THE EMPLOYMENT TRIBUNALS

Claimant Ms K Angloy

Respondent Hanif Premier Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT MIDDLESBROUGH ON 7 February 2020
EMPLOYMENT JUDGE GARNON
Appearances
Claimant in person
For Respondent Mr James Roddy of Avensure

JUDGMENT

On reconsideration, under Rules 70-72 of the Employment Tribunal Rules of Procedure 2013, of my Judgment on liability only dated 12 November and sent to the parties on 14 November 2019, I confirm the judgment. The respondent will be entitled to participate in the remedy hearing which will be listed for half a day on 22 April 2020 ONLY on the question of remedy.

REASONS (bold is my emphasis and italics are quotations)

1. The claimant worked at the respondent's convenience shop and post office franchise from January 2014. She raised a very detailed grievance on 11 July 2019 about various matters including under payment or late payment of wages and says it was ignored. She commenced Early Conciliation on 23 July. It lasted not the usual 4 weeks but until 6 September , I accept at the respondent's request . After a meeting on 5 September which solved nothing she resigned on 16 September, confirmed in writing on 25 September and claim constructive dismissal. The claim form presented on 1 October says she had given both directors every opportunity to deal with her concerns but neither was interested.

2. The claim was sent to the respondent on 14 October. A response form was due by 11 November 2019 but none was received. Having checked the service address was correct by searching at Companies House I gave judgment under Rule 21 of the Employment Tribunals Rules of Procedure 2013 as follows:
The claims of unfair dismissal, breach of contract, compensation for untaken annual leave and unlawful deduction from wages are well founded. Remedy will be decided at a hearing on a date (time estimate two hours)
I said in the reasons I considered the judgment appropriate because the claim form did enable me to find the claims proved on a balance of probability but not to determine remedy. That judgment would have been received by the respondent in the normal course of post by 16 November 2019 at latest.

3. The respondent has applied for a reconsideration. On Thursday 28 November an e-mail to the Tribunal from Mr Roddy at 17:17 read
We act for the Respondent in the above case.
Further to our Mudasir Malik's email earlier this afternoon, we note that a default judgment has been against the Respondent on 12 November 2019 and sent to the parties on 14 November 2019. We have only been instructed as of 28 November 2019 on this matter and we are still taking full instructions from the Respondent, however, we fully intend to file an application for the judgment to be set aside, together with an application for our late ET3 to be accepted and we endeavour to ensure these documents reach both the Tribunal and the Claimant tomorrow.
Under Rule 71 an application for reconsideration has to be made within 14 days of the date upon which the judgment was sent to the parties. The first contact was on the last day and it did not make a valid application . However, I would extend time if that were the only problem.

3. On 2 December 2019 at 13:10 Mr Roddy emailed
Please find attached the Respondent's late ET3, together with the accompanying grounds of resistance and an application for this to be accepted late and the default judgment set aside. We note a remedy hearing has been listed for tomorrow at 2pm and as such, we kindly request the attached documents are urgently put before a Judge for his/her attention today.

An attached letter said

We write to make the following applications:

an application under Rule 71 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the "Rules"), taking account of Rule 70 of the Rules, to have the Tribunal reconsider its default Judgment of 12 November 2019, sent to the parties 14 November 2019 and further to my email of 28 November 2019; and

an application under Rule 20 of the Rules, taking account of Rule 5 of the Rules, for the Tribunal to exercise its discretion to extend the time limit for the Respondent to submit an ET3 response in this case.

