



EMPLOYMENT TRIBUNALS

Claimant: Mrs Rebecca Bush
Respondent: White's Care Limited
Heard at: Norwich Employment Tribunal
On: 21 April 2023
Before: Employment Judge Hutchings

Representation

Claimant: Ms Gilson (lay representative)

Respondent: Ms Barlay (Senior Litigation Consultant, Peninsula)

JUDGMENT having been sent to the parties on 21 April 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant, Mrs Rebecca Bush, was employed by the respondent, White's Care Limited, as a health care assistant from 18 November 2018 to 24 May 2021. By claim form dated 1 November 2021 the claimant claimed maternity discrimination, breach of contract, breach of part time worker regulations, holiday pay and other payments. Early conciliation started on 23 August 2021 and an Acas Certificate was issued on 4 October 2021. By Judgment dated 10 March 2023, following confirmation by the claimant at a hearing before Employment Judge Postle on 1 March 2023 that, although she ticked the box on the Claim Form for pregnancy and / or maternity discrimination, there is no claim for pregnancy or maternity discrimination, these claims were dismissed upon withdrawal.
2. The Employment Tribunal has no record of receiving the response the respondent says it submitted on 23 December 2021. The Tribunal listed a hearing on 1 March 2023. A notice of hearing was sent to the respondent on 7 December 2022. It states:

"The respondent has failed to present a valid response on time and a Judgment has been issued against the respondent under Rule 21. A remedy hearing will now take place at **Norwich Magistrates' Court and Family Court, Bishopgate, Norwich, NR3 1UP on 1 March 2023 at 10:00.**"
3. The respondent did not attend the hearing on 1 March 2023 at which the respondent's reconsideration request dated 30 December 2022 would have been considered. At this hearing Employment Judge ('EJ') Postle made orders to prepare for a hearing on 21 April 2023 to determine how that hearing would proceed on reconsideration, liability and remedy.

Preliminary matters

4. In making the request for written reasons the respondents representative states: "A remedy hearing took place in front of Judge Hutchings on 21/4/23. This was initially meant to be a full merits hearing."
5. The representative appears to suggest that a liability hearing did not take place. A liability hearing did take place. However, it took place in the context of the Tribunal having found, for the reasons stated below, that the respondent had repeatedly failed to comply with Orders of the Tribunal. As such the Tribunal proceeded on the basis of claimant evidence only (refusing the reconsideration request for the reasons below), found liability in favour of the claimant and subsequently addressed remedy. The approach taken by the Tribunal on 23 April 2023 was correct, complying with the Case Management Order dated 16 March 2023 following the hearing before EJ Postle 1 March 2023. A liability hearing took place on 23 April 2023.
6. At the 1 March hearing, despite no explanation being provided to the Tribunal prior to the hearing as to why the respondent did not attend, EJ Postle vacated the liability hearing and relisted it for 23 April 2023. While neither the respondent nor its representative attended that hearing, the Case Management Order ('CMO') was sent to the respondent (and claimant) on 26 March 2023. Paragraph 1.2 states that the hearing on 23 April 2023:

"....will either be for a Remedy Hearing or, if the Respondents did not file their Response by 23 December 2021, or alternatively an Application for Reconsideration, or possibly a Full Merits Hearing to determine the Claimant's claims for unpaid wages and holiday pay."

7. The hearing on 23 April 2023 proceeded on the basis of this direction as a liability and remedy hearing. It seems from the request for written reasons that the respondent's representative has misunderstood the full purpose of the hearing on 23 April 2023. Whether that hearing could proceed as a liability hearing in the first instance was conditional on the Orders made in this CMO of which the respondent received a copy and the respondent's own compliance with those Orders. Indeed, this was how the hearing proceeded in that throughout the hearing the respondent's representative was not cognisant of the orders in this CMO.

Issues for the Tribunal

8. Based on the CMO dated 16 March 2023, I set out below the issues the Tribunal had to decide at the hearing on 23 April 2023, which were explained to the parties at the hearing.
9. Whether parties had complied with the CMO in submitting evidence to each other and to the Tribunal; if not, why not?
10. The relevant Orders are:
 - 10.1. The respondents must file the attachment / documents / ET3 and Response, said to have been filed at the Watford Employment Tribunal by email of 23 December 2021 and to disclose any Employer's Handbook which is incorporated into the employees' Contract of Employment which supports the proposition that periods of suspension are without pay. The CMO states the deadline for submitting these documents to the claimant and the Tribunal as "7 days from the date this Order is sent out to the parties". Accordingly, as the CMO was sent out to parties on 26 March 2023, the deadline by which the respondent had to submit these documents was **4 April 2023**.

10.2. Each party shall prepare a witness statement in relation to the matters to be determined at the Full Merits Hearing, in the case of the Claimant setting out the shifts worked and not paid for and shifts planned and not paid for during a period of suspension. The Respondent to prepare an appropriate witness statement setting out the reasons why those shifts were not paid for, together with any supporting evidence. Parties were ordered to exchange witness statements "on **Friday 14 April 2023**".

