EMPLOYMENT TRIBUNALS

Claimant: Ms A Pierscionek

Respondent: Szampion Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Watford **On:** 19 November 2019

Before: Employment Judge George (sitting alone)

Appearances
For the claimant: Mr S Way, Counsel
For the respondent: Ms L Millin, Counsel

JUDGMENT

The respondent's application for an extension of time for presentation of their response is granted.

REASONS

1. The claimant started work for the respondent as a shop worker on 19 March 2018. In her claim form, she gives some details about an incident which she claims amounted to harassment by a co-worker in November 2018 and then a different incident involving a different member of staff on 23 December 2018 following which she says she was wrongfully dismissed. She originally presented a claim form which included a claim of unfair dismissal.

2. It is clear from the claim form (see section 8.1) that at the time of the incident of 23 December 2018 the claimant had just over nine months' service and therefore did not have the two years' continuous service needed for the unfair dismissal claim. By her claim form she also claimed compensation for a failure to provide written particulars of employment. Under the part of the form headed "I am making another type of claim which the Employment Tribunal can deal with" she stated that she wished to complain about harassment, unlawful deduction of wages and breach of implied contractual duties. Within the narrative the following sentence appears:

> "over the period of nine months, I was intimidated by a co-worker, accused of being aggressive and stealing and wrongfully dismissed."

3. The respondent in the document that they wish now to enter as their response deny that the claimant was dismissed and allege that she in fact resigned on 23 December 2018.

4. After a period of conciliation which lasted between 15 and 18 February 2019, the claimant's ET1 was presented on 18 February. I accept the submission of Mr Way that the claim form as presented does show on its face a wrongful dismissal claim, even though the relevant box in section 8.1 has not been ticked, because of the section of the narrative quoted in paragraph 2 above. In fact that was the interpretation given to it by the caseworker where it has been coded to include a wrongful dismissal claim, unauthorised deduction from wages and failure to provide contractual terms - although the attribution of codes to the case by the Employment Tribunal administration is not determinative of which claims have, in fact, been brought.

5. The unfair dismissal claim was not accepted because the claimant did not have the necessary qualifying service and on 8 March 2019 the claim form was sent to the respondent with a deadline of 5 April for them to enter their response. It was also listed for a hearing. It is of note that it was listed for a hearing with limited case management orders for the claimant to provide within four weeks the remedy that the tribunal has been asked to award and for her to bring a copy of the evidence and documentation on which she is relying to the hearing. In other words, it was clear on the notice of the hearing that it was being listed for a full merits hearing. This contrasted with the normal action of the employment tribunal if they have accepted a claim under the Equality Act 2010. In those circumstances, the claim is normally listed immediately for a closed preliminary hearing to set the issues. Although this would not have been apparent to the claimant personally, she has been legally represented throughout.

6. An application for leave to amend the claim was received by the tribunal on 21 March 2019. The application was to add a breach of contract claim but it is accepted by Mr Way that that application was unnecessary as I have already remarked. This application was sent by post to the respondent on 18 May 2019. While outstanding at the time of the hearing before me, I did not need to determine it because the claim already included a wrongful dismissal claim.

7. A letter was sent by the tribunal to the parties dated 1 June 2019. This letter shows on its face that it was sent by post to the respondent. Under the heading "Rule 21 judgment: claim not quantified" the employment tribunal advises that the respondent has failed to present a response and warns that a judgment could be issued. A direction was made to the claimant asking her to submit a schedule of loss. That was done and the schedule of loss is dated 3 June. By that document the claimant included an estimate of compensation for alleged harassment contrary to s.26 of the Equality Act 2010: she seeks £3,000 as compensation for injury to feelings and £5,000 compensation for personal injury which is said to have been caused by her dismissal and the allegedly

humiliating and degrading treatment during employment. There is reference to compensation being claimed within the lowest Vento band which, again, is a clear reference to a claim for compensation for injury to feelings despite no reference having been made on the claim form to any protected characteristic being engaged.

