Case Number: 3305392/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Jodie Brownbill	**v**	Enlightenment Care Services

Heard at: **Cambridge Employment Tribunal** **On:** 28 April 2023

Before: Employment Judge Freshwater

Appearances
For the Claimant: In person
For the Respondent: Mrs Singh (Senior Litigation Consultant)

RESERVED JUDGMENT

1. The respondent's application to present the ET3 form out of time is refused.

2. Under Rule 21 of the Employment Tribunal Procedure Rules, the claimant's claim for unfair dismissal is well-founded.

3. The remedy awarded to the claimant is as follows:

Basic award - £483.86 (gross)
Compensatory award - £15,238.50

TOTAL AWARD - £15,722.36

4. The recoupment provisions apply to the compensatory award in this case.

RESERVED REASONS

Introduction

1. The claimant is Jodie Brownbill. The respondent is Enlightenment Care Services, which is a company that provides care workers who support people in their homes.

2. The claimant was employed by the respondent as a care worker from 10 October 2019. The circumstances in which her employment came to an end were the subject of her claim to the employment tribunal.

3. The claimant submitted an ET1 claim form which was accepted by the tribunal on 9 May 2022. The claim was sent by the employment tribunal to the respondent on 1 June 2022. This meant that the date by which the respondent had to respond (by way of the ET3 form) was 29 June 2022.

4. The respondent did not respond to the claim.

5. On 9 January 2023, the employment tribunal wrote to the claimant. That letter explained that the respondent had failed to present a response to claim within the necessary time frame and that a judgment could not be issued. However, an employment judge was unable to consider whether to do this in the absence of information about how much was being claimed and how this amount had been calculated. This information was requested. Additionally, the employment tribunal listed the case for a remedy hearing on 28 April 2023.

6. On 4 April 2023, the tribunal received a letter from the respondent's representatives setting out the respondent's application under rule 20 of the Employment Tribunal Procedure Rules 2013, and draft ET3 with particulars of response.

7. An employment judge directed that the respondent's application would be dealt with on the date of the listed remedy hearing.

Procedure and hearing

8. The hearing was in person.

9. The claimant's father (Mr Brownbill) observed the hearing and supported the claimant.

10. First, I determined the respondent's application to submit the ET3 response out of time.

11. Second, having refused that application, I made a judgment that the claimant's claim for unfair dismissal was well-founded.

12. Third, I proceeded with the remedy hearing originally listed for today. I heard evidence from the claimant. I allowed the respondent's representative to ask questions of the claimant in cross-examination, and to make submissions on remedy. This was the extent of the participation in the proceedings permitted, given that no response had been filed.

13. Judgment was reserved.

Application for extension of time to respond to the claim

14. It was said on behalf of the respondent that initially the paperwork in the case had not been received from the tribunal. This included the claim form and correspondence. The respondent had moved offices sometime after the claim was issued. It was submitted that the upheaval of planning an office move had meant that the claim was overlooked. Further, that the respondent had not appreciated the gravity of the situation in not responding to the claim.

15. The claimant opposed the application. She said that the respondent had not been truthful in the late ET3 form and pointed out there had been plenty of time to respond.

16. I refused the application and gave brief reasons orally. I explained that I would set out my full reasons in writing.

Decision: application for extension of time to respond to a claim

17. Rule 20 of the Employment Tribunal Procedure Rules 2013 sets out the procedure for applications for an extension of time to present a response to a claim in the employment tribunal.

18. In reaching my decision, I considered the case of *Kwik Save Stores Ltd v Swain and ors 1997 ICR 49, EAT*, which set out the correct test for determining what was 'just and equitable' under previous versions of the rules. It remains relevant to the question of whether, having regard to the overriding objective, an application for an extension of time to submit a response under rule 20 should be granted.

19. In particular, the EAT held that, when exercising a discretion in respect of the time limit, a judge should always consider the following:

    (i) the employer's explanation as to why an extension of time is required. In the EAT's opinion, the more serious the delay, the more important it is that the employer provide a satisfactory and honest explanation. A judge is entitled to form a view as to the merits of such an explanation

    (ii)the balance of prejudice. Would the employer, if its request for an extension of time were to be refused, suffer greater prejudice than the complainant would suffer if the extension of time were to be granted?

    (iii)the merits of the defence. If the employer's defence is shown to have some merit in it, justice will often favour the granting of an extension of time — otherwise the employer might be held liable for a wrong which it had not committed.

20. I did not find the respondent's explanation as to why an extension of time is required to be satisfactory. I accept that the explanation was honest. However, the fact is that the respondent was aware of the claim in June 2022. This is evidenced by correspondence between an ACAS conciliator and the Mr Hemmington Kwambana (who is the respondent's Head of Operations). On 20 June 2022, Mr Kwambana was told by ACAS that the return date to submit a response to the claim was 29 June 2022. On 21 June 2022, Mr Kwambana contacted the tribunal office to say that he had not received any correspondence. On 29 June 2022, the tribunal sent him a copy of the correspondence by email. On 30 June 2022, Mr Kwambana emailed the tribunal to seek an extension of time. It is unclear to me if any response was received. The respondent's representative did not know. In any event, the email request was not an application made in accordance with Rule 20 of the 2013 Rules.

