

EMPLOYMENT APPEAL TRIBUNAL
ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 27 June 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

METRO LODGINGS LIMITED

APPELLANT

MR G WARLEY

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

No appearance or representation by
or on behalf of the Respondent

For the Respondent

Respondent debarred from taking
part in this appeal

SUMMARY

Practice and Procedure – disclosure – postponement or stay

The Respondent (the Appellant before the Employment Appeal Tribunal) had not attended the Employment Tribunal (“ET”) hearing and the Employment Judge had determined to proceed in its absence, had duly received evidence from the Claimant and had upheld his claims of unauthorised deductions and of breach of the duty to provide a statement of terms of employment pursuant to section 1 of the **Employment Rights Act 1996**. The Respondent appealed.

Held: dismissing the appeal

The ET had not erred in its decision to proceed in the Respondent’s absence: the application for a postponement had been made very late and the ET was entitled to find that the circumstances relied on for its non-attendance would have been known by the Respondent for some time and that there was no good reason why the Respondent could not have made efforts to attend by one of its directors or by a professional representative. The ET had equally not erred in its case management decision to accept the evidence adduced by the Claimant; any prejudice suffered by the Respondent arose from its own decision not to make arrangements to attend the ET hearing (and noting that the Respondent had failed to comply with the EAT’s directions to produce documentation relating to the ET orders and inter-parties’ correspondence relating to disclosure). As for the ET’s finding in respect of the section 1 statement, the Respondent had failed to provide any documentation to support its contention that it had sent evidence of compliance to the ET.

A HER HONOUR JUDGE EADY QC

B Introduction

1. In giving this Judgment I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal from a Judgment of the Employment Tribunal sitting at North Shields (Employment Judge Morris, sitting alone on 29 August 2018; "the ET"), allowing the Claimant's claims.

C 2. The Claimant attended in person before the ET but has been debarred from taking part in this appeal after he failed to file a Respondent's Answer or to respond to the Employment Appeal Tribunal's ("EAT") correspondence, or its Order of 2 April 2019. There is, however, also no attendance today on the part of the Respondent, which has failed to comply with the EAT's directions for this Hearing.

D 3. The notice of Hearing and directions were sent out on 30 April 2019. On 7 June 2019, the EAT sought to contact the Respondent reminding it of its need to comply with the EAT's directions. In response, by email of 10 June 2019 from Mr A P Drummond, Group Company Secretary of the Respondent, the following response was received:

E **"Please note that Metro Lodgings Limited went into liquidation on 6 March 2019. In consequence of that, I am not dealing with this matter and I am no longer the representative for Metro Lodgings Limited.... In the circumstances, I regret that I am unable to assist further in this matter and suggest that you contact the liquidator who may have this matter in hand and have appointed representation."**

F 4. The EAT duly sought to contact the Official Receiver, by email of 15 June 2019, in the following terms:

"The above Appellant has a Full Hearing listed for 27 June 2019 which bundles are now overdue. The Appellant has informed the EAT that Metro Lodging Limited went into liquidation on 6 March. Please can you let me know by no later than 18 June how you wish to proceed with the appeal as bundles are now overdue. Please find attached the letter from Metro Lodgings Limited and the EAT Order."

G 5. On 17 June 2019, an email was received from Anthony Campbell, Insolvency Examiner, from the Insolvency Service at the Official Receiver's Office, in the following terms:

"Thank you for your email. The Official Receiver does not intend to continue with the proceedings as we have no knowledge of the situation and no evidence to present."

H 6. That was followed by a further email of 18 June 2019, also from Mr Anthony Campbell, stating as follows:

"As discussed, given that the Official Receiver has no knowledge of the events that are the

A subject of this Tribunal, we would ask that you furnish us with any information you hold that would assist us in making a Decision on whether to withdraw the company appeal.”

7. The EAT duly responded on 18 June, in the following terms:

“Please find attached the Notice of Appeal, the Employment Tribunal Judgment and the Employment Appeal Tribunal Order. Please provide an update with the utmost urgency so that I am able to assist the Judge.”

B 8. No further response has been received and the Respondent has not attended today.

C 9. Given that position, I have first considered whether it is appropriate to proceed with this Hearing today. In my judgment, that is the appropriate course. In reaching that view, I have had regard to the overriding objective and the need to seek to determine this matter justly, taking into account the interests of both parties. I do not consider it would be in the interests of justice to further delay the determination of this appeal. I note that the Respondent has had the opportunity to consider its position and I can only take the view that it has reached a considered view that it did not wish to attend.