8. The respondent made an application on 22 July 2019 for an extension of time for presentation of their response and appended to that application a completed ET3 and draft grounds of resistance. In their draft grounds of resistance they say that the claimant in fact resigned on 23 December 2018 with no notice and they also say that she was paid £519.00 for hours worked up to resignation and £150.00 for accrued holiday which had not been taken as at the date of termination. They say in the draft grounds of resistance that the claimant signed a receipt indicating that she had been paid that sum. They argue that she is not entitled to notice pay because she resigned.

9. On 8 September 2019, the Employment Tribunal wrote asking the respondent for further information about the reasons for the default. In the body of the application the respondent merely offered their apologies; saying that they had passed the papers to an insurance broker and it was through oversight that the failure to present the response had occurred. It is said that the respondents themselves believed that all issues had been taken care of.

10. The fuller information was provided, as directed, by 23 September 2019. The Employment Tribunal then directed that the hearing that had originally been listed as a full merits hearing of the breach of contract and the holiday pay claims should be converted to a hearing in which the respondent's application could be heard.

11. I have had the benefit of not only the documents that I have already referred to but also skeleton arguments provided by both counsel and I have been taken to relevant authorities in the area and in particular both counsel have cited from Kwik Save Stores Ltd v Swain [1997] I.C.R. 49. That case concerned an application for leave to present a response out of time but in Pendragon Plc (t/a CD Bramall Bradford) v Copus [2005] I.C.R. 1671 the EAT stated that the same principles apply equally to an application to set aside a judgment under what is now r.21 of the Employment Tribunal Rules of Procedure. The Employment Tribunal is designed to be a jurisdiction in which parties have access to relatively quick, cheap and efficient resolution of their dispute and the tribunals regularly enforce time limits stringently in order to seek to avoid the delays that can be seen elsewhere in the civil justice system. Notwithstanding that, I do have a discretion as to whether to grant the application that is made under rule 21 and I need to exercise that discretion judicially, as always, taking into account the reason that is put forward for the default, the merits or apparent merits of the proposed defence and the balance of prejudice to parties.

12. The prejudice claimed by the claimant is set out very vividly in paragraph 13 and 14 of Mr May's skeleton argument. Neither side has produced evidence in the matter. I take full account of the respondent's explanation. The respondent sent the claim form to their insurers reasonably speedily but the responsibility remained with them to ensure that the response was presented in time. The

lack of action by or on behalf of the respondent meant that the company itself remained the point of contact for both the claimant and the employment tribunal. The time limit for presenting a response appeared on the face of the letter that had been sent to them by the tribunal and on the ET2. I have not received any explanation as to what the respondent did on receipt of the letter of 1 June 2019 which warned the parties that a rule 21 judgment was a possibility, nor on receipt of the application to amend.

13. My conclusion is that the delay occurred because a claims handler at the insurance broker, despite their training, did not make notes of the deadline and none of the presumably specialist handlers of the claim, passing it backwards and forwards while they worked out whether there was an applicable policy, seemed to have asked what the deadline was for presentation of the response despite it being common knowledge that these time limits are enforced strictly. It seems to me to be a clear failure of process, which led to a delay of more than three months before the respondent sought to take action. It was not a deliberate delay, I accept that the respondent did not act deliberately to seek to gain forensic advantage. However, I could not characterise the explanation that has been put forward as being a reasonable excuse for the failure.

14. I turn then to the question of the apparent merits and the balance of prejudice. Despite the fact that the draft response is not backed by a statement of truth, I am willing to take the assertions in at face value. If the claimant resigned without notice, that would not inevitably defeat her claim of wrongful dismissal because she could raise the alternative argument that there was a fundamental breach of contract entitling her to resign. There is certainly material in the claim form as it is currently pleaded that suggests that she might choose to raise that alternative argument but the burden would then transfer to her to satisfy the tribunal that the respondent's behaviour fell into the particular category of actions that could entitle her to consider herself dismissed.