21. It does not seem that the respondent made any effort thereafter to enquire about the extension requested. It was not until April 2023, after the remedy hearing had been fixed, that the respondent sought again to request an extension. This time, the request was in accordance with Rule 20 of the 2013 Rules.

22. Even on the respondent's own explanation, the respondent chose not to deal with the claim. It may be the case that there was upheaval in the run-up to moving offices, but this does not negate the need to comply with legal obligations for such a long period of time.

23. It is clear that the respondent will suffer prejudice as a result of being unable to defend the claim. However, this is because of the lack of action taken. There would be prejudice caused to the claimant if the respondent were now able to defend the claim, given the length of time since the incidents in question. In my view, the potential for delay outweighs the prejudice to the respondent who had the opportunity to apply for an extension to respond to the claim in June or July last year when alerted to the relevant date by ACAS.

24. In respect of the merits of the defence, this is finely balanced. The gist of the draft particulars of response is that the claimant was not dismissed at all and if she was, it was operational reasons not for making a protected disclosure. Without hearing the evidence, it is difficult to ascertain the merit in the case. However, it seems to me that the particulars of response lack great detail. They do not deal with why the claimant last worked for the respondent on 1 April 2022 or what the operational reasons mentioned might be. On that basis, I am not satisfied that there is much merit at all in the defence presented.

<u>Rule 21</u>

25. The response received has been rejected because it is out of time, and the application for extension of time has been refused.

26. I have considered whether a judgment on the claim, or part of it, can properly be made. Judgment can properly be made on the claim for unfair dismissal, which is said to be automatically unfair due to detriment caused by making a protected disclosure.

27. Judgment cannot properly be made in respect of the part of the claim relating to unpaid holiday pay. This is because I overlooked that part of the claim today. Although the claim for states there is a claim for unpaid holiday pay, there is no detail in the schedule of loss as to what is sought. I do not know how much holiday the claimant says she is entitled to be paid for. Further information is required to deal with liability and remedy for that part of the claim. This will be dealt with in a separate case management order and subsequent Rule 21 judgment or hearing if necessary. If the claimant does not wish to pursue this claim, then she is able to withdraw it.

Decision on remedy

28. The claimant relied on the schedule of loss she had sent to the tribunal the respondent in advance of the hearing today. She explained that she had not worked for the respondent since April 2022. Since then, she had worked on an ad hoc agency basis. She supplied payslips to show that she had earned £251.20 from the agency. She was in receipt of universal credit. In February 2023, she became a part-time student (studying two days a week).

29. The claimant explained that as a result of losing her employment, she could no longer afford to keep her car and had to take her son out of nursery.

30. The law states that the basic award in a case of unfair dismissal is 1 week's gross pay for each year of employment in which a claimant is below the age of 41 but not below the age of 22; and ½ a week's gross pay for each year of employment in which they were below the age of 22. The claimant was below the age of 22 at all relevant times (namely until April 2022, when she was unfairly dismissed). She was employed for 2 full years before her dismissal. This means that she is entitled to a basic award of 2 x ½ a week's gross pay (which equals 1 week's gross pay). This is £483.86. I calculated this amount by multiplying her gross monthly pay (£2096.74) by 12 (as there are 12 months in a year) and dividing this by 52 (as there are 52 weeks in a year).

31. Section 123 of the Employment Rights Act 1996 provides that the compensatory award shall be: '…such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by

the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer."

32. The claimant is entitled to compensation for her immediate loss of earnings. The starting point is that those are the net earnings between the effective date of termination of her employment and the date of this remedy hearing. However, I must take into account that an employer's liability will normally cease before the date of the remedies hearing if the employee has (or ought to have) got a new permanent job paying at least as much as the old job as there will no longer be a loss arising from the dismissal.

33. In this case, the claimant's evidence was that she had sought other work. However, she was unable to find a job that she could do around her childcare commitments. I am satisfied that she tried to work – this is evidenced by the agency work she undertook. I accept her evidence that she was unable to find suitable work. I have taken into account that in February 2023, the claimant decided to study rather than seek any work. For that reason, I have decided that the claimant is entitled to net take home pay from (and including) April 2022 until January 2023. That is 10 months. 10 x £1548.97 is £15, 489.70. I have deducted the sum of £251.20 which is claimant's earnings from agency work during the period in question. Therefore the award for loss of earnings is £15,238.50.

34. As the claimant has decided to pursue her studies, I do not find it is just and equitable to award compensation for future loss of earnings. The claimant did not explain why she had decided to become a student rather than seek full time work.

35. The claimant was in receipt of universal credit. This means the recoupment provisions apply. The Department of Work and Pensions will advise the respondent how much was paid in state benefits and recover this amount from the respondent. The respondent must pay the balance to the claimant.

36. The prescribed element is the part of the award relating to loss of earnings (this is the compensatory award).

37. The prescribed period is 22 April 2022 until 28 April 2023. This is the effective date of termination until the remedy hearing.

38. The total award in this case is £15,722.36.

39. The balance for recoupment purposes is £15,238.50.

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Employment Judge Freshwater

Date: 13 July 2023

Sent to the parties on: 17 July 2023

For the Tribunal Office