



EMPLOYMENT TRIBUNALS

Claimant
Mrs K Smith

Respondent
Sansha (UK) Ltd

Heard at: Hull
Before: Employment Judge Davies

On: 10 March 2020

Appearances
For the Claimant:
For the Respondent:

Mr R Lassey (counsel)
Mr French (counsel)

RESERVED JUDGMENT

1. Pursuant to Rule 70 of the Employment Tribunals Rules of Procedure, the judgment of EJ Cox dated 27 November 2018 is revoked.
2. There will now be a preliminary hearing by telephone at which an Employment Judge will make case management orders for the future conduct of this claim.

REASONS

Introduction

1. This was an application by the Respondent, Sansha (UK) Ltd for reconsideration of a judgment made pursuant to Rule 21 of the Employment Tribunal Rules of Procedure by EJ Cox on 27 November 2018. Under Rule 72(3) REJ Robertson determined that it was not practicable for EJ Cox to reconsider the judgment and appointed me to do so.
2. Although EJ Cox made judgments in favour of three former employees of the Respondent on 27 November 2018, it is only the judgment made in favour of Mrs Smith that is the subject of this application.
3. The issue for determination is whether it is necessary in the interests of justice for the judgment in favour of Mrs Smith to be set aside.

Procedural history and evidence

4. This claim, together with a claim by Mr Carl Smith (the Claimant's husband) and a third claim were initially presented to the Tribunal in July 2018. Incorrect Early Conciliation certificate numbers were initially provided. That was corrected and the claims were consolidated and deemed to have been presented on 7 August 2018.

5. The claim was made against Sansha (UK) Ltd. The Claimant claimed that she had been constructively unfairly dismissed, and also made claims for a redundancy payment, notice pay, unpaid wages and pay in lieu of accrued but untaken holiday. In outline, the Claimant described problems in the business from March 2018, when Mr Duval, the Respondent's CEO, sent an email saying that the store would have to close. The Claimant said that no information was provided. She said that wages were paid late in April and that she was not paid for May until 1 June 2018. She said that Mr Duval changed passwords on accounts so that it was no longer possible for her to carry on her job role. She said that she was threatened with disciplinary proceedings on 28 June 2018, and received another letter on 12 July 2018 saying that Mr Duval was trying to regain control of the business and would be in contact as soon as possible. She said this was the last straw and she resigned.
6. The other two claims were in similar terms.
7. On 16 August 2018 the claims were sent to the Respondent at the address provided in the claim forms, 65-66 Park Street, Hull. That was its registered office at the time. The envelope was returned undelivered by the Royal Mail, with no reason given. On 13 September 2018, the claims were re-sent to the Respondent at the same address. They were not returned undelivered.
8. Responses were due by 13 September 2018. No response was presented.
9. The three claimants provided schedules of loss, together with copies of their contracts of employment and payslips for March, April and May and on 29 November 2018 EJ Cox issued judgments under Rule 21 in favour of each of them. In the case of Mrs Smith, the judgment was for:
 - 9.1 Unauthorised deduction from wages: **£1750**;
 - 9.2 Damages for dismissal without notice: **£1500**;
 - 9.3 Redundancy payment: **£2818.80**;
 - 9.4 Pay in lieu of accrued holiday: **£223.71**; and
 - 9.5 Unfair dismissal compensatory award: **£9300.56**.
10. The judgments were sent to the Respondent at 65-66 Park Street, which was still its registered office.
11. On 29 October 2019, almost a year later, legal representatives acting for the Respondent made an application under Rule 72 for Mrs Smith's judgment to be reconsidered and an application under Rule 5 for an extension of time for making that application. They could have applied under Rule 20 for an extension of time to present a response, which would have meant the judgment was automatically set aside if the application was allowed. However, they did not do so.
12. The application said that the Respondent had been unaware of the Tribunal proceedings until May 2019. The Respondent is based in Prague. Its UK registered office and shop premises was, until recently, at 65-66 Park Street Hull. The application said that all three staff at the Hull shop had stopped working from 22 May 2018 and all three resigned on 17 July 2018. The Respondent did not have access to the premises from 22 May 2018 because Mr

Smith, who had been the manager, kept the keys. They were only returned after legal correspondence. After that, a representative of the Respondent had visited from overseas on 4 occasions but had not found any correspondence relating to Tribunal proceedings. On 18 October 2018 a possession order was made in the County Court requiring the Respondent to give up possession of the Hull premises to the landlord by 1 November 2018. In May 2019 a representative of the Respondent attended the Hull premises and found a Notice of Enforcement "in the postbox formerly designated to the Respondent when trading". That was an Enforcement Notice issued on 8 February 2019 against the Respondent in respect of Mrs Smith's judgment. The total sum was by this stage £16,047.06. The Notice was forwarded to the Respondent.

