EMPLOYMENT TRIBUNALS

Claimant: Mrs Rea Kubus
Respondent: First Recruitment Ltd

Heard at: **Nottingham** **On:** **5 August 2021**

Before: **Employment Judge Britton (sitting alone)**

RECORD OF AN OPEN HEARING BY CVP

Representation
Claimant: **In person**
Interpreter: **Kathryn Fowler in Hungarian**
Respondent: **Sharon Mapfumohr, Manager**

JUDGMENT

1. The Respondent's application to set aside the default Judgment is granted it being in the interests of justice to do so. Accordingly, the response (ET3) presented on 11 May 2021 is to be accepted.

2. Directions are hereinafter set out.

REASONS

Introduction

1. The claim (ET1) was presented to the Tribunal by the Claimant, who is Hungarian with limited spoke English, on 6 February 2021. She had prepared it herself with the assistance of others, It is ACAS early conciliation compliant and in time. Essentially, she set out that she joined the Respondent as an Administrative Clerk on 12 December 2018. In due course she gave notice that she wished to take maternity leave to start on 14 October 2019. Her intention was to take her full entitlement, in other words one-year maternity leave, and thence to return to work. I have read, in terms of the documentation before me today, her letter giving that notice which is quite clear and well worded. What that then happened is that circa

July 2020, from the correspondence before me, she was emailing the employer and particular Miss K Rutkowska (KR), who I learnt today was one of the two Co-ordinating Managers/Consultants that the Respondent was then employing at the large warehouse/ logistics centre outside Leicester at which a substantial number of workers employed by the Respondent were engaged for the purposes of the contract that it had to supply labour to the owner. The Claimant didn't get answers initially to her requests to meet to discuss a return to work, which of course was her entitlement pursuant to Section 18 of the Equality Act 2010 (the EqA). She persisted, and what then happened is that she was informed by KR on 5 August that: "due to change of management this post admin clerk was occupied you are no longer required for this position". Confirmed was that the Claimant would be paid holiday pay for accrued leave during the maternity period and that the employment would accordingly end on 11 October 2020. The Claimant then raised a detailed grievance, which I have read, pointing out that her job as far as she could see was simply filled by somebody else in circa March/April 2020 and therefore essentially setting out that she was being unfavourably treated by reason of having taken maternity leave.

2. Going back to her claim, she set out some of this narrative and was therefore claiming that what had occurred meant that she had been discriminated against by reason of the taking of the maternity leave. And so she claimed for that and also for sex discrimination, albeit she did not label those claims in terms of the provisions of the EqA engaged. She did not tick the box for unfair dismissal which engages the Employment Rights Act 1996 (the ERA). She was also claiming for what she calculated to be her outstanding annual leave entitlement, and also for unpaid wages which seems to relate to that she had come in for KIT days and should be paid for the same.

3. I bear in mind the lack of labelling, but this Claimant is unrepresented and therefore the Tribunal is today entitled to provisionally label her claim. This I will do once I have dealt with what then happened.

The failure to file a response and what then ensued including further observations as to the claim

4. The Tribunal having therefore received the claim, it was served it out in the usual way upon the Respondent at the address given in the ET1, namely its head office in Slough. The accompanying notice required a response (ET3) by 10 March 2021. That notice also set out that the case was listed for a main hearing before a full Tribunal at Leicester between 27-29 June 2022. It also set out standard directions, the first of which was for a schedule of loss to be supplied by the Claimant by 24 March 2021 and which she duly did.

5. The Respondent did not reply by the deadline and so the normal notice was issued to the effect that it would no longer be able to defend this case albeit it would be entitled to participate in any remedy hearing. The Claimant was asked to provide a schedule of loss, I have already referred to the fact that this she did. Stopping there, that schedule of loss dealt with the claim for the holiday pay; the loss of earnings for the KIT days; and sought further compensation by way of earnings for a limited

period because of the distress the dismissal had caused her and her inability to get other work. She did not set out any claim for injury to feelings, which of course would engage were she found to have been discriminated against by reason of maternity leave. I established today through the interpreter that the Claimant was unaware of the right to claim injury to feelings, and I therefore directed her to what is known as the Vento Bands and how to access the current Vento guidelines on the internet. She is very computer literate. It was quite clear as this case progressed today that she does want to claim for injury to feelings given what had occurred.

