EMPLOYMENT TRIBUNALS

Claimant: **Joanne Locke**

Respondent: **Penketh Parish Council**

Heard at: **Manchester Employment Tribunal**

On: **26 February 2025**

Before: **Employment Judge Tobin (sitting alone)**

Appearances
Claimants: in person
Respondent: Ms E Afriyie (litigation consultant)

JUDGMENT

The Employment Tribunal determines as follows:

1. **The Response was presented out of time and, pursuant to rule 21 of the Employment Tribunal Procedure Rules 2024, the respondent's application for a time extension is refused.**

2. **The claimant's claim that she suffered an unlawful deduction of wages and breach of contract is well founded. The claimant was not paid her accrued and untaken annual leave entitlement amounting to £423.60 gross. The claimant is also owed pay for her notice period of £423.60 gross.**

3. **The respondent is ordered to pay the claimant the amount of £847.20. This award is made gross and may be liable for deduction for tax and national insurance, if appropriate. The respondent may make appropriate deductions so long as this is confirmed to the claimant in writing and appropriately accounted to HMRC.**

REASONS

The case

1. A Claim Form was received at the Employment Tribunal on 12 November 2024; this was after an extensive period of Acas Early Conciliation between 27 September 2024 and 8 November 2024. The details of claim were brief. The claimant said that she resigned from her employment in August 2024. She claimed that she was due her holiday pay and her final week's pay as notice and that these had not been received by the time she issued proceedings.

2. The Tribunal sent the respondent a notice of claim and notice of hearing which advised that a Response was due on 18 December 2024. The claimant sent documents related to her claim to both the respondent and the Tribunal on 10 December 2024.

3. On 16 January 2025 Cllr Michael Potts wrote to the Tribunal saying that he had been advised by his legal representatives to obtain a Notice of Claim and Claim Form from the Tribunal as these had not been received. This request was compiled with immediately by the Employment Tribunal and the next day (i.e. 17 January 2025) the respondent's representatives (Peninsula) went *on the record*. At this point the Response was over 4 weeks out of time.

4. The respondent did not present a Response until 26 February 2025, which was the day of this hearing. The Response was accompanied by an application to extend time for presenting the Response.

The law

Time limits for presenting the Response

5. The respondent must make sure that the completed Response form is returned to the relevant Employment Tribunal office within 28 days of the date on which the copy of the Claim Form was sent by the Tribunal: Rule 17(1) Employment Tribunal Procedure Rules 2024. If a Response is presented outside the 28-day time limit (or any extension of that limit granted within the original limit), it will be rejected by the Tribunal. This is the case unless an application for an extension of time has already been made under rule 21 or the Response includes or is accompanied by such an application, in which case the Response will not be rejected pending the outcome of that application: rule 19(1) and (2).

6. Under the Procedure Rules, a Tribunal can, at its discretion, accept a Response presented outside the time limit — provided the respondent offered a satisfactory explanation for the late submission, showed a meritorious defence, and the extension did not unduly prejudice the claimant.

7. A Tribunal has a discretion to extend the time limit for presenting a Response. The discretion is usually exercised in accordance with the overriding objective to deal with

cases “fairly and justly” (in rule 3). I apply the test set out in *Kwik Save Stores Ltd v Swain & Ors 1997 ICR 49 EAT* notwithstanding that this test was made under previous Employment Tribunal Rules of Procedure.

8. In *Kwik Save* the employer’s Responses in respect of 3 claimants’ claims were entered between 14 and 26 days late. The employer applied for extensions of time, admitting that its failure to comply with the time limits had been due to an oversight. The Employment Judge found the employer’s explanation to be unsatisfactory and refused to grant the extensions of time. The employer appealed to the Employment Appeal Tribunal (“EAT”), arguing that the Judge had exercised his discretion incorrectly. The EAT stated that ‘the process of exercising a discretion involves taking into account all relevant factors, weighing and balancing them one against the other and reaching a conclusion which is objectively justified on the grounds of reason and justice’. 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 may often favour the granting of an extension of time — otherwise the employer might be held liable for a wrong which it had not committed.

9. Guidance on what is now rule 21 of the Procedure Rules was provided in *Thorney Golf Centre Ltd v Reed 2024 EAT 96*. The EAT held that when deciding whether to extend time, the starting point should be a consideration of the extent of the delay in presenting the Response. The more serious the delay, the more important it is that the respondent provide a full and satisfactory explanation. If a late Response is not accompanied, or preceded, by an application for an extension of time, the Tribunal should also consider the delay in making the application and why that was not done sooner. In circumstances where the Tribunal has raised the matter of a failure to make such an application at the same time as submitting a late Response, consideration should be given to how promptly the respondent then makes the application to extend. Where there has been further delay in the Tribunal determining the application, which can be attributed to the unreasonable conduct of a party or some specific further development which should have a bearing on the balance of prejudice, this may also be taken into account. The balance of prejudice between the parties should be considered as at the point that the application to extend was made. Furthermore, when assessing the extent of the prejudice that would be caused to the respondent if the extension of time were refused, the impact of the respondent not being able to advance its case on the substantive merits of the claim should be considered.

