EMPLOYMENT TRIBUNALS

Claimant: **Miss Rubichen Attarwala**

Respondent: **The Newham Hotel Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **12 October 2021**

Before: **Employment Judge Barrett**

Representation

Claimant: In person

Respondent: Did not attend and was not represented

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was by telephone. A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

JUDGMENT

The judgment of the Tribunal is that: -

1. **The Claimant was unfairly dismissed by the Respondent on 1 March 2021.**

2. **The Respondent breached the Claimant's employment contract by dismissing her without notice.**

3. **The Claimant's claim for unpaid holiday pay is well-founded.**

4. **The Claimant's claim for arrears of pay is well-founded.**

5. **The Claimant's claim for a redundancy payment is not well-founded and is dismissed.**

REASONS

Introduction

1. Following early conciliation, the Claimant presented her ET1 on 29 April 2021. She brought claims for unfair dismissal, a redundancy payment, notice pay, arrears of pay and holiday pay.

2. On 8 May 2021 the Tribunal sent out a Notice of Claim and Notice of Hearing together with standard directions setting out the steps the parties were required to take to prepare for the hearing.

3. The Respondent's ET3 was due by 5 June 2021. No ET3 form has been received and neither has the Respondent made any application to extend time for presentation of the form.

4. On 15 September 2021 the Tribunal wrote to the Respondent:

   "You did not present a response to the claim.

   Under rule 21 of the above Rules, because you have not entered a response, a judgment may now be issued. You are entitled to receive notice of any hearing but you may only participate in any hearing to the extent permitted by the Employment Judge who hears the case."

5. On the same date the Tribunal wrote to the parties to state that the hearing on 12 October 2021 remained listed, but the time estimate was reduced to 3 hours.

6. The Claimant complied with the directions to provide a schedule of loss, list of documents relied upon and a witness statement. She did provide copy documents and explained at the hearing today this was because she had not been able to elicit a response from the Respondent regarding preparation of a bundle. I make no findings on this point.

7. On 11 October 2021, the day before the listed hearing, Mr Bob Thakar, Director of the Respondent emailed the Tribunal stating:

   We write on behalf of the Respondent THE NEWHAM HOTEL LTD in regards to the Hearing which is due to take place tomorrow 12 October 2021 at 10am via CVP.

   Regrettably, we request the Tribunal Office to kindly relist this hearing for a new date on the following grounds:

   1. The Claimant has not complied with the Order. The Claimant has not sent us all the documents they intend to rely on as per their attached List of Documents which was due on 28th June 2021.

   2. The Claimant and Respondent have been unable to agree the documents as per the Order 19th July 2021 as the Respondent has not sent the documents which were due as per the Order 28th June 2021.

   3. Due to above 2 Orders not being complied with, the Claimant and Respondent have been unable to agree the documents to be used at the hearing tomorrow.

   4. The owner of the Respondent company is currently undergoing medical treatment for his lost vision in his Right Eye and therefore is unable to attend the

hearing whether in person or CVP. A medical letter from Moorfields Eye Hospital can be produced if the Tribunal Office requires.

We request the Tribunal Office to consider the above urgent grounds and ask for the hearing to be set aside and re-listed with dates provided for Orders to be complied with in order for the Respondents to defend the entire claim. The Respondents do not wish to have the Tribunal Office time wasted in this hearing and therefore request the above.

The hearing

8. The Claimant attended the hearing, supported by her husband. The Respondent did not attend.

9. After an initial discussion, the hearing was adjourned:

   9.1. For enquiries to be made regarding the Respondent's attendance. The Tribunal clerk telephoned Mr Thakar and was informed that he was at Moorfields Eye Hospital and unable to be present, and no one else intended to attend on behalf of the Respondent.

   9.2. For the Claimant to send her copy documents into the Tribunal which she duly did by email.

10. I took the decision that given the Respondent had not presented an ET3 and there was no application to extend time, it would be in accordance with the overriding objective to proceed with the hearing in the Respondent's absence. Following the break, the Claimant gave evidence in accordance with her witness statement, referring to the contemporaneous documents she had submitted.

