment Judge C Palmer QC of 25 June 2018 will be reconsidered (together with the issue of the claimant's alleged unfair dismissal) on Monday 25 May 2020 commencing at 10am.

REASONS

1. In order to explain my decision to order that the judgment given in this case on 25 June 2018 be reconsidered, I need to set out a little of the procedural history of this case.

2. The claimant brought a claim against the First Respondent only in August 2017. She alleged that she had not been paid the National Minimum Wage at any time during her employment, that there had been a breach of contract, or unlawful deduction from wages (namely the failure to pay her notice monies) and that she had been unfairly dismissed because "He fired me as I asked for NMW". The claimant accepted that she lacked the required two years continuous service in order to make an "ordinary" unfair dismissal claim.

3. The response, filed on behalf of the First Respondent, did not deal with the question of unfair dismissal and did not assert that the true employer was the Second Respondent.

4. A preliminary hearing was conducted by Employment Judge Heal on 29 January 2018. She gave the claimant 14 days to say why no strike out of her unfair dismissal application should take place having regard to her lack of two years' continuous service. The claimant failed to supply those particulars, because she accepted that she had not been employed for two years, hence her claim for unfair dismissal was struck out on 12 February 2018.

5. On 15 February 2018, a document containing the preliminary hearing orders was sent to the parties by post. It shows the case to be listed for consideration of the other claims on 25 June 2018. It records that the First Respondent was present at the hearing. However, having heard from him it is unclear to me whether the date was fixed in his presence, or (even if it was) he understood this.

6. On 22 June, as part of its usual exercise to ascertain whether the parties intended to attend the hearing, a representative of the tribunal telephoned the respondent. He explained that he was unaware of the hearing to take place the following Monday and that he could not attend. He was advised to write to the tribunal as a matter of urgency explaining this and asking for an adjournment. At 15:39 that afternoon, he wrote to the tribunal, by email, in the terms requested.

7. On the same day the tribunal wrote to the claimant advising her that the respondent had indicated that he was unaware of the hearing and wanted a postponement, but had not written to the tribunal. That letter also noted that the unfair dismissal claim had been struck out. That letter appears to have been sent to both parties by post. I accept that the First Respondent did not receive it until some days after the hearing had taken place on 25 June.

8. On 25 June Employment Judge Palmer QC gave judgment in the claimant's favour and in the absence of the First Respondent in respect of the National Minimum Wage and unlawful deductions claims. She also ordered particulars of the unfair dismissal claim to be given with a view to that being heard in due course on the basis that what was being alleged was an automatically unfair dismissal in respect of which there was no required qualifying period.

9. On 6 July the claimant gave the required particulars (but did not copy them to the respondent). She there asserted that she had been dismissed because of her National Minimum Wage claims, but also noted that she had been dismissed without reason and by a Skype message.

10. On 16 July, having received Employment Judge Palmer's judgment, the First Respondent wrote to the tribunal complaining of its going ahead in his absence having regard to his having done what the tribunal asked of him in terms of applying for an adjournment.

11. On 19 July 2018 Employment Judge Manley wrote to the First Respondent asking whether his email of 16 July should be seen as an application for reconsideration of the judgement and raising the question as to whether the correct respondent ought to be the Second Respondent.

12. From the tribunal file it is clear that a great deal of time was then taken in exchanges of correspondence between the tribunal and Employment Judge Palmer and that, eventually (possibly after the file was lost for a period), the matter was listed for 13 November 2019 for three matters to be considered:

    12.1 Whether the First Respondent had received notification of 25 June 2018 hearing.

    12.2 Whether the correct respondent ought to be the Second Respondent.

    12.3 For consideration of the unfair dismissal claim.

13. I note that at this stage the First Respondent was someone who had been informed that the unfair dismissal claim had been struck out (whether or not he had received any earlier notification, this was made clear in the tribunal's letter of 22 June), he had not received the particulars given by the claimant in response to Employment Judge Palmer's order and no directions had been given in respect of disclosure or witness statements regarding the unfair dismissal claim. Furthermore, his application to postpone the 25 June hearing had never been considered.

14. Against that background I turn to consider those three issues which are before me today.

15. I deal first with the question of whether or not the First Respondent received notification of the hearing on 25 June. Having considered that matter, I will then turn to consider whether or not the judgment given on that day ought to be reconsidered.

16. I have set out the procedural history above. It is clear that as at the beginning of the hearing on 25 June, the First Respondent had made the application to the tribunal which he had been advised to make and that the tribunal had not responded. The letter of the same date was not a response. I am satisfied that it was written and sent (by post) without the tribunal realising that the apparently absent application to which it refers had indeed been made. I am also satisfied that Employment Judge Palmer QC was unaware of the existence of the application to adjourn, hence she did not consider it.

