EMPLOYMENT TRIBUNALS

Claimant: Miss K Watson

Respondent: Mr A Bladen

HELD AT: Liverpool **ON:** 28 September 2020

BEFORE: Employment Judge T Vincent Ryan

REPRESENTATION:

Claimant: Mr D Jones, Counsel
Respondent: Ms E Elmerhebi, Legal Consultant

JUDGMENT having been sent to the parties on 7 November 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. **Introduction**

1.1 This Judgment arises in a situation where:

1.1.1 The claimant presented a claim alleging:

(a) Unlawful deduction from wages (section 13 Employment Rights Act 1997 ("ERA");

(b) Failure to pay the whole of remuneration due since suspension on maternity grounds on 21 March 2019 (section 70(1) ERA);

(c) Unfavourable treatment during the protected period because of pregnancy (section 18 Equality Act 2010);

(d) Detriment, namely the deliberate failure to pay the claimant her remuneration because of the prescribed reason, namely pregnancy (section 47C(2) ERA);

(e) Direct discrimination (section 13(1) Equality Act 2010, where the less favourable treatment relied upon was failure to pay wages and refusal to respond to request for clarification regarding the same.

1.1.2 A rule 21 Judgment on liability was signed by Regional Employment Judge Jonathan Parkin on 2 September 2019 and sent to the parties on 3 September 2019.

1.1.3 The respondent presented a late response to the claimant's claim with an application for an extension of time.

1.1.4 The hearing of the respondent's said application, and alternatively to proceed to a remedy hearing, was postponed as the respondent was absent and his representative had to concede that available documentary evidence (correspondence and emails) ran contrary to his instructions and were inconsistent with the respondent's defence. (The representative on that occasion being Mr M Keenan, solicitor).

1.1.5 The respondent made a late application to postpone the deferred hearing but without evidence or clear instructions to support the application. This was an application to postpone today's hearing.

1.2 My Judgment dealt with four matters and I set out my reasons below in four discrete sections under the headings of each of the matters to be considered at 1.1.2 – 1.1.5 above.

1.3 Chronology: Mr Jones, counsel for the claimant, has prepared a detailed chronology as part of his written submissions for today's hearing. It was supported by a preliminary hearing bundle of documents and a witness statement from the claimant. I have crosschecked certain other documents against the Tribunal's own case file where appropriate. I find Mr Jones' chronology to be factually accurate; in other words, as a finding of fact the dates and events recited at paragraph 2 (Chronology) of Mr Jones' written submissions are correctly set out without me having to repeat them. The respondent was served with a copy of the written submissions and with the preliminary hearing bundle. I adjourned for 15 minutes at the outset of the hearing to give Ms Elmerhebi an opportunity to read the submissions and to better prepare. The respondent put forward no evidence to counter any of the statements, either in the said chronology or witness statement from the claimant.

1.4 The respondent's case management: In essence, a large part of the contest here was over whether the claimant was suspended on the grounds of her pregnancy by the respondent. The claimant says that she received an email dated 21 March 2019 confirming that a letter was attached to it with confirmation of her suspension. The suspension letter itself is at page 60 of the preliminary hearing bundle, to which all further page references relate unless otherwise stated. The letter at page 60 and subsequent correspondence refers specifically to suspension. The

respondent's case, which was not supported by any evidence, was that the claimant fabricated the email said to be from her line manager, Clare Walker, and the attached letter ostensibly signed electronically by the respondent. As stated above, at the initial preliminary hearing Mr Keenan for the respondent confirmed his professional embarrassment as the documentation which he had not previously seen ran contrary to his instructions, which had been set out in the respondent's ET3, namely that the claimant was never suspended but was absent without leave. That accusation of being "AWOL" is repeated in the respondent's late grounds of resistance at paragraphs 20, 26 and 29. Mr Keenan found he was unable to proceed at the initial preliminary hearing, hence it being deferred. The respondent's revised case, therefore, was the allegation of fabrication by the claimant. In all those circumstances I adjourned again to allow Ms Elmerhebi to take further instructions from her absent client today, and she made a telephone call to obtain those instructions. When the hearing resumed Ms Elmerhebi confirmed her instructions were to the effect that the claimant fabricated the documentation in question and that the line manager, Ms Walker, had no recollection of sending it on behalf of the respondent, albeit the respondent is shown on the disputed document to have been copied in. Ms Elmerhebi confirmed that she did not receive any instructions on subsequent correspondence that referred to suspension. Her position was therefore that she had to contradict the concession made by Mr Keenan on the previous occasion, but that she had incomplete instructions and no evidence. Neither the respondent nor the line manager, Ms Walker, were available or provided witness statements or any additional documentation.