10. In *Werner v University of Southampton ET Case No.1404855/18*, a case falling under the 2013 Tribunal Rules, an Employment Tribunal applied the guidance set out in the *Kwik Save* case and decided to grant an extension of time for the respondent to submit a Response, which had the effect of setting aside a default judgment by which W had been awarded nearly £3.5 million as compensation for his claims. The respondent, who failed to enter a Response on time, applied for an extension of time under what is now rule 21, explaining that the failure to submit the Response was due to a 'catalogue of errors' for which it felt significant regret and offered apologies. The respondent's legal team admitted that it had been overwhelmed and had not done that which, objectively, it should have done. Among other things, a senior member of the team had been dealing with significant domestic matters and needed extra time off, and while there had been a plan to train up a chartered legal executive to deal with employment law matters, that had not happened. The head of the team had taken some steps to prepare the Response, but the deadline was missed because she was juggling more urgent tasks than she had the capacity to deal with at once. It asserted that the only prejudice to W by allowing the application was a short delay, and any additional costs would be met by voluntary payment to him. Conversely, the respondent (a public body delivering education) argued that it would be financially severely prejudiced if it was denied the opportunity of presenting its case. Applying *Kwik Save*, an Employment Judge upheld the application. Among other things, it considered that the respondent's explanation was satisfactory, full and honest; there was no bad faith. Also, in respect of the balance of prejudice, it noted that, although the respondent was seeking to submit its response 133 days late, in practical terms the delay in the case progressing towards its final hearing was only five weeks (35 days), in a case where the claimant had chosen to bring a claim with allegations of discrimination dating back more than 8 years before the claim was presented. Further, the respondent had offered to make a voluntary payment to W in respect of his costs associated with the delay. The Judge also found that it was immediately apparent that the respondent's defence had merit, whereas W's case was unclear and significant weaknesses had been identified in many parts of it. The respondent's arguments were all clear and had potential merit, and fairness suggested that it should be heard before a final judgment was issued.

<u>Non-payment of wages</u>

11. Under s13 Employment Rights Act 1996 ("ERA") a "worker" (which is a wider definition than "employee") has the right not to suffer an unauthorised deduction from his pay:

> (1) 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 workers contract, or
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

12. The non-payment of wages, or the non-payment of holiday pay (in full or in part), could amount to an unauthorised or unlawful deduction of wages.

13. A deduction is defined in s13(3) ERA as follows:

> 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 wages properly payable by him to the worker on that occasion… the amount of the deficiency shall be treated… as a deduction…

14. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to s23 ERA. Where a Tribunal finds a complaint under s23 ERA is well founded, it shall make a declaration to that effect but s25 ERA provides that an employer shall not be ordered by a Tribunal to pay or repay a worker any amount in respect of a deduction or payment in so far as it appears to the Tribunal that the he has already paid or repaid any such amount to the worker.

Breach of contract

15. The contractual jurisdiction of the Employment Tribunal is governed by s3 Employment Tribunals Act 1996 together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623. The Employment Tribunal may hear a contract claim brought by an employee if the claim can be one arising or being outstanding on the termination of the employment of the employee, who seeks damages for breach of a contract of employment or any other contract connected with employment. This includes claims in respect of notice periods. Damages for breach of contract is capped, but the amount of the cap is well in excess of the modest amount claimed in this case.

The respondent's application to accept the late Response and the substantive issue

The respondent's explanation as to why an extension of time is required

16. The respondent did not contend that the Response was not received when it was originally sent on to the respondent on 20 November 2024. The respondent had ample time to pay the claimant the money she was owed following her resignation, and the respondent cannot claim to be taken by surprise in respect of this claim because of the extensive ACAS Early Conciliation.

17. The claimant sent her documents to the respondent and copied in the Employment Tribunal by email. The respondent ignored this. So, even at this late stage, if the respondent was unaware of the claim I wonder why they did not say so promptly at that time and not wait for well over a month to either imply or pretend it was not received.

