EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110611/2021

Held in Glasgow on 16 June 2022 (Remedy Hearing in chambers)

Employment Judge Ian McPherson

Miss Kirsty Blyth	**Claimant** **Written Representations**
BR Fast Food Limited	**Respondents** **No Written Representations**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The further Judgment of the Employment Tribunal is that it does not order any financial penalty on the respondents, in terms of **Section 12A of the Employment Tribunals Act 1996,** in favour of the Secretary of State, as it would not be in the interests of justice to do so.

REASONS

Introduction

1. This case called again before me, as an Employment Judge sitting alone, in chambers, on Thursday morning, 16 June 2022, for an in chambers Remedy Hearing.

2. It follows upon a two-day Final Hearing, which I heard in person on 21 and 22 March 2022, with the claimant only attending, the respondents (previously debarred, when their ET3 response was stuck out) not appearing or being represented to participate in that Hearing, and my written Judgment and Reasons issued to parties on 19 May 2022.

3. In that earlier Judgment, I found for the claimant, and I made various awards of compensation to be paid to her by the respondents, totalling some **£18,308.76,** as follows:

(a) *In respect of financial loss arising from termination of her employment with the respondents, the Tribunal awarded the claimant the sum of* ***Eight thousand, nine hundred and forty-six pounds (£8,946),*** *plus interest of* ***Three hundred and thirteen pounds, seventy-two pence (£313.72);***

(b) *In respect of injury to the claimant's feelings, the Tribunal awarded the claimant the further sum of* ***Six thousand, two hundred and eighty-five pounds (£6,285),*** *plus interest of* ***Four hundred and forty pounds, eighty-one pence (£440.81);***

(c) *The Tribunal further found that the respondents failed to pay the claimant for annual leave accrued but untaken during her employment with the respondents, and the respondents were ordered to pay the claimant the further sum of* ***One thousand, four hundred and seventy one pounds, twenty three pence (£1,471.23);***

(d) *The claimant was dismissed in breach of contract in respect of notice, and the respondents were ordered to pay to her the sum of* ***Two hundred and eighty-four pounds (£284.00);***

(e) *The Tribunal also awarded the claimant a further sum of* ***Five hundred and sixty eight pounds (£568.00)****, and the respondents were ordered to pay to her that further sum, being four weeks' gross pay, as the respondents were in breach of their statutory duty as an employer to provide to the claimant a written statement of employment particulars.*

4. I also reserved, for future consideration, whether or not or not to impose a financial penalty on the respondents, in terms of **Section 12A of the Employment Tribunals Act 1996.**

5. In that regard, I allowed the respondents a period of no more than 14 days from date of issue of that Judgment to make any written representations to the Tribunal, which failing the Tribunal would make a reserved decision without any further delay, and without the need for any attended Hearing, unless the respondents requested to be heard.

6. No written representations were made by the respondents within that 14 day period, or at all, despite an email sent to both parties, by the Tribunal clerk, on 7 June 2022, noting that fact, and that they had not requested a Hearing. In those circumstances, both parties were advised that I would proceed to prepare a further Judgment, without the need for any attended Hearing.

7. In that email to the parties, the Tribunal stated that the claimant must write to the Tribunal, with copy to the respondents' representative, Mr Matthew Campbell, by email, advising whether or not she had received any payment from the respondents in terms of the sums awarded to her by the Tribunal's earlier Judgment.

8. By email from the claimant, sent on 7 June 2022, at 20:52, to the Glasgow ET, and copied to Matthew Campbell, she advised as follows : "***I hereby advise that I have not received any form of payment from the respondents or any representatives on their behalf."***

9. By email from the Tribunal to both parties, on 9 June 2022, they were advised that a 2 hour Remedy Hearing in chambers had been arranged for this morning, and that they did not require to attend, and that a further Judgment would be sent to both parties as soon as possible after this Remedy Hearing.

Issue for the Tribunal

10. The only issue before me at this Remedy Hearing was whether or not or not to impose a financial penalty on the respondents, in terms of **Section 12A of the Employment Tribunals Act 1996.**

11. As I stated at paragraphs 186 to 188 of the Reasons to my earlier Judgment, I found that the respondents had breached the rights of the claimant and, in those circumstances, and as it may be that this case has one or more aggravating features, such that a financial penalty might be imposed against the respondents, under **Section 12A of the Employment Tribunals Act 1996**, before I considered whether to issue such a penalty and, if so, in what sum, I had decided to give the respondents 14 days in which to make written representations as to why I should not do so or, if I decide to do so, what amount the penalty ought to be, having regard to all the circumstances of the case, and the respondents' ability to pay such an award, all as provided for in **Section 12A** itself.

12. A financial penalty can be one half of the award made by the Tribunal. When replying to the Tribunal, within the fourteen days allowed, the respondents were advised that they should also confirm whether or not payment of the sums awarded to the claimant in terms of the Judgment had been paid to her, which is another factor that may be taken into account.

