EMPLOYMENT TRIBUNALS

Claimant: **Ms DL Baldwin**

Respondent: **UK School of English Srls**

Heard at: **Southampton** **On: 16 January 2020**

Before: **Regional Employment Judge Pirani**

Appearances
For the Claimant: in person
For the Respondent: did not attend

JUDGMENT

1. Upon application made by email dated 14 March 2019 to reconsider the reconsideration judgment dated 28 February 2019, and sent to the parties on 1 March 2019, under Rule 71 Employment Tribunals Rules of Procedure 2013, the claimant succeeds in the application to the extent that the strike out of the response is reinstated by way of a variation.

2. The Claimant was automatically unfairly dismissed by the respondent pursuant to section 104 Employment Rights Act 1996.

3. Remedy: The claimant is awarded a compensatory award of £645 (which is calculated by subtracting £205 she received from 900 Euro owed until the end of the contract).

REASONS

Background

1. By a claim form received at the tribunal on 2 September 2017 the claimant brought a claim against the respondent for unfair dismissal. Within the form the claimant says she was employed as a residential English as a Second Language ("ESL") teacher by the respondent from 20 July 2017 until 24 July 2017. The tribunal wrote to the claimant on 11 September 2017 saying, under section 108 of the Employment Rights Act 1996, claimants are not entitled to bring a complaint of unfair dismissal unless they were employed for 2 years or more except in certain specific circumstances. Accordingly, the claimant was asked to give reasons why her claim should not be struck out. The claimant replied the same day explaining her claim was one for automatic unfair dismissal. In particular, the claimant says she was dismissed for asserting statutory rights in relation to, among other things, being paid the minimum wage and holiday pay. Notice of claim was then sent to the respondent on 4 October 2017 with a hearing date of 31 January 2018. Included in the notice were a series of case management orders. The claim was served on UK English International.

2. The tribunal wrote to the claimant on 23 November 2017 explaining the name appears to be a trading name only. No response had been received. Accordingly, the claimant was asked to provide the full correct name of her former employer. The claimant wrote to the tribunal on various dates in November 2017. This resulted in the direction from Acting Regional Employment Judge Livesey that the claim be re-served on UK English International at two addresses in Rome. This was done on 11 December 2017. The notice provided that if the respondent wished to defend the claim a response must be received at the tribunal office by 8 January 2018. Because the claim was re-served the original hearing date of 31 January 2018 was vacated. After further investigation the claim was re-served again on a different address on 26 February 2018. This time a response was required by 26 March 2018. A response was eventually received at the tribunal on 23 March 2018.

3. The name of the respondent, set out in the response form, was UK School of English. The email address provided for contact was info@UKEnglish.it. However, in the body of the response, the respondent referred to itself as UK English International. It was explained that UK English International was an English branch of the organisation, but due to the high cost of offices in England it was closed in 2017.

4. According to the respondent, the claimant was a freelance teacher and not an employee. In addition, the respondent says the claimant caused a commotion at the office which resulted in the termination of her engagement. The respondent says the claimant agreed and signed a written contract setting out terms which were adhered to. It was also said that she was not supervising students during meal times. The claims were denied on this basis.

5. Notice of hearing was then sent to the parties on 23 March 2018 for a hearing on 13 and 14 September 2018. Again, case management orders were included in the notice.

These included that by 9 May 2018 the claimant and the respondent shall send each other a list of any documents they wish to refer to at the hearing or which are relevant to the case. The bundle was to be prepared by 23 May 2018.

6. On 9 June 2018 the claimant emailed the tribunal, copying in the respondent to its info@UKEnglish.it email address, saying she had not received a list or copy of documents from the respondent which was in breach of case management orders. This prompted an email from Employment Judge Harper requesting that the respondent provide comments on the correspondence by 16 July 2018. Because no reply was received the tribunal wrote again by email to the respondent and the claimant on 27 July 2018 requesting a reply by return. Still no reply was received from the Respondent.

7. Employment Judge Harper then caused a letter to be written to the respondent on 11 August 2018 saying on the tribunal's own initiative he was considering striking out the response because it was not being actively pursued. The respondent was given an opportunity to object to this proposal by 20 August 2018. In the event, and after no further response or comment from the respondent, Employment Judge Harper struck the response out on 11 September 2018 because the response was not being actively pursued. The strike out judgment was sent to the parties on 11 September 2018.