5. It enclosed the respondent's proposed ET3 in accordance with Rule 20(1) and said it was unable to comply with the 28-day time limit to file the ET3 because:

The Respondent is caring for his disabled mother who suffered a stroke approximately two years ago. The Respondent's mother lives in India and does not have any family nearby. As such, the Respondent and his sister take turns to go over and care for their mother on a regular basis. The notice of claim is dated 14 October 2019 and as such, the Claimant's ETI form is likely to have reached the Respondent's address by 16 October 2019. Unfortunately, ***the Respondent was in India from 10 October 2019 to 21 October 2019****. On return to the UK on 21 October 2019, the Respondent stayed in London for two days before* ***returning to Middlesbrough on 24 October 2019. On return, the Respondent did not open the post until after the deadline of 15 November 2019*** *as the Respondent was busy preparing for another court hearing.*

The Respondent is in the final stages of an arduous divorce, with the financial remedy hearing listed for 5 December 2019. He is unrepresented and preparing his case himself. As such, even if he had of opened the form when it was received, it is unlikely that he would have been in a position to respond to it before the deadline of 11 November 2019.

On opening the form, the Respondent realised he was late by over 18 days and as such, tried to take advice from different companies until he signed up with Avensure. Avensure were instructed on 28 November 2019 and we promptly emailed the Tribunal service on 28 November 2019, advising of our intention to apply for the judgment to be set aside and an application for a late ET3 to be accepted.

The Respondent is a private individual with no previous experience of dealing with Employment Tribunal litigation. *In those circumstances it would be fair and reasonable for the Tribunal to reconsider its default Judgment, allow the Respondent to resist the proceedings and to lodge the attached ET3 response. A Respondent should not in the ordinary way be denied an adjudication of their claim on its merits because of procedural default.*

The result of these applications not being granted is that the Claimant obtains remedies to which she is not entitled as the other side has not been heard and the Respondent being held liable for a wrong which he has not committed. As submitted in the Respondent's ET3, it is denied that any monies as alleged or at all were outstanding and that the Claimant was paid all wages due to her subject to authorised deductions. Furthermore, the Respondent denies that the Claimant was constructively unfairly dismissed or otherwise, as alleged or at all.

We submit granting these applications would be just and equitable and in accordance with the Overriding Objective in that it would (a) ensure that the parties are on an equal footing; (b) deal with the case in a way which is proportionate to the complexity and importance of the issues; and (c) avoid unnecessary formality and seeking flexibility in the proceedings.

When considering these applications, we assert the balance of prejudice is clearly weighted in favour of the Respondent and in the Tribunal granting these applications. A fair trial is still possible in this matter and there is unlikely to be much of a delay in the Claimant receiving justice by this application. If there is any prejudice to the Claimant, it is outweighed by the prejudice to the Respondent by not being given the opportunity to partake in these proceedings ***at all****.*

In order to save both time and expense in this matter the Respondent can confirm he is happy for the Tribunal to deal with these applications in writing and without the need for a Hearing.

6. I did not refuse the application under Rule 72(1) though I was puzzled by the last words emboldened above because the respondent is a limited company. I sought the claimant's views on whether I should decide the applications without a hearing. By email on 9 December at 10.17 the claimant said she objected to reconsideration without a hearing because:

I do not believe the Respondents are telling the truth about the reason for delays and I believe they should explain the reason for the delay in person.

I object to an extension of time for the presenting of the response because

The claim form was addressed to the correct address 5/6 Langley Court, Penrith Road, Middlesbrough TS3 7JE.

The Respondent is owned or managed by more than one Director as well as Mr. Ravi Makkapati , ***Mr Jehangir Durrani*** *also Director owns and manages the Respondent.*

*The Respondent's **Mr Ravi Makkapati** not opening the post believe his return from India/London on 21/10/2019 until 15/11/19 is not reasonable and if opened would have allowed sufficient time to file a response.*

The Respondents as Company Directors have obligations to properly manage their business as well as their personal affairs and could have taken legal advice about responding to the tribunal claim before the deadline of 11th November 2019 as they have done now.

I am aware of previous Employment Tribunal claims against the respondent by Nikki Smith and Kamran Mahmood and they do have experience in responding to these claims.

I am owed the money I claim and I was constructively dismissed allowing the Respondent to apply for an extension of time when the Respondent had chosen not to open the post until 15th November 2019 or take legal advice until 28/11/19 it is not just and equitable to grant an extension of time. Any prejudice to the Respondent would have been prevented by dealing with the claim reasonably and in time.