18. Ms Afriyie contended that following the claimant's departure, the parish council relied upon volunteers to undertake all administrative tasks. The claimant was the only paid employee, and Cllr Potts was not around, so as to be able to deal with this claim. Yet, the respondent had 9 or 12 parish councillors, in total, and did not redirect post to be handled by Warrington Borough Council. So, I am not at all persuaded that there was a good excuse that it was not practical for this respondent to provide the Response within the 28-day limit that applied to other Employment Tribunal respondents.

19. In respect of the further delay in providing the Response; notwithstanding the respondent's professional representative were instructed over 5 weeks ago, and despite the urgency of addressing this out-of-time claim, Ms Afriyie said that Cllr Potts was only first available on 25 February 2025 – the day before this hearing.

20. The Response was provided on the day of this hearing. This was 8 days after the Employment Tribunal wrote to the respondent noting that it still had not submitted a Response (18 February 2025); over 4 weeks from when their professional representatives confirmed their appointment and well over 2 months out-of-time.

21. In respect of the continued and ongoing delay, it is difficult for me to think of a more lame excuse for providing an out-of-time Response. Unlike *Werner* above, the respondent's excuse, although full and honest, is not at all reasonable. There is no merit in the respondent's explanation as to why it is in this situation.

The merits of the defence

22. The claimant's claim amounted to 5 days/30 hours accrued and untaken annual leave and 5-days/30 hours unpaid wages. This amounted to £423.60 gross x 2.

23. The respondent's defence seems arguable the basis of the Particulars of Response provided today only for the holiday pay claim (i.e. half the amount claimed). The claimant said that she disputed the dates the respondent contended that she took as annual leave. The claimant said that she was responsible for the administration on behalf of the respondent. She handled the Bright HR system entries. She said that she could readily prove that she was owed the 5-days claimed, had she not been taken by surprise with this eleventh-hour defence. Although the respondent's defence for half the claim seems arguable, I am not at all convinced that this is more meritorious than that of the claimant's claim. It seems to me 50:50 at this stage because the claimant produced her documents on time and has given an equally arguable narrative. I am prevented from being more definitive because the respondent has taken the claimant by surprise, with providing this Response on the day of the hearing.

24. In respect of the claim for 1-week's notice pay, the respondent contended that it was not entitled to pay the claimant her notice period because she did not give notice, and she did not work her notice. I heard the claimant's account, and I prefer to believe the claimant's version of events, that she gave notice and that she was owed 1-week's notice pay rather than no notice pay at all as contended by Cllr Potts.

The balance of prejudice

25. It is difficult to see any prejudice to the respondent that was not of their own making or caused by their own ineptitude.

26. If I accept the Response out-of-time, then I will need to adjourn today to afford the claimant sufficient time to consider the new defence and prepare her documents and evidence in rebuttal. So, this means another hearing would be necessary which could easily have been avoided had the respondent moved promptly.

27. The claimant is in work, and she might lose a day's pay to attend the reconvened hearing, and she would be denied her remedy for a further 3-months or longer for the case to be relisted and eventually heard. The respondent made no offer to compensate the claimant

for her lost wages or pay some money in respect of the disputed claims, even in respect of the notice pay.

28. The claimant said that she would not pursue her claim in respect of the financial costs of the non-payments pursued. She said that she merely wanted to be paid the money that she was owed.

29. This is not a claimant pursuing a questionable discrimination claim as in *Werner*. 5-day's holiday pay and 5-day's notice pay is not a windfall. The amounts are modest and affordable, even to any hard-pressed local authority. The legal fee and Employment Tribunal costs would outweigh the money in dispute. It is disproportionate to make the claimant wait longer particularly as she explained she needed her notice pay in particular.

30. There would be substantial prejudice to the claimant if I adjourn the case today and I am not going to allow the claimant to be taken by surprise with the respondent's last-minute defence.

Summary and conclusion

31. In weighing the appropriate factors, the respondent fails on every element of the test. Notwithstanding that the respondent's defence is arguable (although short of meritorious) for the holiday pay dispute (only), the respondent had 28-days to provide a Response. I suspect that even if the Response was provided in the aftermath of the respondent's professional representative confirming their instruction the Tribunal would have accepted the late Response. But to provide a Response the day of the substantive hearing in these circumstances is unjustifiable. For the reasons set out above, I refuse to extend time.

32. The claim, as explained by the claimant, is with merit. I award compensation to the claimant in the amount of £847.60 gross.

Approved by Employment Judge Tobin
Date: 17.03.2025

JUDGMENT SENT TO THE PARTIES ON

3 April 2025

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **6018339/2024**

Name of case: **Miss J Locke** v **Penketh Parish Council**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 3 April 2025

the calculation day in this case is: 4 April 2025

the stipulated rate of interest is: **8% per annum**.

For the Employment Tribunal Office