Findings of fact

11. I accept the evidence given by the Claimant.

12. The Claimant was employed by the Respondent's sister hotel. Rotana Hotel, from 1 September 2018 as a Hotel Receptionist. Both the Rotana Hotel and the Respondent are owned or operated by the SIP Group Ltd. She was given a document setting out the main terms and conditions of her employment. She was required to pay a £100 'deposit' which was deducted in her first pay cheque and to be repaid in her final pay cheque. The nature of the deposit was not explained to her.

13. In August 2019 her employment transferred to the Respondent. From that time on her payslips were in the name of the Respondent. There was no change to her terms and conditions other than to her place of work. The Respondent's leave year ran from January to December.

14. The Claimant commenced maternity leave on 21 January 2020. She received Statutory Maternity Pay until 5 October 2020.

15. In November 2020 the Claimant did not receive her usual salary cheque. In the second week of November, she asked the hotel manager, Mr Rajan Gomu, why she had not been paid. On 12 November 2020 she messaged him to ask whether she could come back to work or be placed on furlough. He advised her to contact the Respondent's Director, Mr Sukhbinder Singh Takhar.

16. The Claimant made several attempts to speak to Mr Singh. On occasions he told her he would look into the matter and call her back, for example he suggested he would discuss with the Respondent's Accounts Manager whether she could be placed on furlough. On other occasions he did not pick up her calls. The Claimant also sent him WhatsApp messages on 13 and 17 November 2020 asking to speak, which he did not reply to.

17. The Claimant also spoke to her Team Leader, who advised her to contact HR. She wrote to the Respondent's HR email address on 9 December 2020 proposing that she return to work. However, she received no response.

18. The Claimant noticed that on the app for her Pay As You Earn (PAYE) tax account with HMRC that there was a salary entry from the Respondent. On 9 January 2021 she sent another email to the Respondent's HR contact address stating that she had not received a cheque or payslip but that her PAYE account showed a payment. She also notified Mr Gomu by WhatsApp and he advised that this was an error.

19. In or around January 2020, the Claimant managed to speak to Mr Singh by phone. He told her that she was not entitled to receive any further pay. He also mentioned that business was poor, the Rotana Hotel had shut down and the Respondent hotel may also close. She asked if she could be paid for accrued holiday leave. He replied, "*Why would you get holiday when you're on maternity leave*?"

20. On 28 February 2021 the Claimant's PAYE app showed the last salary entry for her employment with the Respondent (it was for £0.00). After that date, her app no longer showed her to be employed by the Respondent. As best the Claimant can date it, her employment terminated on 1 March 2021. There was no express dismissal by the Respondent, but the lack of response to her offers to return to work and queries regarding furlough led her to understand that the change of status on the PAYE app related to her being dismissed.

21. On 14 April 2021, the Claimant wrote to the Respondent to appeal against her dismissal. She received an acknowledgment email on 15 April 2021 from Mr Bob Thakar promising to respond within 14 days. However, she never received a substantive response.

Submissions

22. The Claimant explained the reasons for bringing each of her claims. She had not been given a reason for dismissal and no process had been followed, so she believed she had been unfairly dismissed. She claimed a redundancy payment because the conversation with Mr Singh in which he referred to the Rotana hotel closing led her to understand that the reason she was not brought back to work may have related to a downturn in business. However, she had not been told this explicitly. She had not been given notice of dismissal or paid notice pay. She made a claim for holiday pay because she had not taken or been paid for holiday since going on maternity leave in January 2020, and her request for holiday pay was refused. The claim for arrears of pay related to non-payment of wages since 5 October 2020, as well as the failure to repay the £100 'deposit' taken from her first pay cheque.

23. I asked the Claimant to address whether or not the Respondent should be given an opportunity to participate in the remedy stage of the proceedings. She submitted that the decision on both liability and remedy should be made that day. The Respondent had been given a long time and had never responded to the ET1 and had not responded to her earlier requests for information either. Even though she knew that the Respondent's director Mr Thakar was suffering a problem with his eyes, this would not have stopped him from giving information earlier on.