The Respondents were aware of my complaints because we had taken part in ACAS Early Conciliation and should have expected my claims to be made.

I therefore ordered this hearing. The parties today repeated the above arguments.

7. The opening paragraphs of the draft ET3 read

1. *The Respondent is a convenience shop and Post Office franchise, incorporated on 20 February 2013.* ***The current director, Mr Jehangir Durrani was appointed on 18 June 2018 after purchasing the business from a Mr Wazir Imraz Hanif ("WH").***

2. *The Claimant was employed as a Shop Assistant and* ***her employment transferred to the Respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006*** *("TUPE 2006"). However, Mr WH did not comply with Regulation 11 TIJPE 2006, in that he did not notify the Respondent of the employee liability information and as such, the Respondent does not have a copy of the Claimant's initial contract nor her employment start date.*

3. *The Respondent neither accepts nor denies that the Claimant's employment with the Respondent started on 18 January 2014, as detailed at 5.1 of the Claimant's ETI claim form.*

4. *The Claimant was employed as a shop assistant and worked in the shop and on the Post Office till. The Claimant initially worked 16 hours per week, split across two eight-hour shifts on a Friday and Saturday and was most recently paid £8.21 per hour.*

Potential Redundancies

5. *Prior to its purchase, the Company was financially stable, with a high annual turnover. However, a fire in the shop caused considerable damage and consequently, the shop closed from 28 October 2017 to 28 June 2019*.(this is maybe a typing error and should read 2018*) The Respondent hoped that they would be able to revive the shop when it reopened, however, the shops turnover halved and as such, the Respondent had to engage in cost saving exercises which involved consideration of potential redundancies.*

6. *In order to save money and avoid compulsory redundancies, the Respondent met with staff to discuss its proposal to reduce its staffing costs by reducing the shop opening hours by 2 hours a day from Monday to Friday and 1 hour a day on Saturdays. This would also mean that staff would need to reduce their hours across the board, by approximately 2 hours for each employee. The Respondent explained that if everyone agreed to reduce their hours, it may be able to avoid compulsory redundancies.*

The Claimant's working hours

7. *The Claimant was not happy to change her hours as she had childcare commitments and as such, she could not always work nights. The Respondent understood this and therefore agreed with the Claimant that she could continue to do 16 hours* ***where this was possible****, worked across four-hour shifts across four days.*

8. *The Respondent highlights that it made special efforts to ensure the Claimant would be given the shifts that she wanted, in particular, as the Respondent was conscious that the Claimant was the partner of Mr WH and the Respondent's professional relationship with Mr WH was growing incredibly strained. Since the purchase of the shop in June 2018, Mr WH had continued to demand further monies he believed he was entitled to from the shop.*

8. The claimant's mention Mr Ravi Makkapati and the contents of the Grounds of Resistance caused me to check again at Companies House. The respondent was incorporated on 20 February 2013. Mr Hanif resigned as a director on 11 December 2018 and Mr Durrani who was appointed on 18 June 2018 is now its sole director . On 11 December 2018 a company named RNJ Foods Ltd acquired a controlling shareholding. Its directors are Mr Ravi Makkapati and Mr Jehangir Durrani and R N J stands for Ravi & Jehangir. On 19 October 2018 it changed the address of its registered office from an address in Leeds to the same address as Hanif Premier Ltd 5/6 Langley Court, Penrith Road, Middlesbrough TS3 7JE. **Yesterday** it changed it again to an address in Bradford. It was a dormant company shown on its accounts to 31 January 2019 as never having traded. Hanif Premier Ltd's accounts show its financial position as solvent on 30 April 2018 but balance sheet insolvent at 30 April 2019.