13. The application said that if the Respondent had been aware of the proceedings its response would have been that the Claimant had stopped performing any work for the Respondent by 22 May 2018 and had resigned on 17 July 2018. She was not dismissed and was not owed any money.
14. EJ Cox required the Respondent to confirm that it had copied its application to the Claimant and that was done by 21 November 2019. The application was sent to Mrs Smith at her home address.
15. On 13 December 2019 EJ Cox directed that the Respondent's application for the judgment to be set aside should be considered at a hearing. She ordered the Respondent to send a copy of its proposed response to the Claimant and the Tribunal. She did not state expressly whether time for making the reconsideration application had been extended or not.
16. A proposed ET3 response was provided on 3 January 2020. It was very brief, repeating that the Claimant had stopped performing any work for the Respondent by 22 May 2018 and had resigned on 17 July 2018.
17. The Respondent provided written arguments in support of its application on 28 January 2020, with accompanying documentary evidence, but no witness evidence. The written arguments contended that the Respondent had attempted a redundancy consultation in spring 2018 but the three Claimants had not cooperated. They said that in April 2018 Mr and Mrs Smith had decided to set up their own rival business and had done so. They provided an extract from that business's website indicating that it had been opened in April 2018. They also provided photographs of a notice in the window at 65-66 Park Street diverting customers to Mr and Mrs Smith's new business. The arguments attached a copy of the letter dated 27 June 2018 said to have been sent by Mr Duval to Mr Smith. That letter expressed the understanding that the company was now operating online only. It required access to the company's accounts and finances immediately as well as the key to the office and the warehouse. These were to be provided to the Respondent's solicitor in Hull within 48 hours. Failure to do so might result in disciplinary action.
18. The written arguments also included copies of what were said to be the Respondent's Santander bank statements and copies of the Claimant's payslips for March, April and May 2018. The payslips gave a pay date of 24th of the month. They indicated that Mrs Smith's wages were £1653.20, £1074.02 and £1144.35 net for March, April and May 2018 respectively. Mr Smith's wages for

April were £1922.04 net. The bank statements appeared to show a payment of £2996.06 to Mr Smith reference "Carl and Kim wage" on 20 April 2018. That is the total amount the payslips indicate were owed to them both for April 2018. The bank statements also appear to show a payment of £400 to Mrs Smith on 30 May 2018 reference "part wage payment" and a further payment of £1021.69 to Mrs Smith on 2 June 2018 reference "Kim wage balance." The total apparently paid £1421.69 was more than the amount showing on the payslip for May 2018. There were also payments to Mr Smith and to Mrs Smith and for "Stacey wage balance" on 2 June 2018. I understand Stacey to be the third Claimant, who is the daughter of Mr and Mrs Smith. The bank statements also appear to show cheque payments on 12 June 2018. The written submission said that this included £1030.32 to Mrs Smith. It suggested that Mr Smith had not paid the Respondent's payroll company, so Mr Thierry had to make a payment by cheque. It suggested that Mrs Smith had in fact been overpaid.

19. The initial reconsideration hearing had to be postponed because of issues to do with Mrs Smith's representation. It was re-listed for 10 March 2020.
20. REJ Robertson ordered the Respondent to provide an ET3 response by 9 March 2020. It is not clear whether he had seen the outline response already provided. In any event, a fuller response was provided. That sets out the proposed response to the claim, which reflects the written arguments.
21. The hearing took place on 10 March 2020. Neither party called evidence. Both were represented by counsel. By the end of the hearing, I indicated to the parties my view that there was a significant delay in the Respondent making its reconsideration application and that little explanation had been given for much of that delay. However, I was troubled by the information relating to the alleged non-payment of wages. I have referred to the Santander bank statements that appeared to show wages payments being made to Mrs Smith on 20 April 2018, 30 May 2018, 2 June 2018 and (by cheque) on 12 June 2018. At the hearing, it was accepted that wages were paid by Mr Smith logging into the Santander bank account and paying them. Mrs Smith's position at the hearing was that she had not received the payment shown for 20 April 2018. She said that she had not received or cashed any cheque in June 2018.
22. I took the view that this issue was central to the balance of justice. The non-payment or late payment of wages is not simply relevant to the unauthorised deduction from wages claim. It is a central part of why Mrs Smith says she was constructively dismissed. That means that the claims for breach of contract, unfair dismissal and a redundancy payment also depend on it. Put simply, if the Respondent is correct and the wages were paid as it says, there is a risk that Mrs Smith has been awarded very substantial sums of money to which she is not entitled. That might be capable of outweighing the largely unexplained delay in applying for reconsideration of the judgment. In those circumstances, I gave Mrs Smith the opportunity to provide evidence about this herself before I determined the reconsideration application. I ordered her to produce copies of her own and Mr Smith's bank statements, showing any payments in from the Respondent.
23. Unfortunately, both Mrs Smith and the Respondent then needed further time to comply with my orders, because of delay caused by the coronavirus pandemic.

