Case: 1804789/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Leedham**
Respondent: **Tripak Limited**

AT A HEARING

Heard at: **Leeds** **On: 12th February 2020**
Before: **Employment Judge Lancaster**

Representation
Claimant: In person
Respondent: Mr T Fuller, consultant Citation Ltd.

WRITTEN REASONS

1. Judgement having been sent to the parties on 12th February 2020, written reasons are now provided, initially at the request of the Respondent but also subsequently asked for by the Claimant.

2. On 28th October 2019 Judgment was issued under rule 21 of the Employment Tribunals Rules of Procedure 2013.

3. The chronology since that date was summarised in a letter which I caused to be sent to the parties on 19th December 2019, with a view to clarifying the essential facts in advance of this hearing. The text of that summary is now attached as an endnote to this decision[i].

4. The Respondent now applies both for an extension of time in which to serve the Response, and for reconsideration of the rule 21 judgment. I may reconsider the judgment where it is necessary in the interests of justice to do so (rule 70) and may extend time generally (rule 5) and specifically in respect of a late Response (rule 20) where it is in accordance with the overriding objective.

5. Firstly, I am not satisfied on the balance of probabilities that the Respondent did not in fact receive a copy of the Claim form (ET1) which was posted by the Tribunal on 20th September 2019.

6. As I set out in the Reasons for the rule 21 judgment this was erroneously addressed to "William Gluck t/a Tripak Limited". It was however sent to the Respondent's registered office.
7. No explanation is proffered as to why this piece of correspondence alone should have gone astray. The respondent does not assert that it is aware of any history of post going missing, either at around this particular time or generally.

8. There is no statement from William Gluck, the Respondent's Managing Director, to confirm that he did not in fact ever receive this correspondence, addressed specifically to him.

9. The assertion by his son, David Gluck, who did give evidence before me to the effect that he can "confirm that the Respondent had not received any correspondence from the Employment Tribunal regarding this matter" and that an ET1 "was never received by the Respondent" is hearsay. I am not satisfied upon questioning of Mr David Gluck that any appropriate enquiries were ever in fact carried out either with his father or with any one else to ascertain what may have happened to this letter.

10. I take in to account the communications from Mr William Gluck to the tribunal after receipt of the rule 21 judgment. He asserts vehemently in an email sent on 30th October that no correspondence or notification had ever been received and that failure to accede to his demand that the judgment be cancelled by 4pm on 29th October (sic) would lead to an immediate claim for maladministration. This is on the face of it corroborative of the Respondent's case on non-receipt. However I accept the Claimant's submission that Mr William Gluck had previously ignored three letters from him, sent recorded delivery or signed-for. There is certainly a possible inference to be drawn that Mr William Gluck was in fact simply choosing to ignore these claims and did not believe that they would be of any effect until the point that judgment was issued, and that in the circumstances is the inference that I do draw. Subsequent events also show that the Respondent has indeed adopted a lackadaisical approach to the receipt of important Tribunal documents.

11. Further copies of the ET1 were then sent by the Tribunal. Firstly one was sent to Mr William Gluck on 1st November 2019. Then another copy was also sent, at his specific request, to his other son, Simon Gluck; that was on 4th November 2019. There is no dispute that both these communications were received.

12. However, neither William nor Simon Gluck passed the ET1 on to the Respondent's legal advisers, Citation. It was only after Mr Fuller subsequently became aware via the Tribunal that his client had in fact been in possession of the ET1 for some time that he specifically requested that it provide him with a copy, which was done only on 26th November 2019.

13. I am not persuaded by Mr David Gluck's account that he did not "realise" that a copy of the ET1 had been received until 26th November 2019. Nor do I consider it to be a satisfactory explanation from him that the Respondent was concentrating upon seeking to get the rule 21 judgment overturned rather than responding to the claim itself. In the Tribunal's letter of 1st November 2019 Regional Employment Judge Robertson had made

it perfectly clear that the process by which the judgment might be set aside was necessarily predicated upon a proper response to the claim being provided.

14. The delay in submitting a draft ET3 is therefore entirely down to the default of the Respondent. That delay is not insubstantial. Although this being the reason for the delay is not automatically fatal to the Respondent's application it is a material; factor that I take into account when deciding if it is necessary in the interests of justice to grant revocation or variation of the judgment.

15. More particularly I turn to the merits, or otherwise of the draft Response. I had already highlighted matters of potential concern in the letter of 19th December 2019[ii].

16. I am quite satisfied that the purported defence to the claim for an unauthorised deduction from wages in respect of accrued holiday pay would in the event have no reasonable prospect of success.

17. It is correct that The Claimant had taken New Year's Day off so that his assertion that he had taken no holiday at all in 2019 is not strictly accurate. It is however completely immaterial. The contractual provisions for holiday, in the Statement of Main Terms of Employment dated 1st December 1996, treat bank holidays as separate from and additional to the 26 days annual entitlement. When the Claimant calculates his pro rata annual entitlement under the contract at 3 x /12 of the 26 days, which is the 6 ½ days accrued holiday payable at termination the fact that he had had also one of the bank holidays in that 3 month period is irrelevant.

18. There was never any prior written consent to or notification of the non-payment of that 6 ½ days outstanding holiday due with the final instalment of wages. It is therefore an unauthorised deduction.