8. The claimant, who was in Rome, emailed the tribunal on 10 September 2018 saying she would be unable to attend the hearing, by then listed for 11 September 2018. In correspondence with the tribunal she explained that she would limit her claim to four weeks employment at £450 per week, totaling £1,800. She also claimed the cost of the hearing and legal costs. Judgment was then provided pursuant to rule 21 of the Employment Tribunal Rules 2013 in the sum on £1,800 gross on 14 November 2018, which was sent to the parties on 28 November 2018.

Respondent's Reconsideration Application

9. On 11 December 2018 the respondent emailed the tribunal with an application to reconsider the judgment sent to the parties on 28 November 2018. The respondent used a different email address and explained that info@UKEnglish.it was out of service. The email went on to explain that UK English International was only a trading name and not a company name. Points were also made about the substantive defence of the case. However, it was accepted that the weekly fee was 450 Euros per week.

10. The tribunal then wrote to the respondent on 10 January 2019 pointing out that the response had in fact been struck out on 11 September 2018. Accordingly, the respondent was asked to clarify whether the application applied to the decision to strike out the defence of the claim and, if so, why the application was not made in time.

11. The respondent replied on 16 January 2019 explaining that it was not aware of the 20 August 2018 deadline because emails were not received. The server was said to be down from 10 August 2018 until 20 September 2018 which was after relocation of offices on 10 August 2018. The Respondent went on to explain that the email system it uses does not keep records of web emails from its provider. Around this time, according to the respondent, their software technician was on annual leave for two weeks thereby

exacerbating the problem. Accordingly, it is said that there was an outage of the email system and records were lost.

Initial Reconsideration Judgment

12. Both parties were given the opportunity of having a hearing in person or over the phone. In the event, both agreed that I should deal with the initial reconsideration application matter on paper.

13. For reasons set out in the reconsideration judgment, I determined that the interests of justice favoured (i) extending the time to apply for reconsideration and set aside, and (ii) set aside of the strike out of the response and revocation of the judgment. In this instance, the interests of justice favoured the merits of the case being considered.

14. The judgment was dated 28 February and sent to the parties on 1 March 2019.

Further reconsideration application by the claimant

15. The claimant wrote again on 14 March 2019 applying for a further reconsideration of this reconsideration judgment. In essence, the claimant says she is able to provide documented proof that the respondent did not move office as was suggested. According to the claimant, this shows that the alleged problems with the server were a fabrication. She went on to make other comments about the substantive case in the same application.

16. I then caused an email to be sent to the parties on 22 March 2019 saying, among other things, that it was agreed with the parties that the reconsideration would be dealt with on paper. I pointed out that it was not feasible or practical to engage in ping-pong correspondence or applications. Therefore, the parties were informed that the claimant's further request for reconsideration would be dealt with at the commencement of the substantive hearing listed on 16 and 17 January 2020 in Southampton.

17. Both parties were reminded that must come prepared to deal with the substance of the underlying case if the further request for reconsideration does not succeed.

18. A notice of hearing was sent to the parties on 4 March 2019.

Correct name of the respondent:

19. In light of clarification from the respondent, the tribunal wrote on 5 April 2019 asking whether the claimant wished to amend the name of the respondent to UK School of English Srls. The name of the respondent was accordingly amended.

Evidence for further reconsideration application

20. The claimant attended today and provided a witness statement and bundle relating to her reconsideration application.

21. The respondent failed to attend without explanation. The tribunal had previously emailed the respondent and asked them to confirm whether they were intending to attend. No response was received from the respondent to this request. The hearing was delayed to check whether further correspondence had been received from the respondent. Nothing further was received.

22. I decided, in accordance with rule 47 of the Employment Tribunals Rules, to proceed with the hearing.

23. The claimant points out that the previous judgment was overturned on the premise that the respondent had relocated its office on 10 August 2018. The respondent said that after the said relocation problems had arisen with its server. The claimant has produced documentary evidence from the Italian Chamber of Commerce. It transpires that the trading office of any company in Italy is one of the places where the business activities are carried out. This may or may not correspond with the registered offices but it must be duly communicated to the Chamber of Commerce. Documents produced by the claimant indicate that as of 5 May 2019 the only address provided by the respondent was Via Leonida Bissolati. The respondent previously maintained that it had relocated from that address to Via Antonio Salandra.

24. The claimant therefore says that if there had been such a relocation it could and should have been recognised by the local trading office.

25. Mr Laudazi addresses these points in a witness statement sent to the tribunal. He explains that his company has been in the Via Bissolati building for over 24 years. However, despite the claimant referring to and attaching documents in her email of 14 March 2019, the respondent failed to address the allegation relating to the fabricated move to Via Antonio Salandra.

26. Further, the respondent has failed to attend the hearing today without explanation. The claimant exchanged her witness statement together with her evidence with the respondent.