2. **The respondent's application to postpone the preliminary hearing on 22 October 2019**

2.1 The chronology is as follows:

2.1.1 11/06/19 – ET1.

2.1.2 03/09/19 – rule 21 Judgment liability only, remedy hearing listed for 10 September 2019.

2.1.3 09/09/19 – respondent's application for extension of time for the presentation of a response and to strike out the rule 21 Judgment.

2.1.4 10/09/19 – preliminary hearing to consider the respondent's application and/or remedy. Adjourned to 22 October 2019.

2.1.5 21/10/19 – respondent's application to postpone the hearing listed for the next day. Refused by the Regional Employment Judge and deferred to the commencement of today's hearing.

2.2 On 21 October 2019 the respondent applied to the Tribunal for a postponement at less than 24 hours' notice of the aborted hearing of 10 September 2019, as the respondent was not able to proceed. The application was made on the basis of the ill health of the respondent. The

respondent's representative said that she was aware of the respondent's ill health that might necessitate his absence as early as 10 October 2019; that a legal executive was supposed to have made an application for postponement at that stage and believed that she had done so; that the mistaken legal executive was then instructed on 21 October 2019 that the respondent had been admitted to hospital and would not be able to attend the hearing. Clare Walker, who the respondent's representative was "led to believe has power of attorney" was said to be unable to attend the hearing because she too was sick. I was told that efforts had been made to obtain medical evidence but none was available, and in any event Ms Walker was not in attendance because that day was her birthday and, it was said, she had made prior arrangements (presumably prior to 10 September 2019).

2.3 In the absence of medical evidence, I can only accept Ms Elmerhebi's word for it and find that those instructing her were aware of the respondent's ill health, namely that he had a chest infection, on 10 October, when it was also informed that Ms Walker who line managed the claimant would not be attending because she had made plans for her birthday. I also accept Ms Elmerhebi's confirmation that those instructing her requested sight of evidence to support the reasons given for the absence of the respondent and Ms Walker, but none was forthcoming and none is available. I also find, as it is self-evident, that the respondent has known, at least since initial instruction and the presentation of a late response, that the respondent lives with a disabling physical condition, namely Duchenne Muscular Dystrophy, which it describes in the grounds of resistance accurately as a muscle wasting condition, meaning the respondent is a wheelchair user; I was told in the grounds of resistance that the respondent uses a non-invasive ventilator to aid his breathing. I infer from that situation that the respondent has always been aware of the risk to Mr Bladen of chest infection and potential inability to attend a hearing in person. I note the complete lack of any witness statement let alone medical evidence from the respondent to cover the situation at today's hearing, and note further that neither the respondent nor Ms Walker attended the hearing of 10 September either, hence in part Mr Keenan's embarrassment when he found that the documentary evidence was wholly contrary to his instructions.

2.4 The respondent is represented by Peninsula Business Services Limited, a professional organisation holding itself out as experts in the field of employment law and litigation. I infer from this that the respondent's representative is aware of the need for supporting evidence and ought reasonably have a mind to obtaining a witness statement from the respondent and/or Ms Walker to corroborate the assertions it made in the late ET3 response and to support the assertions it would make today in applying for various postponements or otherwise in addressing matters of substance, specifically remedy. I note that on both occasions neither representative for the respondent was in a position from the instructions at the outset or evidence in their possession to conduct the hearings to their natural conclusion, and both were obliged to make repeated apologies and excuses for the position they were in.

2.5 Regional Employment Judge Parkin refused the written application for postponement received on 21 October 2019 and deferred the decision to today.