6. In any event, following the no response notice to which I have referred, on 13 April 2021 Employment Judge Ahmed issued a default Judgment as to liability only leaving therefore assessment of remedy to be at a hearing, I detect that he had spotted that a Judge would obviously need to consider whether an injury to feelings award was in fact being claimed for. The matter was listed for a Remedy hearing on 28 April 2021 but that got taken out and it was relisted for today.

7. On 11 May the Respondent wrote into the Tribunal with a proposed response. This was penned by Ms Mapfumohr. I learnt today that she only took up her post in January of this year. Explained was that the headquarters of the Respondent had to all intents and purposes closed because of the Corona pandemic. An employee came into the office shortly before the 11 May and, as I learnt today from Ms Mapfumohr in more detail as to the application to set aside the default judgement, found a large pile of post amidst which was the correspondence from the Tribunal including of course the notice of the claim.

8. This was referred to Ms Mapfumohr who then acted promptly by completing the Response (ET3) and sending it to the Tribunal with the explanation that I have now dealt with. Not mentioned was the default judgment but that maybe was because at that stage it had not been received. In any event, part of the application today is obviously to set aside that judgement and be permitted to defend the claim as per the ET3.

9. As to the defence what was pleaded was that the Claimant had wanted to come back only on a part time basis whereas her contract, albeit at zero hours, was a full time and that there was no part time role available. Accepted was that matters had handled “badly” by the Respondent and made plain was that it had offered the “outstanding money” in the sum of £2,880.00 which I gather would be its calculation of the holiday pay and the wages for the KIT days.

10. It is obvious from my reading all the correspondence that has come in, primarily from the Claimant, for the purposes of today that the Respondent needs to plead a great deal more than it currently has.

11. That brings me to the agenda for today and because once the ET3 and the accompanying explanation for its lateness came in, Employment Judge Clark directed that today would first of all deal with the Respondent’s application and then if it was not granted move on to determine remedy. Conversely if it was granted, the issues would be discussed and the current directions re-visited and a new trial date set. He made orders for the parties to provide additional submissions. This is

because engaged is rule 70 of the 2013 Employment Tribunals Rules of Procedure. What has to be determined is whether it is in the interests of justice to set aside the default judgement. The exercise of what is a Judicial discretion includes not just the explanation for the late response but consideration of the merits. Thus, if it is manifestly a hopeless defence that may be a decisive factor in deciding that it is not in the interests of justice to set aside the default judgement, albeit the Respondent can still be heard on remedy.

12. The Respondent essentially repeated its explanation. The Claimant sent in the documentation to which I have now to some extent referred.

13. In the discussion today, the Claimant made plain that she never asked for part time work and had always intended to return to the full time position. Thus, her case essentially is as per the email by KR of 5 August. Thus, somebody else filled her job whilst she was on maternity leave; hence she was dismissed: thus this was a dismissal by reason of having taken maternity leave, that is to say being treated unfavourably, which of course engages Section 99 of the Employment Rights Act 1996 (the ERA). The Claimant does not need the usually required two years qualifying service to bring such a claim. And of course, it also engages Section 18 of the Equality Act 2010 (the EqA). She also made plain that her grievance was never dealt with. This appears to be agreed for the purposes of the discussion today by Ms Mapfumohr. As to KR, the Respondent seeks to say in the ET3 that she had no authority. But I observe that given she was employed by the Respondent in a senior role at this logistics centre where many workers were deployed by the Respondent to service the contract, she prima facie clearly had ostensible authority and the Respondent may therefore be in difficulty. She is no longer employed by the Respondent. The other Supervisor/Consultant at the warehouse, namely Robert, who it seems was also involved, has also left this employment. Ms Mapfumohr repeated before me that her understanding is that the Claimant did not want to come back in a full-time role and so she repeats the defence in that respect. There is a clear conflict on this issue because the Claimant made it very plain indeed today that this was never the case.

14. So, the core issue in this case is going to be what was the role that KR refers to in that email of 5 August 2020. Is it in fact the role that Claimant had been employed to do as at her going on maternity leave, and if so why was it not therefore kept open for the Claimant who clearly intended to return and for instance by placing somebody in the role as a temporary cover which of course usually occurs. That, of course, is going to have to be an issue for the Respondent to address.

