EMPLOYMENT TRIBUNALS

Claimant: **Ms R Shafiq**

Respondent: **L3COS Ltd**

Heard at: London Central, by CVP **On:** 08/04/2022

Before: Tribunal Judge A Jack,
acting as an Employment Judge

Representation
Claimant: Ms I Egan, counsel
Respondent: Ms S McArdle, CEO of the Respondent

JUDGMENT

1. The Respondent's application for an extension of time to present a response is refused.

2. The Respondent made an unlawful deduction from the Claimant's wages and is ordered to pay her the net sum of £33,082.61, in respect of the amount unlawfully deducted.

3. The Respondent failed make the Claimant a payment in lieu of leave following the termination of her employment, and is ordered to pay her the net sum of £1,338.18 as compensation.

4. The Respondent is ordered to account to HMRC for any tax and National Insurance due.

REASONS

1. The case was listed for a two hour full merits hearing.

Findings of Fact

2. The Claimant's ET1 was presented on 21 January 2022. She claims unauthorised deduction from wages under the Employment Rights Act

1996 and payment for accrued but untaken holiday under the Working Time Regulations 1998. The parties agree that she was employed by the Respondent from 19 April 2021 to 15 January 2022, and that her salary was £85,000 (bundle pages 5 & 6, and pages 46 & 47).

3. The Respondent was sent a Notice of a Claim to its registered address on 10 February 2022. This stated clearly that if the Respondent wanted to defend the Claim it needed to submit its response by 10 March 2022, and that if this was not done a Judgment might be issued against the Respondent. It was not addressed to any particular individual. It was addressed to a registered company at its registered address.

4. Mr Zurab Ashvil, the founder of the Respondent, saw the claim. He is the sole registered director of the Respondent. He is registered under the name Mr Zurab Tsitsushvili. He decided not to respond to it, as he viewed it as vexatious.

5. A Notice of Hearing was sent to the parties on 23 February 2022, giving notice of the hearing on 8 April 2022. This stated clearly that it was the responsibility of the parties to ensure that any relevant witnesses attend the hearing and that they bring sufficient copies of any relevant documents.

6. The Tribunal emailed the Respondent on 29 March 2022 stating that if a response had not already been submitted and if the Respondent wished to defend the claim, the Respondent should supply a response together with an application for an extension of time for presenting the response, including the reasons for not presenting a response to date. The response should be sent as soon as reasonably practicable and, in any event, no later than 1 April 2022.

7. The Respondent presented its response on 1 April 2022 as an attachment to an email. The email stated that the Respondent did not require any further time to prepare either its argument or supporting evidence. The ET3 contained the Respondent's reasons for the delay.

8. The Tribunal emailed the parties on 5 April 2022 noting that the ET3 was filed out of time and that at the start of the hearing on 8 April 2022 the Tribunal would decide whether to allow the Respondent to defend the claim following the principles set out in *Kwik Save Stores v Swain*. Both sides were ordered to ensure that electronic copies of all the documents they wanted the judge to refer to at the hearing were provided by 12 noon on 7 April 2022.

9. The Respondent emailed the Tribunal on 7 April 2022 stating that they had no digital documents to submit for the hearing. Also on 7 April 2022, the Claimant served a witness statement from the Claimant, a Schedule of Loss, and a bundle of 102 pages.

10. Having received the Claimant's material, the Respondent asked for a postponement of the hearing, by email, at 16:13 on 7 April 2022. However this application was not pursued at the hearing, and Ms McArdle stated that she had read the bundle and was happy to go ahead with what she correctly described as a full merits hearing.

The Law

11. The response to a claim must be presented to the tribunal office within 28 days of the date that the copy of the claim form was sent by the Tribunal: rule 16(1), Schedule 1 to Employment Tribunals (Constitution and Rules of Procedure) Regulations 2022 SI 2004/1861.

12. However a respondent can apply for an extension of time for presenting a response: rule 20.

13. *Kwik Save Stores v Swain and ors* 1997 ICR 49 concerns how the judicial discretion in respect of whether or not to extend time should be exercised. The process of exercising the discretion involves taking into account all relevant factors, and weighing and balancing them. The judge should always consider the respondent's explanation as to why an extension of time is required, the balance of prejudice, and the merits of the defence.

14. Section 13(1) of the ERA states:
"*An employer shall not make a deduction from wages of a worker employed by him unless—*

> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*"

15. Section 13(3) ERA provides:
"*Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion*."

16. Section 23 ERA gives a worker the right to complain to an Employment Tribunal of an unauthorised deduction from wages. Where a tribunal finds a complaint under section 23 ERA well founded it shall make a declaration to that effect and shall order the employer to pay the worker the amount of any deductions made in contravention of section 13 ERA (s24(1)(a) ERA).