2.6 I heard the application from Ms Elmerhebi, including apologies for lateness, explanations for misunderstandings and mistakes. Mr Jones for the claimant opposed the application, reminding me that Peninsula was aware that the respondent was unwell on 10 October 2019 and that it was clear Ms Walker never had any intention of attending the hearing because of her birthday. He highlighted the lack of evidence provided in support of the application. Mr Jones submitted that the respondent was not prejudiced today because he was represented, and that whilst it was not the claimant's fault that the respondent was in difficulties she would be greatly prejudiced and suffer a further delay in a situation where she was being accused now not only of having gone absent from work without leave and therefore lying in her claim form, but also being dishonest in that she has allegedly fabricated documents to the effect that she was suspended by the respondent. At the very least, the respondent will rely on Ms Walker's lack of recollection, but again she was not available and neither was there any written statement or explanation from her.

The Law

2.7 My decision had to be based on the overriding objective of the Tribunal and in the interests of justice. I had to carry out a balancing exercise as to the balance of prejudice to the respective parties. I took into account the context of today's hearing, which included the late submission by the respondent of a response to the claim, a response that was only received after the rule 21 Judgment on liability had been promulgated. An earlier hearing on 10 September 2019 was adjourned for the respondent to clarify its ET3 because of the embarrassing position Mr Keenan found himself in. The date was then agreed for the hearing today. On the eve of today's hearing there was a late application, but again without evidence and without the provision of any statements or indeed, from the confusion this morning suffered by Ms Elmerhebi, there did not appear to me to have been any clear instruction to her either. The prejudice to the claimant of a further adjournment weighed heavily against the claimant. The respondent had ample time and opportunity to prepare properly to address the claimant's claims. The respondent's application and confusion over instructions with excuses and cited errors is unsatisfactory.

2.8 In the interests of justice, I refused the application to postpone and decided that I would next address the respondent's application to accept a late ET3 response and to set aside the rule 21 Judgment on liability.

3. **The respondent's application for extension of time to present a response and to strike out rule 21 liability Judgment**

3.1 Ms Elmerhebi had nothing further to add to her earlier instruction and submissions, and neither had Mr Jones to his earlier comments and submission.

3.2 Once again, I am bound to consider this matter in the interests of justice, applying the overriding objective of the Tribunal. Once again, I had to conduct an exercise to see the balance of prejudice to the respective parties.

3.3 I noted that there was no evidence from the respondent, Ms Walker, who line managed the claimant and was heavily involved in matters in and around the question as to whether the claimant was suspended, or indeed from any legal executive or other personnel at Peninsula who could adequately explain the errors and delays in making a timely submission. I could rely only upon the written application itself, the contents of the late ET3 with grounds of resistance and today's submissions.

3.4 In his written application the respondent says that a carer sent Tribunal papers to Peninsula in the post but that Peninsula "failed to receive them". The said carer made contact again upon receipt of the notice of remedy hearing for 10 September 2019 and Peninsula blame "an oversight on behalf of the respondent's carer who mistakenly thought Peninsula were dealing with the matter on their behalf but in reality papers had not been received". It says it was unaware of the claim. No evidence has been put forward from the carer who is being blamed for her mistake and oversight. No evidence was available from whoever it was at Peninsula who had any dealings at any point with the carer. No evidence or explanation was put forward as to the mail arrangements at Peninsula or any instructions given to clients as regards communication with Peninsula, its practices or procedures.

3.5 Given all that has been said and I have heard about the handling of the case to date, I consider that the balance of prejudice weighs heavily against the claimant in this matter. I am not satisfied about the vague unsupported explanation given on behalf of the respondent and in the interests of justice refuse the application for an extension of time and acceptance of the late ET3 response. I dismiss the application to set aside the rule 21 Judgment on liability. That Judgment is confirmed.

4. **The respondent's application to postpone the remedy hearing**

4.1 Ms Elmerhebi had nothing further to add to what she had already submitted, and neither had Mr Jones.

4.2 Once again, the interests of justice have to dictate, and I am enjoined by the Rules to seek to achieve the overriding objective of the Tribunal taking into account the factors mentioned. Once again,6 I had to conduct a balancing exercise. The date of today's hearing was agreed at the last preliminary hearing with the parties. Peninsula has known throughout the time of its instruction that the respondent is unwell. There was no suggestion at the September preliminary hearing that Ms Walker would be unavailable other than to give instructions by telephone as she did today. It appears to me that the respondent's case is wholly unprepared. Ample opportunity has been given for proper preparation.