15. However, the Respondent is of course entitled to defend if I accept its explanation for why it didn't put the response in when it did. I have no evidence to contradict what Ms Mapfumohr says and therefore I accept the explanation. As to the viability of the Respondent's defence, well that is of course a matter which will become clearer once it provides further and better particulars of its response. Suffice to say that this is not for me today as prima facie it puts forward a defence, namely the new role being full time and the Claimant only wanting to work part time. Therefore, it is in the interests of justice that I revoke the default judgement and permit the response to be accepted.

Conclusion on this issue

16. The Respondent's application succeeds. The default judgement is revoked and the Response is ordered to be accepted.

Judicial Mediation

17. However, it seems to me that this case is suitable for judicial mediation (JM). I have explained the process to the parties before me. They have agreed to participate. I am going to list the same on a date which allows sufficient time for the Respondent to consider whether it wishes to have legal representation, particularly in order to assist it to put in a fully particularised defence. I am also allowing sufficient time for the Claimant to be able to seek legal advice and I have directed her to a port of call in terms of legal representation in the Leicester area.

18. I wish to stress that I do not know that firm personally, but it appears regularly before the Tribunal in Leicester and has experience in dealing with employment matters and acts for employees and frequently those who may be in low income roles; so it may be able to assist. If it does, that would help the Claimant to amend her schedule of loss, because she needs to do the following: -

18.1 Having researched Vento make plain whether she is claiming for injury to feelings and if so, why, and the amount she seeks by way of an award from the Tribunal in terms of the Vento Bands.

18.2 She also needs to consider whether she is legally entitled to claim for paid annual leave at her normal wage whilst on maternity leave and having run out of statutory maternity pay. As I understand the law, and I might be wrong, what she is entitled to do is to save her accrued annual leave so to speak during the maternity period so as to take that annual leave once she returns to work, in which case what her claim for losses is really about is the loss of the annual leave entitlement accrued at the date of dismissal. If so, that fits within as to what should be in her schedule of loss, namely loss of earnings predicated on the basis that she would have continued in the employment post her due date of return from maternity leave in October 2020 but for the dismissal, and thus extrapolating forward as to the period for which she seeks those earnings. She needs to give credit for any earnings she has obtained elsewhere.

18.3 So, the schedule of loss needs significant amendments.

19. I am then giving a time for the Respondent to reply to that schedule of loss.

20. Otherwise as to current directions such as preparation of a trial bundle, I am going to stay all of that until the outcome of the judicial mediation. If it fails, and I hope that it will not, then those directions can be further considered and also the time estimate of the already listed 3 day main Hearing.

ORDERS
Made pursuant to the Employment tribunal 2013 Rules of Procedure

1. The Respondent will file with the Tribunal and serve upon the Claimant a fully particularised amended response **by Friday 17 September 2021.**

2. The Claimant will then file an amended claim responding to the same as well as making plain the full details of her claim, albeit I have set them out to a significant extent, and confirming the labels so to speak of the claims that she brings whether it be under the Employment Rights 1996 or the Equality Act 2010. She will do this **by Friday 15 October 2021**.

Judicial Mediation

3. The Claimant will serve her revised schedule of loss upon the Respondent together with her expectations for the judicial mediation **by Friday 24 September 2021**.

4. The Respondent will reply thereto with its counter schedule of loss and its list of expectations **by Friday 22 October 2021**.

5. There will be a judicial mediation (JM) to be heard by cloud video platform (CVP) commencing **at 9.45am on Tuesday 23 November 2021**, the parties have the necessary connectivity. Further details of joining in for the purposes of that CVP hearing will follow in due course. I have fully explained to the parties what is involved by means of judicial mediation. The Tribunal will need no further documentation other than that which I have ordered because otherwise that documentation is now in the Tribunal's file and the PDFs can of course be provided to the presiding Judge at the judicial mediation. I make plain to the Respondent that it must have at the JM a person with decision making authority. I have urged that the Claimant should have with her somebody to help her. Her intention is that should be her husband who has good English. However, I am also directing that there should be provided by the Tribunal an **approved interpreter in Hungarian** and I hope that this will be Kathryn Fowler as she has assisted most ably today and is now, of course, conversant with the issues. The JM is listed for 1 day.

Mainstream Hearing

1. Other than the directions that I have made preceding above, they are stayed until the outcome of the judicial mediation.

Employment Judge P Britton

Date: 12 August 2021

JUDGMENT SENT TO THE PARTIES ON

17 August 2021

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FOR THE TRIBUNAL OFFICE

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

Notes

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management':

https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/

(v) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so".* If, when writing to the Tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.