15. The factual issue about whether the claimant resigned or was dismissed therefore raises the prospect of a successful defence to the wrongful dismissal claim. Payment of the other sums, if proven, would be a good defence to those. However, it seems to me that the decisive factor weighing all the different factors into account in this particular case is the harassment claim.

16. There is nothing on the face of the claim form to show what is said to be the unwanted conduct, not in sufficient detail to enable the respondent to reply to it. The claimant talks of intimidation; of being accused of being aggressive and stealing. She talks of harassment, but she doesn't say what the acts are and although she talks about being grabbed by her supervisor, it is not clear that she would include that particular action as an act of harassment. There is nothing on the face of the claim form to explain exactly what the claimant is relying on as unwanted conduct, whether she claims of one act, two acts or even three. There is nothing to show what the protected characteristic is, despite her alleging that the actions led to personal injury.

17. The form was not, as I said above, recognised as including a s.26 EQA harassment claim by the Employment Tribunal and therefore I have considered whether on the face of it, the alleged harassment claim can be discerned at all.

Reading the ET1 as a whole, do I consider that a claim under section 26 of the Equality Act is made at all? If I do not and the judgment entered against the respondent were to stand, that judgment would only be entered on the claim for holiday pay, failure to provide contractual terms and wrongful dismissal. That would exclude the claimant from the prospect of making the harassment claim that she now says she wishes to make.

18. My view is that this is the sort of situation in which the benefit of the doubt about how to construe the claim form should be likely to be given to the claimant. I construe the claim form as including a claim of unlawful harassment contrary to s.26 EQA. However, that claim is unparticularised and the consequence of not aceding to the respondent's application would be that they would be unable to defend themselves against liability for alleged harassment; they would potentially be unable to adduce evidence in respect of allegations of which they presently no next to nothing. I remind myself of the paragraph in Kwik Save v Swain that is at the bottom of page 55 of the Industrial Cases Report about the way in which merits and the risk of prejudice should be weighed up. I consider that there is a risk in this case, that the respondent may be held liable for a wrong that they have not committed because they risk being excluded from adducing evidence in relation to a complaint of which they presently know little. I have concluded that a section 26 Equality Act 2010 claim for harassment is apparent on the documents but that the balance of prejudice to the respondent outweighs the prejudice of delay to the claimant because the respondent ought to have an opportunity to defend themselves against this claim. I therefore grant the application for an extension of time for presentation of the claim.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. The claimant is to provide particulars of her harassment claim to the respondent by **10 December 2019**, setting out:

   1.1 What protected characteristic is relied on;
   1.2 Who the alleged perpetrators are;
   1.3 What is the act relied on;
   1.4 What is the date of that act; and
   1.5 How the act is related to the protected characteristic.

2. The respondent shall, by **15 January 2020**, file and serve amended grounds of response responding to the harassment claim as particularised in compliance with paragraph 1 above.

3. The parties are to agree a list of issues by **4 February 2020** and by the same date are to write to the tribunal stating whether the telephone preliminary hearing listed today to take place on 18 May 2020 is needed or not.

4. The case should be listed for a full merits hearing including remedies, for **three days**, from **28** to **30 September 2020**.

5. A telephone preliminary hearing is listed for **18 May 2020**, with a time estimate of one hour.

6. Mutual disclosure by list and copy documents is to take place by **4 March 2020**.

7. The claimant is to tell the respondent no later than **18 March 2020**, which documents she wishes to be included in the bundle for the full merits hearing.

8. The respondent is to produce a copy of the bundle and to send a hard copy and a soft copy of the same to the claimant by **15 April 2020**.

9. Witness statements are to be exchanged by **13 May 2020**.

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Employment Judge George

Date:……7 January 2020 ……

Sent to the parties on:

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For the Tribunal:

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