17. Having heard from the respondent, I am satisfied, on balance, that he did not receive any notification of the hearing of 25 June until the Friday beforehand. Some support for his contention in that regard is found in the fact that in all other regards, when contacted by the tribunal he did respond and he has attended today.

18. The First Respondent disputes the claimant's entitlement to the sums awarded at that hearing. I shall not seek to encapsulate what he told me in that regard. Making a determination as to where the truth lies will be a matter for the tribunal which considers these matters in due course. Suffice it to say that it is the First Respondent's case that once the written contracts of employment supplied to the claimant are understood in the context of the working pattern and payment regime, then it will be seen that the National Minimum Wage was paid. He also points to the fact that a review took place by HMRC some two months after the claimant's departure and that this review established compliance with National Minimum Wage requirements during the previous year. In due course I will make appropriate orders for the disclosure of relevant documents, including any correspondence with HMRC in this regard.

19. On 16 July the respondents wrote to the employment tribunal by email following his receipt of the judgment sent to him on 3 July. He pointed out that he had done what had been asked of him and questioned why the tribunal had then proceeded in his absence. I regard that as an application for a reconsideration of the judgment appropriately made under rules 70 to 72 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1. It was made within the appropriate 14-day time limit. In any event, in the above circumstances (and having regard to what I shall conclude, below, with regard to the Second Respondent) I consider that I should, on my own initiative, order a reconsideration of that judgment. In particular, an application to adjourn had not been dealt with.

20. I now turn to the issue of the correct respondent in these proceedings.

21. As I have already noted the First Respondent submitted a response in his own name alone. He made no mention of the Second Respondent. However, he now maintains that the claimant was employed by the Second Respondent.

22. On being questioned, the claimant accepted that her employment was by the Second Respondent. She produced two contracts of employment (being those referred to in her claim form) both of which are in the name of a limited company. I note that the second such contract purports to describe the relationship between the company and the claimant as being one of self-employment. The First Respondent (who is the sole Director, so he told me, of the Second Respondent) does not advance any case to the effect that the relationship was one of self-employment. Hence, I accept that the claimant was an employee, the question remains of whom.

23. The claimant says that she had intended to claim against the Second Respondent, but had been advised by Acas that the relevant person to claim against was the First Respondent, having regard to the fact that he is the sole Director of that company and that it has no shareholders. She also told me that "he" (being the First Respondent) had been "liquidated" on two occasions.

24. I have not probed the First Respondent as to when the shareholders which it must have had at incorporation ceased to be so (if they ever did). The status of the company at the time it purported to issue a contact of employment to the claimant will have to be considered at the further hearing, as will the impact of that status upon the identity of the employer and upon the identity of the appropriate respondent to these proceedings. For present purposes I go no further that to add the company as Second Respondent and to make appropriate orders for disclosure and the provision of information in this and other regards.

25. Finally, I turn to the claim for unfair dismissal. I have already noted that it was struck out in accordance with the order of Employment Judge Heal. I have also noted that that strike out was consequent upon the claimant's deliberate failure to provide the particulars ordered. Of course, that failure was in the context of her lacking two years qualifying service, a requirement which had specifically been pointed to (as a likely reason why the claim could not proceed in this regard) in the order of Employment Judge Heal. Yet, the claimant's ET1 had made clear that she considered that she had been dismissed for asserting her National Minimum Wage rights. If she was correct, the requirement for qualifying service would not apply.

26. I have also noted above, that the respondent had been informed of the striking out of that part of the claim, then (confusingly no doubt) saw an order which referred to the claimant being given an opportunity to provide particulars, but no particulars were provided to him. In those circumstances, even leaving aside the lack of disclosure and witness statements, I do not believe that the interests of justice would be served by hearing that matter today.

27. It appears to me that Employment Judge Palmer QC implicitly set aside the strike out which had followed from the order of Employment Judge Heal and extended time for compliance with the order to supply particulars by a further 14 days from the sending out of her order. In any event, I consider the earlier order to be a case management order which can be set aside under Rule 29 and I do so. I would further note that the interests of justice require that order to be set aside, because it expressly proceeded on a false premise, namely that the claim which the claimant asserted was one which required her to have qualifying service (which she knew that she lacked).

28. The issue of whether the claimant was automatically unfairly dismissed in accordance with either s.104 or s.104A of the Employment Rights Act 1996, will be considered at the hearing of the claims against the Second Respondent and the reconsideration of the National Minimum Wage and unlawful deductions claims against the First Respondent.

29th November 2019

Employment Judge Andrew Clarke QC

Sent to the parties on:

…29th November 2019

For the Tribunal:

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