Decision on reconsideration application

27. Rule 70 of the Tribunal Rules 2013 provides an employment tribunal with a general power to reconsider any judgment where it is necessary in the interests of justice to do so. Interests of justice as a ground for reconsideration relate to the interests of justice to both sides.

28. Where a response is struck out, the effect is as if no response had been presented — rule 37(3). In these circumstances, in accordance with rule 21, an employment judge will decide whether, on the available material, a determination of the claim can properly be made. However, the striking out of a response does not constitute a judgment as defined in rule 1(3)(b) and therefore cannot be reconsidered under rules 70–73. The striking out of a response puts the respondent in the same position as if it had failed to present one and the respondent is therefore liable to have a default judgment issued against it.

29. However, this type of automatic strike-out order can, however, be varied or revoked in accordance with a tribunal's general power to manage proceedings contained in rule 29. Rule 38(2) also provides the respondent with the right to apply to the tribunal within 14 days of the date when the response is struck out for a failure to comply with an unless order to have the order set aside on the basis that it is in the interests of justice to do so.

30. On the basis of what the claimant has shown me I am satisfied that the respondent has not been transparent about its non-receipt of correspondence from the tribunal. The basis on which the first judgment and strike-out were reconsidered/varied is therefore unsafe.

31. However, the judgment which was subject to the original application for reconsideration by the respondent was in fact against UK English International. Both the claimant and respondent agree that is not the correct respondent.

32. Further, the remedy in that judgment was that the respondent was ordered to pay the claimant the sum of £1800 (gross). Even the claimant seems to accept that were she to be successful in her claim of automatic unfair dismissal she would not be entitled to that sum.

33. Although two contracts were signed by the claimant it seems that the first of those contracts, signed on 11 and 12 May 2017 for a 29 day period commencing 6 July 2017, was terminated by email sent on 1 June 2017. This was to be for £360 per week.

34. The second contract signed by the claimant and the respondent on 5 June 2017 was for a period of 14 days over two weeks from 20 July until 2 August 2017. The revised remuneration was for €450 per week. It is agreed that the claimant was paid £205 after termination of their contract on 24 July 2017.

35. Although it is in the interests of justice to reinstate the strikeout of the response it is not in the interests of justice to reinstate a remedy, which cannot be justified even on the claimant's case against the wrong respondent.

Strikeout of the response

36. Therefore, the response is struck out. As has previously been set out the striking out of a response puts the respondent in the same position as if it had failed to present one and the respondent is therefore liable to have a default judgment issued against it. In these circumstances, in accordance with rule 21, an employment judge will decide whether, on the material available, a determination of the claim can properly be made.

37. The parties were previously advised that they must come prepared to deal with the substance of the underlying case if the further request for reconsideration did not succeed.

38. Because the case and remedy were not entirely clear from the papers I determined it was in the interest of justice to hear brief evidence and submissions from the claimant. The claimant provided a witness statement which dealt with both her reconsideration and substantive claims together with a bundle of documents which ran to 100 pages.

Very properly, the claimant included in that documentation copies of witness statements provided to her by the respondent. However, the response has now been struck out and, in any event, no witnesses for the respondent attended.

Relevant findings of fact

39. The claimant teaches English as a foreign language. The respondent is a company based in Rome which, among other things, provides ESL courses to foreign students in England.

40. The claimant met with a representative of the respondent in Rome and initially signed a four week contract on 11 May 2017 for a period of service commencing 6 July until 1 August 2017. Payment was to be £360 per seven days for teaching English to Italian students at the University of Portsmouth. Clause 17 of the said contract provided that it may be ended by either party before the opening date of the centre with written notice of 30 calendar days prior to the commencement date. In the event, by email sent to the claimant on 1 June 2017, the claimant was informed by the respondent that they had not received many enrolments for the first session of the summer camp and therefore asked if the claimant could sign a new contract. The claimant replied the same day saying reducing the length of her contract would put her in financial difficulty.

41. Subsequently, the respondent emailed the claimant again saying a director had suggested a compromise of an increase in payment to €450 per week. The claimant replied the same day saying she appreciated the salary adjustment and would sign the new contract when it was sent to her.

42. Accordingly, a revised contract was sent to the claimant which she signed on 5 June 2017. It was for a fixed term 14 days from 20 July until 2 August 2017. The claimant was to provide English teaching to students provided by the respondent. Clause 4 of the said contract provided that she would be required to provide 20 hours per week of EFL tuition plus 28 hours per week of extracurricular services and lesson preparation for a total of 48 hours per week.