D **The Relevant Background and the ET’s Decision**

E 10. The Respondent was in business operating one or more hotels. The Claimant was an employee of the Respondent, working at its hotel in Newcastle upon Tyne, as a receptionist, since January 2014. It was a Claimant's case before the ET that, during the months of April and May 2018, he had worked for the Respondent but had not been paid. He claimed unauthorised deductions of wages, and consequential financial losses, and contended that the Respondent had failed to provide him with a written statement of particulars of his employment as it had been required to do pursuant to section 1 **Employment Rights Act 1996**.

F 11. The Claimant’s claim was listed for Hearing before the ET on 29 August 2018. The Claimant attended in person, but no one attended from the Respondent. The ET recorded the relevant history in this regard as follows:

G **“Procedural issue**

1 The respondent was neither present nor represented at the hearing at the due time of 10:00am. Other hearings had engaged the Tribunal from then until 1:00pm, during which time the claimant simply had to wait. At 1:00pm the respondent was still neither present nor represented and no message had been received on its behalf; for example, that there were any transport difficulties.

H 2 It was apparent from the file that the previous afternoon three requests had been made on behalf of the respondent that today’s hearing be adjourned: the first by e-mail timed at 15:40; when that was refused, the second by e-mail timed at 16:52; and when that was refused, the third by e-mail timed at 18:39. That application was refused first thing this

A morning. In summary, it was explained on behalf of the respondent that its director was out of the country at the moment and the matter was being dealt with by Ms Kirkpatrick who was the only person who had knowledge of it. She had been on long-term sick leave for a year but was due to travel from Northern Ireland where she lives to attend the hearing. It had only been found out on 28 August 2018, however, that Ms Kirkpatrick was unable to attend the hearing for medical reasons. It was explained that she was the respondent's sole and essential witness and it was not possible 'to arrange for another person to appear for or represent the respondent at such short notice'. A number of medical related documents, including letters, medical certificates and a list of medication, were attached to the first of the applications. A letter from a doctor with the Ardmore Medical Practice dated 22 December 2017 recorded the ill-health of Ms Kirkpatrick Stagg from being admitted to hospital on 7 August 2017 and again on 7 September 2017 when she underwent cardiac stenting, and that she was not physically well enough either to work or attend court appearances. Indeed, in light of her 'severe heart failure' she could be 'medically unfit for many months'. A further letter from the same Doctor dated 5 March 2018 confirmed, amongst other things, that Mrs Kirkpatrick Stagg was medically unfit to attend tribunals. A letter from a nurse specialist with Southern Health and Social Care Trust dated 17 July 2018 recorded, amongst other things, that Ms Kirkpatrick Stagg remained under review of the Trust heart failure service, the pumping strength of her heart remains below normal, she requires frequent rests, and expressed the opinion that she was unable to give evidence or meet with her legal representatives to give instructions.

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3 All three applications had been refused on the bases that the application had been too late and that the respondent is a limited company and someone from or on behalf of the respondent must attend the hearing on its behalf at which the request for an adjournment could be made directly to the Employment Judge."

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12. The ET took all that background into account and noted that Ms Kirkpatrick Stagg had been quite seriously unwell since August 2017, and it was thus surprising that she was put forward as the only person within the Respondent who had knowledge of the matters raised by the Claimant's claim or that it had been intended that she would be the Respondent's sole witness. It was also surprising that no application for a postponement had been made until 15.40 the day before Hearing.

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13. In these circumstances, the ET considered it appropriate, and in accordance with the overriding objective, to proceed in the Respondent's absence. Doing so, the ET took evidence from the Claimant and considered the documents that he produced, and the response that had been entered by the Respondent. It found the Claimant's claims were proven and gave Judgment in his favour as follows:

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"1. The Claimant's complaint that the Respondent made an unauthorised deduction from his wages contrary to Section 13 of the Employment Rights Act 1996 ("the 1996 Act") in that it did not pay to him the money that he had earned during the period 21 April 2018 to 20 May 2018 is well founded.

2. In accordance with Section 24(1) of the 1996 Act, the Respondent is ordered to pay to the Claimant the amount of that deduction being £1,028.57.

