EMPLOYMENT TRIBUNALS

Claimant: Ms N Dolby v **Respondent:** Ruston Sports and Social Club Limited

Heard at: Nottingham (via CVP) **On:** 30 May 2022

Before: Employment Judge Fredericks

Appearances
For the claimant: Miss S Watson
For the respondent: Mr R Clement

JUDGMENT ON REMEDY FOLLOWING RULE 21 DEFAULT JUDGMENT ON LIABILITY

1. The respondent's name is amended to 'Ruston Sports and Social Club Limited'.

2. The respondent's application to extend time to present a response is refused and the Rule 21 judgment issued on 16 March 2022 stands.

3. The claimant's application for the respondent to pay the legal costs incurred in bringing her claim is refused.

4. In respect of unfair dismissal, it is ordered that the respondent pays the claimant:-

   4.1 £4,326.93 in respect of the Basic Award;
   4.2 £14,572.99 in respect of the Compensatory Award*.

5. The claimant suffered an injury to feelings as a result of the respondent (1) failing to supply a reference and (2) causing her to work in conditions which she considered were unlawful, and so it is ordered that the respondent pay her the sum of £5,000 in compensation.

6. The respondent unreasonably failed to follow the ACAS Code of Conduct in respect of the claimant raising a grievance, and it is considered just and equitable to uplift the total award due to the claimant by 15%.

7. Consequently, the respondent is ordered to pay the claimant the total sum of **£27,484.91.**

8. The Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996 apply, and for those purposes:

   a. The monetary award is £27,484.91;

   b. The amount of the prescribed element is £11,552.31;

   c. The prescribed period runs from 1 October 2021 to 30 May 2022; and

   d. The amount by which the money exceeds the prescribed element is £15,932.60.

9. NB – the Compensatory Award was made up of:-

   9.1 £11,552.31 in respect of past losses (salary and pension contributions lost, after mitigation); and
   9.2 £3,020.68 in respect of future losses (arising from a shortfall to the salary she would have earned at the respondent for a period of 52 weeks).

REASONS

Introduction

1. These reasons are produced at the respondent's request following my refusal of its application to set aside the default judgment in this case and extend time to file its response.

2. The claimant was employed by the respondent as an office manager from February 2014 to 1 October 2021. On 10 January 2022, she issued her claim for automatic unfair dismissal following her raising concerns about the respondent's use of the Coronavirus Job Retention Scheme. The claim was in time following her engagement with the ACAS early conciliation process. The Notice of Claim was sent to the parties on 21 January 2022 and the respondent was required to file a response by 18 February 2022 if it intended to defend the claim.

3. The Tribunal did not receive a response from the respondent on time, and had still not received a response by the time a default judgment under Rule 21 was issued by Employment Judge Ayre on 16 March 2022.

4. This hearing was listed to determine the remedy to be paid to the claimant in the case. The respondent attended the hearing and applied to set aside the default judgment and for the Tribunal to accept its response today. The claimant applied for an order for the respondent to pay her costs of bringing these proceedings.

Respondent's application to file a late response under Rule 20 Employment Tribunal Rules of Procedure

5. The respondent made an application under *Rule 20 Employment Tribunal Rules of Procedure 2013* to set aside the default judgment and extend the time allowed to file a response on 25 June 2022. I heard submissions from Mr Clement and evidence from Mr Terence Hunt in support of the application. Mr Hunt is the director of the respondent whom had been allocated primary responsibility at the respondent for dealing with the claimant and these proceedings. Miss Watson cross examined Mr Hunt on the evidence he gave and the circumstances surrounding the respondent's failure to file an ET3.

6. *Rule 20(1)* requires the application to give reasons for the proposed late filing of the ET3 together with provision of a completed ET3 which the tribunal is being asked to accept late. The respondent complied with this rule, and so I was able to consider the application at the outset of the hearing.

Reasons given for late filing of ET3

7. First, I should say that I extend my greatest sympathies to Mr Hunt for the context against which he had been dealing with these proceedings. Mr Hunt told me that his partner had led on providing a response to the claimant's claim because she had experience in dealing with employment tribunal proceedings. He said that she completed a response form by hand and then posted it, but it seemed to have never been received by the employment tribunal. Tragically, his partner had then passed away and he had not felt able to chase the tribunal about the response. He considered that the response had been filed.