43. The contract also provided at clause 5 that the claimant was a service provider and, as such, both parties acknowledge it does not give “right” to a contract of employment and that they consider themselves to be independent operators in this service provision agreement.

44. All teaching and test materials were provided to the claimant by the respondent. In addition, the respondent dictated the syllabus and controlled the way in which she taught. In particular, she was provided with a staff handbook and was to be reviewed by one of the respondent’s manages. She was obliged to teach at certain times and during certain hours.

45. The claimant was provided with a timetable by the respondent. She started work in Portsmouth on 20 July 2017. The next day she taught students. She worked 11 ½ hours on the day of her arrival. She reasonably believed, having perused documents provided to her from the respondent, that she would be required to do 20 hours of teaching per week together with five hours of preparation per week, attend meetings, work during

meals and help enforce curfews. In addition, she was told she would be scheduled to work two three-hour afternoon shifts per week and was asked to work every evening. She therefore reasonably concluded that this would have exceeded the 48 hours required in her contract.

46. The claimant then approached Ms Menezes, the Centre Director of the respondent at the University of Portsmouth, 21 July in the canteen. The claimant explained that she was willing to do the additional work but wanted to be compensated for additional hours. In broad terms, the claimant believed that the respondent expected her to work hours for which she would not be paid. She believed that the respondent would be unlawfully deducting money from her wages.

47. The next day, Ms Menezes informed the claimant that she did not need to teach in the morning. The claimant became concerned when she was later unable to locate Ms Menezes. Eventually, she located Ms Menezes on the 24 July 2017. Ms Menezes asked her to come to the office. The claimant was then told that she was dismissed. The purported reason for dismissal was that the claimant had refused to go to the disco night excursion. The claimant immediately pointed out that she never received the relevant schedule and did not know that she was supposed to go.

Outline of applicable law

(i) Employment Status

48. Only employees can claim unfair dismissal rights. An employee is defined in S.230(1) ERA as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'. 'Contract of employment' is in turn defined as a 'contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing' — S.230(2).

49. There is no precise and uniformly applied legal definition of a contract of employment. As Lord Justice Denning put it in *Stevenson Jordan and Harrison Ltd v Macdonald and Evans 1952 1 TLR 101, CA*: '[I]t is almost impossible to give a precise definition … It is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies.' In practice, it is obvious enough in the great majority of cases whether a worker is an employee or an independent contractor, but there is a grey area between the two and borderline cases have generated a large body of case law. Over the years the courts have developed a number of tests of employment status and have viewed a variety of factors as relevant in particular cases. The tendency in recent years has been to take a broad and flexible approach to the question of who is an employee and the courts and tribunals have adopted what has become known as the *multiple* or *mixed* test. This involves the proposition that no single test is conclusive and that what the tribunal or court must do is weigh up all the relevant factors and decide whether, on balance, the relationship between the parties is governed by a contract of employment.

50. The test was formulated by Mr Justice MacKenna in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 2 QB 497, QBD*, but has been developed in a number of subsequent cases. Following the decisions in *Carmichael and anor v National Power plc 1999 ICR 1226, HL*; *Express and Echo Publications Ltd v*

Tanton 1999 ICR 693, CA; and *Hewlett Packard Ltd v O'Murphy 2002 IRLR 4, EAT*, it is clear that four essential elements must be fulfilled for a contract of employment to exist. There must be:

i. a contract (between the worker and the alleged employer)

ii. an obligation on the worker to provide work personally

iii. mutuality of obligation

iv. an element of control over the work by the employer.

(ii) Automatic Unfair dismissal

51. To qualify for the right to claim unfair dismissal, employees must generally show that they have been continuously employed for at least two years — S.108(1) ERA

52. No period of qualifying service is required to bring a claim of automatically unfair dismissal for one of the 'inadmissible' reasons.

53. Certain reasons for dismissal can be described as 'automatically unfair' in the sense that, if one of these reasons is established, the employment tribunal *must* find the dismissal unfair. Consideration of the reasonableness of the decision to dismiss is entirely irrelevant when it comes to claims based on any of the statutory provisions that render a dismissal automatically unfair. In such cases, the focus of the tribunal's inquiry will be on establishing, on the evidence, whether the prohibited reason was the reason or principal reason for dismissal. If it was, then there is no option but for the tribunal to find the dismissal unfair.

54. The Court of Appeal in *Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*, described a 'reason for dismissal' as: 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'.

55. Under S.104 of the Employment Rights Act 1996 (ERA), an employee's dismissal is automatically unfair if the reason or principal reason for the dismissal was that:
    i. the employee brought proceedings against the employer to enforce a relevant statutory right — S.104(1)(a), or

    ii. the employee alleged that the employer had infringed a relevant statutory right — S.104(1)(b).