However, I have now been provided with a witness statement and bank statements from Mrs Smith and a further witness statement and documents from Mr Duval.

24. In her witness statement, Mrs Smith now accepts that she was paid her April wages on time but she says she was underpaid by £230.28. That is different from what she said in her claim form. It is also different from the information on the payslips for her and Mr Smith that were provided with their schedules of loss in October 2018. Those payslips, which I understand were based on the information provided by Mr Smith, indicate that the wages due amounted to £2996.06 in total for Mr and Mrs Smith. That is the sum that Mrs Smith accepts was paid into their bank account. Mrs Smith also says that there was not enough money in the bank account for everybody to be paid their wages in full. Mr Duval has produced a bank statement that suggests the balance after payment of all wages was more than £4000.
25. In her witness statement, Mrs Smith says there was not enough money to pay the wages on time in May. She accepts that she was paid in full by 2 June 2018. Mr Duval suggests that the responsibility for the delay was Mr Smith's, and that as soon as he (Mr Duval) was told by Mr Smith that there was not enough money in the bank account he made a transfer, which is what led to the payments made by Mr Smith on 2 June 2018.
26. In her witness statement Mrs Smith accepts that a further cheque for £1030.32 was also received on 8 June 2018 and that this was cashed. That is different from what was said at the hearing. Mr Duval says that this cheque was sent to make sure her wages were paid. By virtue of the electronic transfer and the cheque, it appears that Mrs Smith was overpaid for May.
27. In her witness statement Mrs Smith says that after this no further money was put into the bank account to support her ongoing employment. Mr Duval has produced a bank statement suggesting that after the May wages had been paid on 2 June 2018, the balance in the bank account was more than £12,000.
28. Neither Mrs Smith nor Mr Duval has given evidence on oath or been cross-examined about their statements. This evidence will be relevant if the judgment is set aside and the claims are determined on their merits. In those circumstances, I have not made findings of fact about what happened.
29. However, the evidence before me is sufficient to give rise to the real possibility that a Tribunal would find that Mrs Smith was paid her full wages for April 2018, that she was overpaid for May 2018 and that the delay was the responsibility of Mr Smith, and that there were sufficient funds for Mr Smith to make a payment of wages for June 2018.

Legal principles

30. Rule 70 of the Employment Tribunal Rules of Procedure says that a Tribunal may reconsider any judgment where it is necessary in the interests of justice to do so.
31. That gives the Employment Judge a broad discretion, but one that must be exercised judicially. The Judge must have regard to the interests of both parties

and to the public interest in the finality of litigation: see e.g. *Outasight VB Ltd v Brown* [2015] ICR.

Application of the law

32. I was not given a clear explanation of when precisely the Respondent first became aware of these proceedings or why it was unaware of them until May 2019. Nobody gave evidence about it at the hearing and counsel was unable to answer many of my questions. The Respondent appears to have had keys to the premises from 1 November 2018 onwards. However, on the basis of the information provided by the Respondent and given its location overseas and the fact that Mr and Mrs Smith appeared to have the keys for the premises at the time the proceedings were started and when they were served on the Respondent, I proceed on the basis that the Respondent was not aware of the proceedings prior to Employment Judge Cox issuing judgment. However, I was not given a coherent explanation of why there was such a delay in applying for reconsideration even after the Respondent accepted that it became aware of the proceedings. That weighs strongly against granting the reconsideration application. So too does the public interest in the finality of litigation. Mrs Smith received a judgment in her favour in November 2018 and no steps were taken to have that set aside until almost a year later.
33. However, the judgment is for a very substantial sum of money – more than £15,000. If Mrs Smith was not constructively dismissed, most of that sum would not be payable to her and that would be a real injustice to the Respondent. The judgment was made under Tribunal Rule 21, without any evidence having been heard or tested. For the reasons outlined above, on the information before me, there is a real possibility if evidence is heard and tested that the Tribunal could find that what Mrs Smith says about non-payment or late payment of wages in the claim form is incorrect. That gives rise to the real possibility of a finding that she was not constructively dismissed.
34. In those circumstances, I consider that it is necessary in the interests of justice to reconsider this judgment and set it aside. The risk of the Respondent having to pay very significant sums that are not payable outweighs the unexplained delay and the public interest in finality of litigation. Mrs Smith will still have the chance to present evidence and explain why she says she was constructively dismissed, but the Respondent will also have the chance to defend itself against that claim. For the avoidance of doubt, if it is necessary to extend time for the Respondent to make its reconsideration application, I extend time for the same reasons.

**Employment Judge Davies
8 June 2020**