8. There is no proof of postage of the response form, said to have been sent in time, and no copy of the hand written form exists either. The simple fact, though, is that the document was never received by the tribunal. *Rule 16(1) Employment Tribunal Rules of Procedure 2013* requires as follows:

> *"The response should be on the prescribed form and presented to the tribunal office within 28 days of the date that the copy of the claim form was sent by the Tribunal"*.

9. Consequently, it is not the case that proof of service automatically suffices to show compliance; the document must be presented (ie. received) by the Tribunal for a response to be accepted in time.

10. Mr Hunt said that the respondent did not initially react to the sending of the Rule 21 judgment and notice of this hearing because these documents were not received by the respondent. He acknowledged that the address used by the Tribunal was the correct one, and that the initial claim form sent by the Tribunal to that address was received. He had no explanation for why the documents may not have been received other than that they had not been received or, perhaps, not picked up and opened by anybody.

11. Mr Hunt explained that the respondent became aware of the default judgment in late April 2022. He said that the respondent's advisers advised he write to the tribunal to find out the position. He did this on 10 May 2022 and was told by the tribunal on 17 May 2022 that the respondent needed to make an application to file an ET3 late, and also provide that ET3. The respondent's representatives were

appointed on 19 May 2022 and the application made on 25 May 2022. At some point, alternative advisers were courted but were felt too expensive. At least one board meeting happened over this period, on 27 April 2022.

Claimant's submissions on application

12. Miss Watson urged me to refuse the respondent's application. She questioned whether Mr Hunt had really overseen the sending of a handwritten response form where there is no proof at all that he did so. She noted that the respondent has a number of other directors who could and should have dealt with the proceedings during the period Mr Hunt said he was unable to engage following his bereavement. She submitted that the respondent has a tendency to blame correspondence not arriving for failure to act or engage on issues, and referred to examples of that in the correspondence between the parties. It was submitted that this theme ran through the respondent's conduct and that this ultimately undermined the proposed defence. Miss Watson also submitted that the delay between learning of the default judgment and instructing representation, and making the application, was unreasonable. She noted that there was almost a month between a board meeting where advisers were not appointed because they were 'too expensive' and the eventual submission of the application.

13. To further illustrate the points about the respondent's approach to correspondence not being sent or received, I note that paragraph 21 in the proposed Grounds of Resistance asserts that a key e-mail in relation to the claimant retracting her notice and returning to work was not received. That e-mail dated 30 September 2021 was shown to me as part of the documents provided by the claimant for this hearing. I can see that it was sent to five individuals at the respondent, including Mr Hunt. She followed up again with the same message to Mr Easton of the respondent and what appears to be an enquiries inbox on 1 October 2021, and then reminded the same recipients on 4 October 2021 that she had not received a reply to the e-mail of 30 September 2021. The respondent's position on this point alone is simply not credible or accurate.

14. Referring to the relevant case law, Miss Watson concluded that (1) the respondent had no credible or cogent reason for the delay in filing a response, (2) the proposed defence is weak and predicated on assertions which are dis-provable on the evidence available, and (3) the balance of prejudice in the case would lie with the claimant if I allowed the application and the matter continued to trial.

Relevant law

15. When considering any application under the Rules, I must give weight to the tribunal's Overriding Objective, which is contained at <u>Rule 2</u>. This requires –

> *"2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*

> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."*

16. *Kwik Save Stores Limited v Swain and others [1997] ICR 49* provides the factors I should consider when determining an application to extend time to file a response to a claim. These are: (1) the explanation for the delay in presenting a response, (2) the merits of any defence advanced in the response which it is proposed is to be accepted late, and (3) where the balance of any prejudice lies in the granting or refusing of the application.

Refusal of application

17. I refuse the application to extend time to file a response, and so decline to set aside the default judgment. In my view, there is no reasonable explanation for the respondent's delay in sending the response to the tribunal. I am cautious about accepting the assertion that a hand-written response had been sent in the post. The respondent has communicated electronically otherwise in all other engagements. It does not seem likely to me that Mr Hunt would oversee the preparation of such a key document as a defence to the claim, and then not take a copy of it – especially in circumstances where professional advisers had been involved previously.