13. Following the expiry of that 14 days from date of issue of that Judgment, the Reasons stated that I wished to make it plain that if the respondents did not make any written representations to the Tribunal, I would proceed to make a reserved decision, without any further delay, and without the need for any attended Hearing, and that I would deal with the matter in chambers, and on the available papers. That has been the purpose of today's in chambers Hearing.

Discussion and Deliberation

14. I have had cause to reflect, in private deliberation, in writing up this further judgment, whether or not this is an appropriate case to consider making a financial penalty order against the respondents, in terms of **Section 12A of the Employment Tribunals Act 1996,** as amended by the **Enterprise and Regulatory Reform Act 2013, Section 16**, in circumstances where, in determining a claim involving an employer and a worker, the Tribunal concludes that the employer has breached any of the worker's rights, and the Tribunal is of the opinion that the breach has one or more "***aggravating features".***

15. Whilst the legislation itself does not define what "***aggravating features***" are, the UK Government's explanatory notes suggest that some of the factors which a Tribunal may consider in deciding whether to impose a financial penalty could include the size of the employer, the duration of the breach of the employment right and the behaviour of the employer and the employee.

16. Further, those explanatory notes also suggest that a Tribunal may be more likely to find an employer's behaviour in breaching the law had aggravating features where the action was deliberate or committed with malice, the employer was an organisation with a dedicated HR team, or the employer had repeatedly breached the employment right concerned.

17. Also, again as per those explanatory notes, it is suggested that a Tribunal may be less likely to find an employer's behaviour in breaching the law had aggravating features where the organisation has only been in operation for a short period of time, it is a micro-business, it has only a limited HR function, or the breach was a genuine mistake.

18. While the power to make financial penalty orders has been in place since 6 April 2014, it would seem that few, if any, have been made, and as such,

so far as I can ascertain, there has been only one appellate judgment from the Employment Appeal Tribunal on such orders.

19. I have identified the EAT judgment by Mr Justice Kerr in **First Greater Western Ltd & Anor v Waiyego [2018] UKEAT 0056/18; [2019] WLR(D) 290.** On the facts and circumstances of that case, the EAT held that the ET had rightly rejected the claimant's invitation to impose a financial penalty on the first respondent for deliberate and repeated breaches of employment law.

20. The relevant law is fairly straightforward, and contained within the bounds of **Section 12A**. Further, I have reminded myself that the UK Government's explanatory notes are guidance, they are not the law, but an interpretation of the law. The absence of a statutory definition of "***aggravating features***" is peculiar, but Parliament has so made the law, and I have to do my best to interpret its meaning, and the extent of its application.

21. As such, I have referred to the clear words of the statute, and there is no gloss, whether by appellate case law authority, or otherwise, upon the wording of **Section 12A**. As Mr Justice Kerr identified in **Waiyego,** there is a power to make such an order, but not a duty.

22. In the absence of any statutory definition of those two words, "***aggravating features***" , it seems to me that I need to have regard to the ordinary and natural meaning of those two words as they are used in the English language.

23. In that regard, I accept, as falling within the proper meaning and effect of those two words, the various examples cited by the explanatory notes. However, I equally well recognise that, as in all cases before the Employment Tribunal, cases are all fact-sensitive, and everything depends on the particular circumstances of the specific case before the Tribunal.

24. In such circumstances, I turn to the facts and circumstances of the present case. While, at the Final Hearing, I heard evidence from the claimant, and her father, I have not heard any evidence from the respondents, nor received any written representations, or submissions, other than Mr Campbell's "***evidence pack***", as detailed in my earlier Judgment.

25. The respondents chose not to participate in the Final Hearing, which proceeded in their absence, and equally, from Mr Campbell's failure to reply to recent correspondence from the Tribunal, post issue of my earlier Judgment, and no correspondence from anybody else on behalf of the respondents, I am of the clear view that they have chosen to make no written representations to this Tribunal, despite the express invitation to do so.

26. What is clear, from my original Judgment, issued on 19 May 2022, against which the respondents have made no application for reconsideration, within the 14 days allowed, is that they infringed the claimant's employment rights, in several ways, and I so found in my earlier Judgment. Further, I am of the opinion that the breach of those rights had one or more aggravating features.

27. Specifically, I find, from the facts and circumstances of this case, as established in evidence at the Final Hearing, and as set forth in my findings in fact in the earlier Judgment, that the acts and omissions of the respondents, through their managers, and director, Mr Campbell, were deliberate, although I do not go as far as to state that it is established that they were done with malice towards the claimant.

28. Viewed in that light, the acts and omissions of the respondents seem to me to have been more money focussed, and economically driven, in the sense of seeking to avoid any financial responsibility falling at the door of the respondents, rather than personally vindictive out of spite, or for some other improper personal motive, towards the claimant.

29. It is not evident to me, on the limited information available to the Tribunal, whether at the material time, the respondents had a dedicated HR team, or indeed any access to HR advice, but I am satisfied, from the evidence before me at the Final Hearing, that the respondents are a micro-employer, even although their business might be operating under the trading style of a larger franchise.