4.3 Ms Elmerhebi is in the position of having no evidence whatsoever from her respondent client or witness (Ms Walker), even as to means to pay any award, and cannot even obtain instructions from the respondent with regard to his medical position or Ms Walker as to her booked holiday arrangements that cannot be changed for today's hearing. Peninsula is well aware of the requirements of the Tribunal. Ms Elmerhebi today received limited instructions when she made a phone call to her client and/or Ms Walker. It appeared to me that there is a grave lack of proper communication. I inferred a reluctance on the part of the respondent and/or Ms Walker to engage in this litigation and to provide any clarity and a realistic and reasonable way to address the issues that the respondent must address if it seeks to defend the claim.

4.4 Taking all those matters into account, I refuse the application to postpone consideration of remedy. This is the second hearing where the respondent and his witness has failed to attend or provide instructions or provide evidence. There was no indication before me that the matter would improve in the future and that the postponement would achieve anything other than to delay justice.

4.5 I dismiss the respondent's application to postpone the remedy hearing.

4.6 At this stage I adjourned again to allow Ms Elmerhebi an opportunity to take instructions. This was the third adjournment this morning. I adjourned initially to allow Ms Elmerhebi further time to prepare, specifically to read written submissions. I adjourned at 10.40am for five minutes for Ms Elmerhebi to telephone her client to check that she was instructed as there seemed to be some doubt at that stage of the morning, and she returned to confirm that she had instructions. I then adjourned again at 11.15am to 11.30am to allow Ms Elmerhebi to take instructions on the issue of remedy.

5. **Award on remedy £18,652.39**

5.1 Ms Elmerhebi confirmed that she had no instructions to oppose the claimant's application for remedy in accordance with the Schedule of Loss submitted to the Tribunal and in line with the claimant's written submissions. She went on to say that she had no instructions to do anything other than to sit in silence, which is what she did.

5.2 I heard evidence upon her affirmation from the claimant who presented me with a written witness statement which was not challenged by the respondent. In brief, I confirm that I found the claimant to be a credible and reliable witness and I accept her witness statement which ran to 27 paragraphs as being true and accurate. Any assertions of fact I find to be facts.

5.3 Specifically, I find:

5.3.1 The claimant was suspended from work on full pay by the respondent for the reasons set out in a letter dated 21 March

2019 electronically signed by the respondent but sent by Ms Walker and copied to the respondent by email of the same date (page 60).

5.3.2 Subsequent to that written correspondence there was further correspondence which is contained in the preliminary hearing bundle under the subject matter "Suspension". This correspondence included attempts on the part of the claimant to obtain some clarification and included confirmation from the respondent that he was seeking further information and would further advise the claimant.

5.3.3 Ms Watson, the claimant, did not absent herself without leave and she did not fabricate the correspondence concerning suspension. She was suspended. In fact, she was relieved at the suspension because she thought that would give some clarity as to her situation and assist with her trying to receive adequate money to maintain her personal situation. She had been trying to get a response since 2 December 2018 from the respondent, and she raised a grievance in March 2019 with which she was assisted by the CAB (to obtain confirmation of suspension).

5.3.4 The claimant had not intended initially to be absent from work and had not thought she would be suspended. She wanted to work as much as possible so that she could take time off after the birth to enjoy time with her baby. She had considered the respondent a friend to that point to the extent that she found herself working more overtime than the time she spent at home. She had enjoyed the respondent's company and was saddened by the way everything went sour.

5.3.5 The claimant had a feeling of being treated unfavourably from December 2018 when she disclosed that she was pregnant and when her partner said it was not safe for her to carry on working whilst suffering vertigo. She felt let down from that point onwards but she carried on with her caring duties for as long as she could. The relationship was described as going "downhill" from 30 December 2018 and I accept that that is genuinely the way that she felt. The claimant felt a lack of support, culminating in her having to go the CAB to draft a grievance letter which in turn resulted in a suspension letter. The claimant reasonably therefore believed that the matter would be resolved and the suspension letter would trigger pay as it confirmed that she would be paid. She was not paid. She did not receive an explanation as to why the respondent stopped her wages. There had been non-payment prior to 21 March and although there was an assurance given in that letter that payment would be made, none was made.