11. I note that the CMO states:

"Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and / or (d) awarding costs in accordance with rule 74-84."

12. If I find that the respondent had complied with the Orders, or I must consider the respondent's application dated 1 March 2023 at 9.22am for Consideration of the decision not to accept the Response form, and / or an Application to Extend Time to accept a Response".

13. If I find that the respondent has not complied with the above Orders I must decide applying rule 6 such action I consider just.

14. If I reconsider and do not accept the ET3, I will determine liability based on the evidence of the claimant only.

15. If I reconsider and accept the ET3 I will determine liability based on the evidence of both parties.

16. The claims to determine are whether the claimant:

16.1. was paid for shifts on 19, 20, 21 of May 2021 and shifts planned for 22 and 23 May 2021; and

16.2. accrued 65.25 hours of holiday pay accrued which was not paid.

17. For completeness it is noted that, given non-attendance by the respondent without explanation, which meant further progress could not be made and therefore wasting Tribunal time and resources, EJ Postle also exercised his discretion to order the respondent to pay the claimant's Preparation Time Costs in the sum of £84 (2 hours).

Procedure, documents and evidence

18. The claimant was represented by a lay representative and gave sworn evidence. The respondent was represented by Ms Barley and called sworn evidence from Mr Jack White. I had the benefit of a 171-page hearing bundle.

Findings of fact

19. I find as a fact that the respondent failed to comply with any of the Orders in the CMO of EJ Postle dated 16 March 2023, which it was sent on 26 March 2023. The claimant told me that she did not receive the electronic hearing bundle and witness evidence from the respondent until the evening of 22 April 2023. Tribunal correspondence records, and I find as a fact, that: "The Respondent's Representative has informed me over the phone this afternoon that they will provide hard copies of the Bundle at the Hearing tomorrow and will endeavour to send an electronic version of this Bundle to

the Tribunal this evening.” This was recorded on the case file and discussed at the hearing.

20. The respondent’s representative was asked several times to explain why the evidence was sent to the claimant after the dates in the CMO, and not until the evening before the hearing when the Tribunal chased for it. Ms Barley referred to the illness of Mr White. By letter dated 20 April 2023, the Tribunal refused the respondent’s request, sent 19 April (therefore several days after the last deadline) to postpone the hearing on the basis: “The medical evidence attached does not seem to give any information as to why the application could not have been made sooner, nor why it is not possible for Mr White to attend.”
21. This letter is many and several days respectively after the evidence deadlines of 4 and 14 April 2023 and does not offer explain why these dates were not met. Mr White’s illness was not only not evidenced, but it was also after the deadlines. Neither before or at the hearing has the respondent’s representative offered any explanation as to the respondent’s failure to comply with the CMOs. In reply to the Tribunal’s questions, she referenced the reconsideration application rather than an explanation for the non-compliance. As was explained to parties at the hearing, whether the Tribunal could proceed to hear the application for reconsideration could not be determined until the Tribunal understood the reasons for non-compliance and was satisfied that a fair hearing could take place.
22. I find that, due to the respondent’s very late filing of evidence (the evening before the hearing) without any explanation for the delay, the respondent has failed to comply with Orders of the Tribunal, again without providing any explanation to the Tribunal and as such a fair hearing cannot take place as the claimant has had no time to consider the respondent’s evidence. These breaches of the CMO entitles the Tribunal to “*take such action as it considers just*” including striking out the response (rule 6).
23. This case is curious as the Orders breached by the respondent were made by EJ Postle to have the purpose of enabling the respondent to have its application for reconsideration for its response to be submitted. In this regard, in filing the evidence late and failing to comply with Tribunal Orders it has sabotaged it’s right to reconsideration regarding its ET3.
24. I find that by its failures to comply with evidence order the respondent has prejudiced itself in that the Tribunal cannot hear the application in the absence of evidence (that evidence being significantly out of time). I find that the claimant, who is not legally represented, is extremely prejudiced by the respondent’s disregard of the Tribunal’s Orders in receiving evidence the evening before the hearing. This did not allow her sufficient (indeed any) time to consider the evidence and her response to it at the hearing today. I find the behaviour of the respondent, who is represented, in failing to attend the hearing on 1 March 2023 without explanation and failing to comply with any of the Orders made at the hearing not only vexatious but also prejudicial to itself. It is difficult to understand why when a respondent is seeking reconsideration it would not ensure that it had complied with the dates for evidence which would enable that reconsideration application to proceed fairly. It did not do so.
25. Without the evidence, which is out of time, the claimant cannot fairly respond to that reconsideration application. For these reasons I find that that application cannot proceed. To proceed would be contrary to the overriding objective of the Employment Tribunal to deal with cases fairly and justly, including ensuring that the parties are on an equal footing. The respondent’s actions in sending evidence to the claimant the evening before the hearing has resulted in parties not being on an equal footing in considering the application for reconsideration.