17. Regulation 14(2) of the Working Times Regulations 1998 SI 1998/1833 provides that where a worker's employment is terminated during the course of her leave year, and on the date on which the termination took effect, the proportion of leave she has taken is less than the proportion of the leave year which has expired, the employer shall make her a payment in lieu of leave.

18. Rule 21 provides that where on the expiry of the time limit in rule 16 no response has been presented, a judge shall decide whether on the basis of the available material a determination can properly be made of the claim. To the extent that a determination can be made, the judge shall

issue a judgment accordingly.

Conclusions

19. I start by considering the Respondent's explanation of why an extension of time is needed. Ms McArdle told me that she did not become aware of the claim until 24 March 2022 and that at that time she had covid, which is why she did not send the response until 1 April 2022. However it is clear that her having covid at that time was not the reason that the deadline of 10 March was missed in the first place. Rather, I was told, and have found, that Mr Ashvil did receive the claim but decided not to respond as he regarded the claim as vexatious. That is not an acceptable approach to the rights asserted by the Claimant or to the employment tribunal system itself (to adapt the words of *Kwik Save Stores v Swain).* It was said that Mr Ashvil is an American and not familiar with employment law in England and Wales. However, as Ms Egan submitted, he is the sole registered director of a company in England and Wales, and the Tribunal's Notice of Claim was clear on its face as to the deadline for a response and the possible consequences of a failure to comply.

20. In terms of the balance of prejudice, if time is not extended then the Respondent will be unable to defend the claim. That will clearly prejudice the Respondent, assuming that there is merit in the response that has been presented. However it is also relevant that although the Respondent has said that it is ready to proceed with a full merits hearing today, it said yesterday that it did not wish to submit any documents in support of its claim. If the hearing proceeds there will therefore be not witness statements or other documents supporting the Respondent's case, as the Respondent has chosen not to supply any document in support of its case. The lack of exhibits would not be remedied if the ET3 were itself to be accepted as Ms McArdle's witness statement.

21. In terms of the merits of the defence, the response does not address and provides no defence at all to the claim for unpaid holiday pay.

22. The response does not dispute that the payments of May 2021 and June 2021 were less than the amounts due under the contract. The response does not dispute that the payment of July 2021 was not made at all. The response accepts that the Claimant was given notice on 15 July 2021, and does not dispute that she was given 6 months' notice. The response does not dispute that the Claimant submitted a grievance on 17 August regarding unpaid salary, and that the Respondent did not respond to this grievance.

23. The core factual dispute between the parties is whether or not there was an agreement that the Claimant did not need to work her notice period after 15 July 2021, and therefore whether or not she failed to return to work after her leave ending on 2 August 2021. The response does not dispute that no payments were made after 2 August 2021. There is no attempt to argue that any of the undisputed deductions made either before or after 2 August 2021 were authorised, either by statute or by a relevant provision of the contract, or that the Claimant had agreed to the deductions in writing before they were made. What is said is that the Claimant was required to but did not work her notice period. However

even if I were to accept that after a full merits hearing, the undisputed deductions would not be lawful. As I have noted, the parties agree that the Claimant was employed by the Respondent from 19 April 2021 to 15 January 2022. Further, as Ms Egan submitted, if it was the case that the Claimant was required to but did not work her notice period, the appropriate response would have been to take disciplinary proceedings and to terminate the contract.

24. Ms McArdle argued at the hearing that the Claimant had been given the wrong contract and that the claim is therefore unreasonable and unfair. However I was not able to discern a disagreement between the parties as to what to the requirements of the contract that the Respondent had actually entered into with the Claimant were. That the Respondent now regrets entering the contract that it entered with the Claimant can provide no defence to this claim.

25. In summary I consider that the defence has no real merit, and I am satisfied that there is therefore no prejudice to the Respondent in not being able to present it.

26. Taking account of the factors outlined above, and all of the submissions of both Ms McArdle and Ms Egan, I therefore refused the application to extend time to present the ET3.

27. Ms Egan then asked me to give judgment for the Claimant under rule 21. I did so, as I was satisfied that a determination could properly be made on the basis of the available material (including the bundle and the Claimant's Schedule of Loss).

Tribunal Judge A Jack

3 May 2022

JUDGMENT SENT TO THE PARTIES ON

03/05/2022.

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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