5.3.6 The claimant felt completely let down, embarrassed, isolated and stressful. She felt stripped of her independence having lost her income and she was distressed at being accused by the

respondent of being absent without leave which was clearly untrue, and also being accused of fabricating documents, namely the email and other correspondence.

5.4 I witnessed the claimant being tearful at the 10 September hearing when she had thought that matters would proceed and was taken aback by Mr Keenan's application to postpone. She was somewhat reassured by his concession that he could not argue in the terms of the ET3 (that the claimant was absent without leave) in the face of the correspondence suspending her on full pay; but she was further upset when the respondent reiterated allegations that she was absent without leave and that she had fabricated documentation. This caused her considerable stress and anxiety and further embarrassment. Once again, these feelings were against the background of the claimant having previously enjoyed a congenial relationship with the respondent, that is prior to her announcement of her pregnancy.

5.5 I accept the claimant's evidence and calculations as to her loss of wages in the sum of £6,006.24. This was not challenged by the respondent.

5.6 I assess damages for injury to feelings in the sum of £10,000 in accordance with the Presidential Guidance and updated Vento guidelines, taking into account the claimant's unchallenged evidence as to how she was made feel from as long ago as December 2018 and in the light of a continued failure to properly engage and pay her. I accept the submissions made on the part of the claimant this was too serious an example of discrimination for the lower bracket, but that the assessment of damages fell within the mid range. My assessment of £10,000 is in line with Mr Jones' assessment, which was unchallenged by the respondent.

5.7 Having assessed damages at £10,000 I calculated the interest payable and checked that calculation of £646.15 with both representatives. Ms Elmerhebi confirmed it was mathematically accurate, and that figure was therefore agreed.

5.8 With regard to aggravated damages, I accepted the claimant's unchallenged submission that whilst aggravated damages are rarely granted it would be appropriate here. The respondent of his own accord or on advice submitted a false ET3. Mr Keenan on the earlier occasion conceded that to be the case but the respondent then decided to "take a second bite". Mr Jones submitted that the respondent's stance and arguments were dishonourable. Initially a false argument was put that the claimant was absent without leave and that the claimant had fabricated documentation, which I also found to be false, and ultimately that if the correspondence was ever sent then Ms Walker had no recollection (albeit she was not prepared to provide any evidence, written or oral, to support any of these arguments). I took into account that aggravated damages are extraordinary and they are distinct from damages for injury to feelings in a situation where I have to be careful not to provide double recovery. It was clear to me that from 30 December 2018 the claimant has attempted to deal with matters properly and appropriately both directly, in a personal

and friendly manner, then more formally with the aid of CAB and finally through legal representation. The respondent has not acted properly, fairly, reasonably or decently. In those circumstances I have accepted the claimant's evidence as to her reaction to the respondent's treatment of her, that she was embarrassed, isolated, lost friends, was stressful and felt stripped of her independence. Those feelings I would imagine are natural when faced with repeated formal allegations of dishonesty as the respondent has made in this case against her.

5.9 I grant aggravated damages of £2,000 taking into account the officious and high-handed manner in which the respondent has conducted this litigation. The respondent has abused the process as described above.

6. I therefore award unlawful deduction from wages including pension contributions of £6,006.24, damages for injury to feelings of £10,000, interest on damages for injury to feelings agreed at £644.15, aggravated damages of £2,000.

7. I referred above on numerous occasions to Mr Jones' written submissions. They are detailed and comprehensive. I took some time to read them and granted additional time to Ms Elmerhebi to read them also and to prepare properly to address them. I am content that the statutory and case law authorities referred to and relied upon by Mr Jones were appropriately mentioned in his written and oral submissions without my repeating the law contained therein. The respondent did not challenge or contest in any way or question the authorities relied upon.

Employment Judge T Vincent Ryan

Date: 05.10.20

REASONS SENT TO THE PARTIES ON

5 November 2020

FOR THE TRIBUNAL OFFICE