56. It is immaterial whether the employee actually had the statutory right in question or whether the right had been infringed, but the employee's claim to the right and its infringement must have been made in good faith — S.104(2). Furthermore, it is sufficient that the employee made it reasonably clear to the employer what the right claimed to have been infringed was; it is not necessary actually to specify the right — S.104(3).

57. Therefore, in a claim brought under S.104, there are three main requirements:
    i. the employee must have asserted a relevant statutory right

ii. the assertion must have been made in good faith, and

iii. the assertion must have been the reason or principal reason for the dismissal.

58. Section 104 does not apply to all statutory rights but only to the 'relevant' statutory rights referred to in S.104(4). These include 'any right conferred by this Act [i.e. the ERA] for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal' — S.104(4)(a). This means that when a new employment right is inserted into the ERA it automatically becomes a relevant statutory right, provided of course that the remedy for infringement of that right is by way of a complaint to an employment tribunal.

59. The relevant statutory rights covered by S.104(4)(a) relied on in this case are according to the claimant's email to the tribunal of 11 September 2018 include protection of wages rights — Ss.13, 15, 18 and 21 ERA.

60. S.104 is not confined to cases where a statutory right has actually been infringed. It is sufficient if the employee has alleged that the employer has infringed a statutory right and that the making of that allegation was the reason or the principal reason for the dismissal. The allegation need not be specific, provided it has been made reasonably clear to the employer what right was claimed to have been infringed.

61. Furthermore, the allegation need not be correct, either as to the entitlement to the right or as to its infringement, provided the claim was made in good faith.

62. The important point is that the employee must have made an allegation of the kind protected by S.104; if he or she did not, the making of such an allegation could not have been the reason for his or her dismissal.

Conclusions

63. The claimant says she was an employee and not a worker. Although this was disputed in the response, it has been struck out. Nonetheless, potentially a jurisdictional issue arises. The contract signed by the claimant states expressly that she was not an employee. Nonetheless, the claimant was obliged to do work by the respondent in accordance with the contract and not able to substitute herself. The respondent not only provided the relevant teaching materials but also required the claimant to teach a particular syllabus in a particular way. The respondent provided the claimant with a handbook and explain that her teaching would be supervised by the respondent.

64. It seems clear that the claimant was working pursuant to a contract of employment.

65. The next issue to determine is the reason or principal reason for dismissal. Because the claimant was employed for under two years the burden is on her to establish the reason or principal reason. However, the response has been struck out and, in any event, the respondent did not attend today.

66. The claimant believed in good faith that contrary to what was set out in her written contract she was being required to work in excess of 48 hours per week and for time which would not be paid. During a meeting with the centre director of the respondent in the UK the claimant effectively asserted her statutory right not to receive deductions of wages pursuant to section 13 of the Employment Rights Act 1996.

67. Straight after this conversation the claimant was effectively removed from her duties until she was eventually dismissed on 24 July 2017. Although the respondent said that the reason for her dismissal was that she had failed to attend a disco night excursion she never received a schedule and did not know that she was supposed to go. In fact, after she asserted her statutory rights she was told that she would not need to teach the next day.

68. Taking all that into account I am satisfied that the principal causative factor acting on the mind of the respondent was the assertion of her statutory rights.

69. Accordingly the dismissal on 24 July 2017 was automatically unfair.

70. Employment tribunals are directed by statute to award 'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer' — S.123(1) Employment Rights Act 1996 (ERA). When assessing what the employee has actually lost as a consequence of being unfairly dismissed, the tribunal looks at the net remuneration that the employee would have continued to receive if the dismissal had not occurred.

71. The claimant had been paid £205 for the work that she did. Had she not been dismissed she would have been employed, in accordance with her written contract, up until 2 August 2017. The claimant provided me with a copy of the relevant exchange rate for the pound and the euro at the relevant time in July 2017. This was 0.939. The total amount payable would therefore be £845. Subtracting the £205 provides a compensatory award of £640. She was unable to mitigate her loss in this period.

72. Finally, I add that the judgment and remedy in this case would have been then same even if the response had not been struck out. Although the respondent submitted statements to the claimant, which she very reasonably provided to me, the witnesses failed to attend. They were therefore not able to be subject to cross-examination by the claimant. The claimant gave clear and credible evidence about the circumstances surrounding her status as an employee and also the circumstances of her dismissal. She was able to rebut the purported allegations about misconduct.

Regional Employment Judge Pirani

Dated: 22 January 2020

Judgment sent to parties: 23 January 2020

FOR THE TRIBUNAL OFFICE