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3. The above amount of £1,028.57 has been calculated by reference to the Claimant's gross pay. Any liability to pay income tax or employee National Insurance contributions in respect of that amount shall be the liability the Claimant.

4. In accordance with Section 24(2) of the 1996 Act, the Respondent is ordered to pay to the Claimant the sum of £307.76 being the amount the Tribunal considers is appropriate

A in all the circumstances to compensate the Claimant for certain of the financial losses sustained by him which are attributable to the unauthorised deduction of wages.

5. The Respondent was in breach of its duty to the Claimant under Section 1 of the 1996 Act to give him a written statement of the particulars of his employment and in accordance with Section 38 of the Employment Act 2002, the Respondent is ordered to pay to the Claimant for a higher amount of 4 weeks' pay being £944.64.

B 6. The total sum that the Respondent is ordered to pay for the Claimant is therefore £2,280.97."

The Appeal

14. The Respondent's appeal was permitted to proceed to this Full Hearing by His Honour Judge Auerbach, on the following bases:

C "1. That the ET erred in not granting the postponement. Having regard to the Presidential Guidance on seeking a postponement and on the information presently available, this appears arguable but the Appellant must ensure that in the EAT's bundle for the Hearing are copies of the full correspondence with the ET and attachments relating to its applications to postpone.

D 2. That the ET considered documents produced by the Claimant at the Hearing, but the Respondent had not previously been notified that he intended to rely on these or send copies. This is arguable. However, the Respondent must include in the EAT Hearing bundle any notices or directions given to the parties before the ET Hearing and any relevant pre-Hearing correspondence with the Claimant regarding exchange of lists or copies of documents and/or preparation of bundles for the ET's Hearing. Copies of the documents in question must also be included in the EAT's Hearing bundle.

E 3. That the Tribunal was wrong to find that the Claimant had not been given a Section 1 statement when the Respondent had sent in evidence that he had. This is arguable but the Respondent must include in the Hearing bundle copies not only of the statement which it says it has sent the Tribunal, but the evidence, if any, which it had provided to the Tribunal about when it was originally given to the Claimant."

F 15. Notwithstanding HHJ Auerbach's directions, the Respondent has, however, failed to produce any of the documentation identified, and has not attended the Hearing today to assist with any of the points thus permitted to proceed.

Discussion and Conclusions

G 15. Given the information available to the ET, I consider it made an entirely permissible decision to proceed in the Respondent's absence. The Respondent had waited until 15.40 the day before the Hearing before making any application for a postponement and the grounds provided for that application did not demonstrate that the Respondent had previously entered into any serious engagement with the claim. The Respondent was apparently relying on an employee to represent its interests, and attend as its sole witness, when she had been quite seriously ill for some time and apparently signed off as unfit - certainly to attend a Tribunal Hearing - over the relevant period to which the Claimant's claim related. It must have been

A apparent for some time that Ms Kirkpatrick Stagg would be unable to attend the ET to represent
the Respondent and/or give evidence on its behalf relating to the matters raised by the
Claimant's claim. The Respondent was a limited company and could reasonably have been
B expected to send one of its directors to represent its interests or to arrange for professional
representation. It chose not to do so. The ET, appropriately, had regard to the overriding
objective and was entitled to take the view that delay would not be in the interests of justice.

C 16. As for the ET's consideration of the documents adduced by the Claimant at the Hearing,
I cannot see that the Respondent was prejudiced. It might reasonably have anticipated that the
Claimant would give evidence, both oral and in documentary form, in support of his claims.
The Respondent chose not to make reasonable attempts to attend the Hearing and that is why it
was unable to deal with the evidence then adduced. It has provided no documentation relating
to the ET's directions, or any pre-hearing correspondence it had with the Claimant relating to
D disclosure, and I am again satisfied that the ET made an entirely permissible case management
decision when determining to accept the Claimant's evidence.

E 17. As for the ET's finding that the Claimant had not received a section 1 statement, the
Respondent was given the opportunity to demonstrate that this was incorrect by providing the
EAT with a copy of that statement, together with documentation to show that it had been
provided to the Claimant and that that material had been sent to the ET in advance at the
Hearing. It has not done so. I have, therefore, no basis to overturn the ET's decision in this
respect.

F 18. For the reasons thus given, this appeal is dismissed.

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