18. Clearly, I consider Mr Hunt's lack of engagement and delay on acting in this case to be thoroughly excusable. But he is only one director among many, any and all of whom carry the authority and the obligation to deal with the claim on the respondent's behalf. The respondent is the legal entity being sued. The respondent failed to respond. I do not consider that the delay whilst alternative advisers were courted is justifiable either. I cannot, in my judgment, excuse that delay unless the defence offered is meritorious and the balance of prejudice does not weigh against continuing without the response being filed.

19. It is difficult to weigh the strength of the proposed defence without hearing evidence. It is not the sort of case where the defence looks likely to succeed on the face of it – it is a case of conflicting evidence which could only be resolved at a full hearing. In terms of the credibility of the respondent's evidence, though, then I have a similar level of caution as outlined above given the issues with the filing of the ET3 and the apparent willingness to plead obviously incorrect facts as

described in paragraph 13 above. I do not consider that this factor assists in determining the application made one way or the other.

20. In my view, the balance of prejudice clearly weighs against granting the application. The claimant is seeking a remedy for events that she has found obviously distressing. I understand that the claimant is on medication as a result of the matters leading to the claim and that the continuing of this litigation is likely to impact on her recovery. She has complied with all of the requirements and obligations placed upon her in this litigation and, in my view, she is entitled to the benefit of a remedy judgment.

21. Further, the trial window which had been listed for September 2023 has been vacated already. Any new listing is likely to lead to further delay, and further cost to both parties. This, added to the factors considered above, leads me to conclude that granting the application would not be in accordance with the overriding objective. The application is consequentially refused.

Determination of Remedy

22. The claimant filed a schedule of loss dated 4 March 2022, and then an updated schedule of loss dated 19 May 2022. In her updated schedule of loss, the claimant claimed:

    22.1 Basic award of £4,326.93;

    22.2 Total past losses of £11,552.31 (after mitigation);

    22.3 Future losses of £3,020.68 (claimed for a 52 week future period after mitigation);

    22.4 £10,000 in respect of injury to feelings; and

    22.5 A 25% uplift to the award to reflect a claimed unreasonable failure to follow ACAS Codes of Practice (relating to the grievance raised).

23. I made no adjustment to the basic or past or future losses claimed. It is clear to me that the claimant took steps to mitigate her loss. I queried the justification for awarding future losses as far as a year into the future, but I am satisfied that the claimant may struggle to get an equivalent paying role in the sector following the Covid pandemic and I also note that the amount claimed is relatively modest as a result of the claimant's efforts to mitigate her losses.

Injury to feelings and Vento

24. The claimant's original schedule of loss requested £5,000 to compensate for injury to feelings. The new schedule of loss requested £10,000. The remedy flows from the claimant's detriment claim under s47B Employment Rights Act 1996. It is said that the claimant's failure to provide a reference has caused further detriment and distress resulting in a delay to the claimant starting new employment. I was also drawn to the case of *Lough v Taaks of Scotland and Another (ET/4107889/20)*, where a first instance Employment Tribunal took into account the claimant's

concern that they were being asked to work in breach of 'furlough' regulations. This is analogous to the claimant's case, where such a concern formed part of her grievance against the respondent.

25. An award for injury to feelings is to compensate the claimant for the injury they have suffered and, when deciding an award, I should focus on the injury rather than the gravity of the act committed by the respondent (*Komeng v Creative Support Ltd UKEAT/0275/19/JOJ*). The general principles when considering the remedy are drawn from *Prison Service v Johnson [1997] IRLR 162*:

    25.1 Awards are compensatory and should be just to both parties to compensate fully without punishing the perpetrator or allowing feelings of indignation affect the decision;
    25.2 Awards should not be too low to ensure that the cause of the claim is respected, but not too high so that the claimant enjoys untaxed riches;
    25.3 Awards should bear some broad general similarity to the whole range available in personal injury cases;
    25.4 Tribunals should take in account the value of everyday life by reference to purchasing power or by reference to earnings; and
    25.5 Tribunals should keep in mind the need for public respect for the level of awards made.

26. *Vento v Chief Constable of West Yorkshire Police (No2) [2003] IRLR 102* found that compensation can be awarded for subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression.