Applicable legal principles

24. Rule 21 of the ET Rules provides that:

> **21.— Effect of non-presentation or rejection of response, or case not contested**
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> **(1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.**
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> **(2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone.[Where a Judge has directed that a preliminary issue requires to be determined at a hearing, a judgment may be issued by a Judge under this rule after that issue has been determined without a further hearing.]1**
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> **(3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.**

25. The process to follow under this rule has been described in the case of of *Limoine v Sharma* [2020] ICR 389 at paras 29 to 40; see in particular:

> **"29. If no Judgment is issued under Rule 21(2) then, to repeat, the sub-rule requires that there be a hearing. As the Presidential Guidance also points out, ordinarily that will be, in principle, an ordinary final hearing under Rule 57, although it might be solely a remedy hearing, but with two differences. First, in all cases, as provided by Rule 21(2), the hearing will be before a Judge alone, even if the complaint is of a type which, had it been defended, would have been heard before a full three-person Tribunal. Secondly, in accordance with Rule 21(3) , the respondent shall only be entitled to participate in the hearing to the extent permitted by the Judge. However, that will still be a substantive hearing, and, once again, Judgment should not be granted at such a hearing unless, taking account of the fact that what the party advancing the claim asserts is uncontested, the Judge is satisfied that, in law, the factual basis for doing so is made out.**
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> **…**
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> **32. I turn to Rule 21(3) . That, on its face, applies in respect of any and every hearing in an undefended case. That is, it does so, when the matter has been considered, as it should be, under Rule 21(2) and a Judgment has been given on some aspect such as liability, but with a hearing being directed on another aspect such as remedy; equally, when the matter has been considered under Rule 21(2) and no Judgment has been given under that sub-rule at all; and equally where,**

though this ought not to happen, there has been no Judgment under Rule 21(2) because the matter has not been considered by a Judge under that Rule hitherto at all.

33. In all such cases, if the respondent to the claim wishes to participate in the hearing, they will need to proactively seek, and obtain, permission to do so. However, if they do seek permission to participate, the Judge must consider and decide, judicially, whether or to what extent to permit such participation. That will be so whether there is a formal application in advance of a hearing or in the event that the party concerned attends the hearing and indicates a wish to be permitted to participate there and then.

…

35. … in principle the fact that a Judgment has been given in respect of liability on an undefended claim should not be treated as an automatic bar to the respondent to that claim being entitled to contest issues in respect of remedy. Thus, even in a case where the Tribunal considers that a further remedy hearing may not be necessary, the power under Rule 21(2) to seek information should, in an appropriate case, be exercised to enable them to have their say on remedy.

36. … in all cases a proper balance needs to be struck between avoiding the delays and costs associated with the holding, prolonging or possibly postponing of a hearing, given that the claim is indeed undefended, and, where appropriate, allowing the other party to participate to some extent.

37. Importantly, participation may take different forms. It might be confined, as appropriate, for example, to the making of written or oral submissions or the cross-examination of witnesses, but not the introduction of evidence. In a case where only remedy is being considered at the hearing, the absence of a written response document may be less significant, as the issues relating to remedy may be readily apparent; and some limited form of participation may be capable of being fairly accommodated in a way that the complainant can address and at little if any cost or delay.

38. However, where the hearing is concerned with liability, very different considerations are likely to apply. The fact that there has been no written response at all is likely in most cases to be highly significant to the practical implications of a request to participate. Further, the fact that such a party can still potentially be permitted to participate under Rule 21(3) should plainly not be treated as a ready substitute for the obligation to put in a timely response, or apply for, and obtain, an extension of time to do so, under Rule 20 . The Rule 21(3) power cannot be lightly invoked in order to subvert or circumvent the essential framework of Rules which support the obvious importance of defences to claims being properly set out in a timely pleading, so that the party bringing a claim knows clearly what elements of it are contested and on what basis, and there is then fair and orderly preparation, and in due course trial, of the contested aspects."