26. The respondent's representative is reminded that they have a duty set out in Rule 2 to "assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal." I find that in sending evidence to the respondent the evening before the hearing and not offering any explanation to the Tribunal the respondent and its representative have failed to do so.
27. On the evidence in the claimant's witness statement and to me at the hearing I find that she was not paid for shifts on 19, 20, 21 of May 2021 and shifts planned for 22 and 23 May 2021 and accrued 65.25 hours of holiday pay accrued which was not paid.

Law

Rule 6 Irregularities and non-compliance

6. *A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following— (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; (d) awarding costs in accordance with rules 74 to 84.*

Effect of non-presentation or rejection of response, or case not contested

21.—(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. (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.](a) (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.*

Costs orders and preparation time orders

75.—(1) *A costs order is an order that a party ("the paying party") make a payment to— (a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative; (b) the receiving party in respect of a Tribunal fee paid by the receiving party; or (c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal. (2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing. (3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make. 25 When a costs order or a preparation time order may or shall be made*

76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that— (a) a party (or that party’s representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success; [or (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins].(a) (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party. (3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if— (a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and (b) the postponement or adjournment of that hearing has been caused by the respondent’s failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment. (4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer’s contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party. (5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

Rules on reconsideration

Principles

70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision (“the original decision”) may be confirmed, varied, or revoked. If it is revoked it may be taken again.

Application

71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

Process

72.— (1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused, and the Tribunal shall inform the parties of the refusal. Otherwise, the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge’s provisional views on the application. (2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations. (3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who

made the original decision or chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

Conclusions

28. I set out my conclusions by reference to the issues for determination by this Tribunal.
29. First, I must consider whether parties had complied with the CMO in submitting evidence to each other and to the Tribunal. I have found that, in breach of the CMO, the respondent failed to comply with the evidence deadline of **4 April 2023 and deadline for witness statements of 14 April 2023**. I have found the claimant received the evidence the evening before the hearing. I have found that the respondent has provided no explanation for these breaches of the CMO.
30. Applying rule 6 as the respondent has not complied with the orders a Tribunal may take such action as it considers just. I have found the claimant is prejudiced by these breaches in that she did not have time to consider the evidence and prepare a response to the application for reconsideration. In these circumstances I do not consider it fair for the respondent's application dated 1 March 2023 for "Consideration of the decision not to accept the Response form, and / or an Application to Extend Time to accept a Response" to be considered at this hearing. As this is the second opportunity the respondent has had at a hearing for its application to be considered (it did not attend nor explain non-attendance at the first), I conclude it is just and fair not to adjourn to another date to consider the application for reconsideration. The reason for this is the respondent's own conduct in failing to attend the first hearing and failing to provide the evidence in support of the application until the evening before the second hearing.
31. Therefore, the liability hearing proceeds on the basis of the claimant's evidence only, and in the absence of an ET3, the Tribunal having no record of receipt of the ET3. Accordingly, I apply rule 21. As there is no response before me, I determine liability in this claim in favour of the claimant, having found on the evidence she presented to the Tribunal that she was not paid for shifts on 19, 20, 21 of May 2021 and shifts planned for 22 and 23 May 2021 and accrued 65.25 hours of holiday pay accrued which was not paid. The claimant told me she had not received the costs award of £84 made by EJ Postle at the hearing on 1 March 2023. I conclude this is outstanding.
32. The respondent's representative shall note that, in this regard, a liability hearing did take place on 23 April 2023. The respondent has no-one but itself to blame that the reconsideration application could not be heard. It was given deadlines by EJ Postle for evidence to enable the Tribunal to fairly hear the reconsideration application. It failed, without explanation, to comply with these deadlines. The respondent has shown disregard for Orders of the Tribunal not once but twice.
33. The respondent and its representative having failed to comply with any of the Orders made by Judge Postle on 1 March 2023 and sent to the parties on 26 March 2023, there is no response before the Employment Tribunal and given the respondent's failure to comply with the Orders the reconsideration request could not proceed. Accordingly, Judgment on liability is entered for the claimant and remedy awarded.
34. In accordance with rule 21 of the Rules of Procedure the claimants claims of unlawful deduction from wages and holiday pay are upheld and the respondent must pay the claimant £1,292.50 as follows:

- 34.1. The respondent has made unauthorised deductions from the claimant's wages and must pay the claimant £470 gross.
 - 34.2. The respondent has failed to pay the claimant's holiday entitlement and must pay the claimant £652.50.
35. The respondent must also pay the claimant £84 preparation time costs as ordered by Judge Postle on 1 March 2023.

Employment Judge Hutchings

16 June 2023

REASONS SENT TO THE PARTIES ON

21 June 2023

GDJ

FOR THE TRIBUNAL OFFICE