19. Belatedly in a letter dated 10th May 2019 (which is headed "without prejudice" but which has been produced by the Respondent, and is not in any event properly "without prejudice" to anything in this regard), Mr William Gluck asserted that the 6 ½ days holiday had "already been taken in previous months as you were not working 9-5 as per the employment contract". That is essentially the position repeated in the draft ET3. This is an after-the-event attempt to justify the failure to pay what was due by "deeming" him to have taken leave which he had not. Clearly the Claimant had not in fact actually booked any holiday during the first 3 months of the year and the Respondent had never taken issue with the hours he worked. He was paid a salary and not by the hour.

20. The alternative proposition in Mr David Gluck's statement that the Claimnt had been expressly required to take his outstanding leave during his notice period is groundless. Whilst an employer may specify when holiday is to be taken that, absent any provision in the contract, can only be in accordance with the provisions in regulation 15 of the Working Time Regulations 1997, which have not been met in this case.

21. I also consider that the argument in the draft Response that no commission whatsoever was due for the final month of employment would have no reasonable prospect of success. There is nothing in the contract to limit the payment of commission to employees who are actually in work at the later date of calculation rather than at the date when the commission was earned. There is no reason to imply a term that an employee who, as the Claimant

did, was required to give 1 month's notice of termination would work that month without accruing any right to commission in that period, where that commission was a significant part of the total contractual remuneration.

22. If that were the position the Respondent now concedes in Mr David Gluck's evidence that based upon a net profit of £4313.09he would be entitled to £1269.06 commission but not the £2318.05 claimed and reflected in the judgment. However the draft pleaded defence is not only that there is simply no entitlement whatsoever, but that there was in fact a negative balance for March 2019, that is no net profit at all. On the evidence of Mr David Gluck that assertion of a negative balance in the draft ET3 is clearly wrong

23. The alleged justification for that lower figure for the commission potentially due in that month as compared to the average over the previous quarter is a single sheet of paper produced by Mr David Gluck, with no supporting documentation, and which appears artificially to deflate the calculation by attributing exceptional costs to that month so as to reduce the gross profit upon which commission would be due by a significant amount. If I were to retake the decision today as to the appropriate level of commission due that scanty evidence would not be enough to satisfy me that there was in fact substantial replacement of or repairs to equipment in the last month of employment where the Claimant denies that this happened. It would not now be proportionate to delay the matter for the Respondent to seek to assemble further evidence on this point where the Claimant has already been kept out of all the monies due to him on his retirement for a period of some ten months.

24. It is in my view not necessary, therefore, in the interests of justice to extend time or to reconsider this judgement in any respect.

25. The Claimant has, today, applied for a preparation time order. Having found that the draft Response as pleaded would have had no reasonable prospect of success the Respondent has clearly acted unreasonably in making this application for reconsideration on that basis. The preconditions for making an award under rule 76 are therefore satisfied and I further exercise my discretion to make an order in these circumstances.

26. The Claimant estimates that he has spent 15 to 20 hours, though not all of that would appear to be in preparation for f this case from the date of preparing the ET1 onwards. On a summary assessment under rule 79 (1) (b) I consider that the Claimnt will have spent 6 hours in preparation, not including his attendance at this hearing. At the current hourly rate of £39.00 he is therefore awarded the additional sum of £234.00.

EMPLOYMENT JU DGE LANCASTER
DATE 19th February 2020

JUDGMENT SENT TO THE PARTIES ON
DATE 20th February 2020

AND ENTERED IN THE REGISTER

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunaldecisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

[i] The judgment, issued in default of any Response having been received by the due date of 18th October, was sent to the parties on 28th October 2019.
The Respondent, through Mr William Gluck , then emailed the Tribunal on 30th October 2019 purporting to demand that the judgment be cancelled by the following day
Although the first request for reconsideration of the judgment was received on 1st November, from the Respondent's representatives, this was after Regional Employment Judge Robertson had replied to Mr Gluck, informing of the correct procedure and attaching a copy of the Claim Form (ET1).
By this stage there was no reason why a draft Response should not, in fact, have accompanied the application. The Respondent's representatives were reminded therefore of Judge Robertson's direction in a further email , sent on my instructions, dated 5th November 2019. Unfortunately this was sent to an incorrectly transcribed email address , and not re-sent correctly until 18th November 2019. I had earlier understood that this re-sent correspondence had also included a further copy of the ET1, but that appears to have been incorrect. However, another copy of the ET1 had already also been sent, at his further request, to Mr Simon Gluck on 4th November 2019.
The request for reconsideration was repeated on 18th November 2019, but again without a draft amended Response being attached. I therefore caused a further letter to be sent dated 25th November 2019 , rejecting that application. That letter, it is now accepted, correctly stated the position as being that the Respondent had had a copy of the ET1 since at least 1st November 2019.
Nonetheless the third request for an extension of time to serve the Response, now accompanied by a draft, was still not received until 13th December. That is nearly 3 weeks after the letter of 25th November and more than 6 weeks since the ET1 was sent to Mr William Gluck

[ii] At the hearing I shall also consider whether, if leave is given, the draft Response discloses a defence which has no or little reasonable prospect of success. Whilst it may be arguable that the terms of the contract in respect of commission falling due after the end of employment preclude any such sums being properly payable, I am not immediately persuaded that there is any good defence to the claim for accrued holiday pay. The Respondent is purporting, retrospectively to allocate "holiday" to the Claimant on a bare assertion - untested in any disciplinary proceedings - that he had not worked his contractual hours and that he has therefore effectively used up his leave allowance even without having in fact booked any time off. There is certainly no pleaded authorisation for the deduction of accrued holiday pay from the final wages.