30. Finally, from the extent of their breaches of the claimant's employment rights, I cannot regard the respondents' established breaches of employment law as having occurred due to a genuine mistake – their acts and omissions are indicative of failures by deliberate design, rather than by inadvertent default of their obligations, or some pretended ignorance of their statutory and contractual responsibilities as an employer.

31. In these circumstances, in terms of **Section 12A (1),** I am satisfied that the first part of the statutory test is met, which takes me on next to the ability of the respondents to pay, under **Section 12A (2).** It is provided that the Tribunal "***shall have regard to the employer's ability to pay***." That is a mandatory requirement, as evidenced by the use of the word "***shall***", but it is then provided that ability to pay is to be had regard to in deciding whether to make such an order, and in deciding the amount of a penalty.

32. I also bear in mind that the power under **Section 12A(1)** is discretionary, as evidenced by use of the words "***the Tribunal may order the employer to pay a penalty to the Secretary of State,"*** and in the exercise of my judicial powers, I bear in mind the overriding objective under **Rule 2 of the Employment Tribunal Rules of Procedure 2013** to deal with cases fairly and justly.

33. I must take into account the interests of all parties affected by these Tribunal proceedings, and not just the interests of the respondent employer as the potential paying party, where, if ordered, the ultimate

recipient of any penalty to be paid by the respondents to the Secretary of State is HM Exchequer, and not the claimant.

34. As the respondents did not participate in this Remedy Hearing, and I have received no written representations from them, I have not heard from them on this matter, which I raised, on my own initiative, in my earlier Judgment, nor have I heard from them on their ability to pay, if I were to decide to make a financial penalty order against them.

35. Their failure to make any written representations, or to seek to appear, or be represented, at this Remedy Hearing, is unreasonable conduct of the proceedings by them, and I consider that these features too can fall within the scope of "***aggravating features***".

36. Having decided that the respondents acted in a way that a financial penalty order might be made by the Tribunal, I have also asked myself whether I should exercise my judicial discretion by granting such an order against the respondents.

37. I know from the claimant's email to this Tribunal on 7 June 2022 that the she has not received any payments from the respondents as awarded to her in my earlier Judgment. This Tribunal has no power to enforce that earlier Judgment issued in her favour, but in the event of non-payment, as seems to be the case here, the sums awarded to the claimant are subject to interest payable by the respondents.

38. Further, the claimant can apply to the Tribunal for an Extract of that earlier Judgment to allow her to take steps to instruct Sheriff Officers to execute diligence against the respondents. Any such application should be made by her, in writing, to the Tribunal. The claimant may wish to take advice on this from a solicitor, or voluntary advice centre, such as the CAB, etc.

39. After careful and anxious reflection, I have decided that it is not appropriate for me to make a financial penalty order against the

respondents, not because of any aspect of the respondents' entirely unacceptable conduct, and their failure to pay the sums already awarded to the claimant, but because, to do so, I genuinely believe, would place in jeopardy the chances (if any) of the claimant receiving from the respondents the various amounts that I have already ordered the respondents to pay to the claimant.

40. If I were to make such an order now, the respondents might well decide to give priority of payment to the Secretary of State, rather than the claimant. In these circumstances, I have decided not to make any order under **Section 12A** against the respondents.

41. Accordingly, it is not required that I go on and decide upon an appropriate sum to award against the respondents. What I will say, at this point, is that under **Section 12A(2),** the Tribunal is obliged (rather than permitted) to take into account the respondent employer's ability to pay, when considering whether or not to make an order or how much that order should be for.

42. I have no information before me from the respondents for me to consider their ability to pay, and I did not consider it appropriate to again seek that information from the respondents by correspondence, when there was no guarantee that they would reply, and that would simply have further delayed issue of this my further Remedy Judgment. After all, despite the invitation in my earlier Judgment, the respondents have not communicated with the Tribunal.

43. A check of the Companies House online website, as at the date of this Remedy Hearing, shows the respondents as still an active company. Mr Matthew Campbell is shown as the person with significant control, and he remains a director of the respondent company, as well as a director of another 4 active companies.

44. A confirmation statement was made on 25 February 2022, with no updates, and that was put on the register on 2 March 2022. Further, the Companies House online check shows that, on 2 June 2021, total exemption full accounts made up to 31 March 2021 were filed, with a retained profit carried forward of £34,137. Its next accounts, made up to 31 March 2022, are due to be filed by 31 December 2022.

45. Otherwise, this Tribunal has no information as to the respondents' current trading and financial status, nor any documented, or vouched information, about their current financial circumstances, and so their ability to pay, or not.

Disposal

46. Having carefully considered the matter, I have decided not to make any financial penalty order in favour of the Secretary of State, considering it to be in the interests of justice to make only the monetary awards of compensation payable to the claimant, payable by the respondents, as set forth in my earlier Judgment issued on 19 May 2022.

Employment Judge: **G Ian McPherson**
Date of Judgment: **16 June 2022**
Entered in register: **17 June 2022**
and copied to parties