27. *Vento* then set the possible ranges of awards which should be paid and separated them into three 'bands': lower; middle; and upper. These ranges have been amended in subsequent cases culminating in *De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879*. Following this, the Presidents of the Employment Tribunals of England and Wales, and Scotland, issued Presidential Guidance which, now in its 15th Edition, and that guidance sets the current *Vento* bands as follows:

    27.1 Lower Band, for less serious cases which are an isolated or one-off occurrence causing the injury to feelings: £900 to £9,100;
    27.2 Middle Band, for serious cases which do not merit the Highest Band: £9,100 to £27,400; and
    27.3 Upper Band, for the most serious cases involving a prolonged course of discrimination or harassment on the grounds of sex or race: £27,400 to £45,600.

28. Whilst it is possible to award more than £45,600, this should be reserved only for the most exceptional cases.

29. For an award to be made, I must be satisfied that the injury to feelings has occurred and that it has occurred because of the action or incident identified. Where the link between those two is clear, it might be sufficient for the claimant to

simply say that they were upset by the action (*Murray v Powertech (Scotland) Limited [1992] IRLR 257; Ministry of Defence v Cannock [1994] ICR 918*).

30. It is said that the claimant's treatment in this case should lead to an award within the Middle Band. I do not agree and, without wishing to in any way diminish what happened to the claimant, consider that the Lower Band remains appropriate in the claimant's case. I note that there is not a great deal of evidence from the claimant about her injury to feelings other than what is said on her behalf about her stress and anxiety and medication. I am conscious that the period of time over which the injury to feelings are said to occur is quite short.

31. Finally, it appears that the claimant and her advisers accepted in March 2022 that the award for injury to feelings should fall in the Lower Band and at £5,000. I was not given a convincing explanation as to why the remedy claim under this head doubled. I consider that £5,000 is the appropriate amount to award under this head of claim and so this is what I order.

Unreasonable failure to follow ACAS Codes of Practice

32. Where there has been an unreasonable failure to follow ACAS codes of practice on the part of the employer, the tribunal is able to uplift an award by up to 25% if it considers it just and equitable to do so (*s207A(2) Trade Union and Labour Relations (Consolidation) Act 1992)*. The tribunal is also able to reduce an award by up to 25% if it is considered just and equitable to do so in circumstances where an employee has unreasonably failed to comply with ACAS codes of practice (*207A(3) Trade Union and Labour Relations (Consolidation) Act 1992*).

33. The claimant claimed a 25% award. To award this, I must be satisfied that it would be just and equitable to do so. It is said that the claimant raised a grievance in relation to working during furlough and that, instead of dealing with the grievance in the way outlined by the ACAS code, the respondent's manager effectively threatened her over the complaint and then put her in the position where she felt that she must leave the respondent's employment. The claimant left the organisation shortly thereafter. There has been a default judgment in the case, and so by default the claimant's case is accepted in full.

34. I consider that the matters described do reflect an unreasonable failure to deal with the grievance in the way outlined by ACAS. However, to award the maximum amount, the respondent would in my view have had to have failed entirely to deal with any issues, and this includes them failing to deal with the grievance having had the full opportunity to do so. The fact that the claimant then left in too short a time frame for the respondent to deal with the grievance does tend away from making a maximum award. Consequently, I consider it just and equitable to award an uplift of 15% under this head instead.

Claimant's application for costs

35. The claimant applied for costs on the grounds that, essentially, the respondent failed to engage properly with her claim at the pre-action stage and then neglected to engage with the proceedings resulting in the issuing of the default judgment. It

was said that this was unreasonable conduct of litigation which had led to the claimant incurring additional legal cost.

36. I am satisfied that the factual assertions made by the claimant are true. The respondent did not respond to the claimant's pre-action correspondence. Settlement negotiations, to the extent there were any, were not ultimately successful. The respondent was under an obligation to file a response if it was to defend the claim and it did not do so. I can see why the claimant would argue that this was unreasonable behaviour such that a costs award should be made.

37. However, I remind myself that costs awards in the Employment Tribunal are to be an exception rather than a rule and that there must be some element of conduct of proceedings which is wholly unreasonable for an award to be made under such an application. I asked Miss Watson why the falling into default judgment by the respondent should lead to an award of costs, observing that such occurrences are common and that ultimately the claimant has been saved costs by the respondent being rendered unable to defend the claim. Miss Watson could not give me a persuasive answer, and I cannot think of a reason why I would exercise my discretion to award costs in the circumstances of this case.

38. The costs application was accordingly refused.

Employment Judge Fredericks

Date: 12 August 2022

Sent to the parties on:

…………………………….
For the Tribunal Office:

……..……………………..

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