26. The specific question of a defaulting respondent's participation in the remedy stage of proceedings was also considered in the case of *Office Equipment Systems Ltd v Hughes* [2019] ICR 201 at paras 19-20:

"19. There is no absolute rule that a respondent who has been debarred from defending an employment tribunal claim on liability is always entitled to participate in the determination of remedy. At the lower end of the scale of cases employment tribunals routinely deal with claims for small liquidated sums, such as under Part 2 of the Employment Rights Act 1996 (still commonly called the "Wages Act" jurisdiction) where liability and remedy are dealt with in a single

hearing. In such a case, a respondent who has been debarred from defending under rule 21 could have no legitimate complaint if the employment tribunal proceeds to hear the case on the scheduled date, determines liability and makes an award. Even in that type of case it would generally be wrong for the tribunal to refuse to read any written representations or submissions as regards remedy sent to it by the defaulting respondent in good time, but proportionality and the overriding objective do not entitle the respondent to a further hearing.

20. But in a case which is sufficiently substantial or complex to require the separate assessment of remedy after judgment has been given on liability, only an exceptional case would justify excluding the respondent from participating in any oral hearing; and it should be rarer still for a tribunal to refuse to allow the respondent to make written representations on remedy."

Conclusions

27. In this case the Respondent did not present a response or any application to extend time. A rule 21 judgment was not entered, and a hearing was fixed in accordance with rule 21(2). The Respondent was given notice of the hearing but in the circumstances was only entitled to participate to the extent that I permitted. In the circumstances and having regard to the guidance at para 38 of *Limoine,* I was satisfied that the Respondent's non-attendance, even for medical reasons, was not a good reason to postpone the hearing and therefore decided to hear the Claimant's evidence in the Respondent's absence.

28. Having heard that evidence, I am satisfied that the Claimant's claim for unfair dismissal must be upheld. The burden of proof in that claim is on the Respondent to show there was a fair reason for dismissal and that burden has not been discharged. Further there was no fair process followed in relation to the termination of the Claimant's employment.

29. The Claimant's claim for a redundancy payment is not well-founded and is dismissed. There is insufficient evidence on which to conclude that the reason for dismissal was redundancy; the Claimant suspects that may be the case, but the Respondent's reasons are not within her knowledge. However, the Claimant will receive a basic award in relation to her unfair dismissal claim that mirrors the amount of the statutory redundancy payment and so her compensation will not be affected.

30. I conclude that the Claimant's claim for notice pay is well-founded. In breach of contract, she was not given any notice of her dismissal.

31. The Claimant's claim for holiday pay is also well-founded. I accept that she received no holiday pay from January 2020, when she went on maternity leave, until the end of her employment at the end of February 2021.

32. The Claimant's claim for arrears of pay is also well-founded. I accept that she did not receive any pay after 5 October 2020 when she received her last instalment of maternity pay. I also accept that the Respondent was obliged to repay a deposit payment of £100 in her final pay and did not do so.

33. In relation to remedy, the Claimant has submitted a helpful and comprehensive Schedule of Loss. The Respondent has not submitted any documentary evidence or submissions to challenge the calculations in that Schedule. However, following the guidance in *Office Equipment Systems Ltd v Hughes,* I consider that there

are remedy issues which are separate from the issues of liability, and which may entail some complexity; for example, whether if the Claimant had not been dismissed, she would have been placed on furlough and what pay she might have received in that case.

34. The Claimant made a well-founded submission that the Respondent has had time to provide its response and has not done so, notwithstanding the medical issues which affected Mr Thakar's attendance at the hearing. Balanced against that submission, I consider the fact that the Respondent, which is not legally represented, has by the postponement application demonstrated that it wishes to participate in the proceedings.

35. I conclude that it would not be in accordance with the overriding objective to decide the remedy issues in the case without giving the Respondent a limited further opportunity to state its position in relation to them. However, I take the view that the remedy issues can be determined without a further oral hearing based on written submissions as well as the evidence already given. This will avoid the additional wait that would be inevitable if a further hearing were to be listed, which would be prejudicial to the Claimant.

36. I make a direction in the enclosed Case Management Order that by **Tuesday 9 November 2021** both parties must send to the Tribunal and each other any written submissions and any further documentary evidence they wish the Tribunal to consider in relation to the question of how much compensation the Claimant should be awarded for her unfair dismissal, notice pay, holiday pay and wages claims.

37. Should either party consider that an oral remedy hearing would be necessary in the interests of justice they may apply to the Tribunal in writing and the application will be considered.

Employment Judge Barrett
Date: 12 October 2021