9. As RNJ Foods Ltd acquired the shares in Hanif Premier Ltd no change of employer took place under TUPE at all. The ET3 makes an allegation of theft against Mr Hanif and continues

12. *In early April 2019, a heated discussion took place between the Respondent and Mr WH. Mr WH continued to demand monies he believed owed to him from the shop, however, the Respondent disputed that any monies were due, advising that the payment for the shop had been processed in full.*

13. *On 18 April 2019, the Claimant called her colleague Lisa Field to query whether Mr Ravi Makkapati ("RM") was in the shop or not. Lisa confirmed that he was not and a minute later, the Claimant's partner Mr WH came into the shop.*

14. *Once Mr WH was in the shop, he proceeded to open the Post Office safe and stole a large amount of cash from the safe contents. In addition, Mr WH stole tobacco, a lottery machine and a pay point machine. The Respondent immediately called the police.*

15. *The Respondent is not clear on what took place between the police and Mr WH, however, the police brought Mr WH back to the Shop and made him return all of the property he had stolen. The Respondent had notified the Post Office Head Office of the monies stolen from the safe and Head Office advised that the police needed to be present when the monies were returned, so that the safe could be counted. It was later established that the safe was down by £3,872.*

16. *This is an ongoing matter that the Respondent is pursuing with the Police under crime reference number: CVP — 19/064406.*

The Claimant's Grievance

17. *The Claimant continued working after the above event on 18 April 2019 as normal. However, the Respondent was not happy to give the Claimant the password to the safe due to the above incident. The Respondent did not investigate the Claimant in regard to its concerns that* ***she had potentially assisted her partner in stealing from the shop****….*

10 The draft ET3 also says

22. The Respondent accepts that some final payments may be due for accrued but untaken holiday pay for the current leave year.

23. *The Respondent accepts that due to financial difficulties, there may have been a few occasions when payment was paid late, however, these payments have been made.*

24. *The Respondent puts the Claimant to strict proof of any loss she has incurred due to late payment.*

27. The Respondent highlights that the Claimant is claiming she is owed 90 hours unpaid work of £738.90. The Respondent submits that the Claimant did not work these 90 hours as claimed and it appears to be the Claimant's calculation of the shortfall between what the Claimant did work and 16 hours each week. The Respondent submits that the Claimant did not work 16 hours each week for varying reasons.

The claimant has always said her guaranteed hours of work were unilaterally reduced by Mr Makkapati who today gave evidence on oath they were not.

10. The draft ET3 concludes with assertions which include

…the Claimant has not particularised what alleged breach or series of breaches she relies upon to give rise to the Claimant's alleged entitlement to treat the contract as terminated with immediate effect. The Respondent therefore requests further and better particulars of claim,

28. *It is denied that the Respondent's treatment of the Claimant amounted to a breach of any express or implied terms of the Claimant's contract of employment.*

29. *If, which is denied, the tribunal finds that there was such a breach, the Respondent contends that the breach was not sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement to treat the contract as terminated with immediate effect. In the alternative, the Respondent contends that the Claimant has affirmed any such breach.*

30. *If, which is denied, the Tribunal finds that there was a repudiatory breach, the Respondent contends that the Claimant by their conduct waived such breach and was not entitled to terminate the contract without notice.*

31. *If, which is denied, the tribunal finds the dismissal (constructively or otherwise) unfair, the Respondent contends that the Claimant contributed to her dismissal particularly as a result of* ***her possible involvement in the theft from the shop****.*

32. *In any event, the Respondent contends that the Claimant's resignation was not in response to the alleged breach.*

11. Section 95(1)(c) of the Employment Rights Act 1996 (the Act) provides an employee is dismissed if"*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*." An employee is "entitled" so to terminate the contract only if the employer has committed a breach of such gravity as to discharge the employee from the obligation to continue to perform the contract, Western Excavating (ECC) Ltd v Sharpe [1978]

IRLR 27. The conduct of the employer must be more than just unreasonable to constitute a fundamental breach. Unilateral alteration of hours and non payment of wages on time are always fundamental breaches and the claimant says both occurred.

12. She mentions failure of the respondents to deal with her concerns. In WA Goold (Pearmak) Ltd v McConnell 1995 IRLR 516, that was held to be a fundamental breach. In Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, the EAT, said: -
"It is clearly established there is implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner, calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunals function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer. Any breach of that implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract."

13. A breach of the implied term of mutual trust and confidence may result from a number of actions over a period of time Lewis v Motorworld Garages [1985] IRLR 465. further explored London Borough of Waltham Forest v Omilaju [2005] IRLR 35. The last straw does not have to be a breach of contract in itself or of the same character as the earlier acts but when taken in conjunction with the earlier acts on which the employee relies, it must amount to a breach of the implied term of trust and confidence. If there has been a fundamental breach which has not been affirmed, and nothing the claimant did comes close to affirmation, and it is, at least in part, the effective cause of the employee's resignation, there is a dismissal, see Jones v F.Sirl Furnishing Ltd and Wright v North Ayrshire Council, EAT 0017/13.

14. Today Mr Makkapati gave evidence. I accept he went to India and London but there is no reasonable excuse for no-one opening post addressed to the respondent while he was away or himself not doing so soon after his return. He said today in effect the claimant's association with Mr Hanif caused him not to trust her echoing the emboldened references to *" her possible involvement in the theft from the shop"*. On his own account he has not investigated and has no evidence. His suspicions very probably were the cause of his treatment of the claimant calculated or likely to cause her to leave. He also in answer to the claimant confirmed the respondent sold the shop to a buyer on 1 December 2019. The remedy hearing had been fixed for 3 December and notice sent to the parties on 20 November. Still no contact with the Tribunal was made until so soon before the remedy hearing that it had to be postponed. As the claimant submitted everything points to the respondent ignoring her grievances and her claim for long enough to divest itself of assets and deprive her of effective remedy.

15. Cases under earlier different versions of the Employment Tribunal Rules include Kwik Save-v-Swain where Mummery P said if delay was, "*the result of a genuine misunderstanding or an accidental oversight* "a Tribunal should be " *more willing to allow the late lodging of a response* " . It should always weigh all factors including the apparent strength or weakness of the proposed defence, in assessing the balance of prejudice to the parties.

16. Rule 2 provides their overriding objective is to enable Employment Tribunals to deal with cases fairly and justly. The overriding objective is a concept created when the Civil Procedure Rules were reformed under the direction of Lord Woolf in the early 1990s. His Lordship emphasised in a number of cases, notably, Beachley Properties v Edgar, the concept of

ensuring just handling of cases was not confined to the case in question. The proper administration of justice for all litigants was not to be disrupted by parties' failure to comply with rules. Under the 1993 Rules judgments in default of a response were not permitted but the time for presenting a response was only 21 days. In the 2004 Rules that was extended to 28 days to allow for such matters as postal delay but provisions for default judgments were implemented. The Employment Tribunals send to every respondent very detailed explanations of what they must do, when they must do it and the consequences of not complying.

17. The claimant today has shown her grievances were ignored as were her efforts using Early Conciliation to avoid litigation. The proposed defence is very weak. Mr Roddy submits the prejudice to the respondent of not being allowed to defend far outweighs that to the claimant. I wholly reject that . The prejudice to the claimant would be she has been owed money since mid 2019 already and would have to wait longer still and now faces the added problem of the respondent having sold the shop being a respondent against which delay in obtaining a judgment on remedy will result in her entitlements being harder to enforce.

18. For no good reason this respondent ignored the claim. A procedure followed which resulted in a judgment.. It would cause the Tribunal and other litigants delay and expense to revoke the liability judgment and start afresh. Under the 2013 Rules, the only ground for reconsideration is whether one is necessary in the interests of justice. That means justice to both sides and other litigants. To allow a respondent, who has not taken advantage of the opportunity to defend, to do so after a Rule 21 judgment would make a mockery of the system.

19. It has recently been affirmed by the Court of Appeal in Office Equipment Systems -v-Hughes that the case under the old Rules of DH Travel-v-Foster still applies . The respondent may be heard at the remedy hearing on issues of how much wages the claimant is owed and what compensation she should be given for her unfair and wrongful dismissal

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T M Garnon EMPLOYMENT JUDGE
SIGNED BY EMPLOYMENT JUDGE ON 7 February 2020