



EMPLOYMENT TRIBUNALS

Claimant: Mr. A El Imam Elalaoui

Respondent: Mrs. Naima El-Alaoui

RECORD OF A PRELIMINARY HEARING

Heard at: London Central (by video)

On: 11 November 2020

Before: Employment Judge P Klimov (sitting alone)

Appearances

For the claimant: Ms. C. Urquhart (counsel)

For the respondent: Ms. M. Moussaif (respondent's daughter)

JUDGMENT

Mrs. Naima El-Alaoui was the claimant's employer and is the correct respondent in these proceedings.

REASONS

The history of these proceedings

- (1) By a claim form presented on 10 January 2020 the claimant brought complaints of unfair dismissal and breach of contract (wrongful dismissal).
- (2) The tribunal sent to the parties a notice of claim on 15 January 2020. In the notice the respondent was told that if she wished to defend the claim she must present a response by 12 February 2020. By the same notice the parties were informed that the claim would be heard by an Employment Judge sitting alone on 28 and 29 May 2020.

- (3) On 10 February 2020 the respondent's daughter wrote to the tribunal on behalf of the respondent stating that the claim was against the wrong person. She said that her mother was not an appointee of Mr. Noredidine El-Alaoui, for whom the claimant had been acting as a carer, and it was her mother's mother who took all decisions in relation to Noredidine's wellbeing, including engagement of carers and personal assistants.
- (4) On 20 February 2020 the tribunal ordered the claimant to provide the tribunal with copies of documents evidencing the existence of an employment relationship between the claimant and the respondent. These were provided by the claimant's solicitors on 10 March 2020.
- (5) On 14 March 2020 Employment Judge Brown ordered the respondent to present a response (ET3) by 30 March 2020, giving the respondent a warning that a default judgment may be entered against her if no response was presented by that date.
- (6) On 26 March 2020 the respondent applied for an extension of time to present a response due to a family bereavement. Employment Judge Snelson granted an extension of time until 21 April 2020.
- (7) On 20 April 2020 the respondent wrote to the tribunal restating her position that she was not the correct respondent because she had simply followed the instructions of her mother (Ms. Fatima Moustauoui) to terminate the claimant's employment. The respondent did not present a completed ET3 form.
- (8) On 1 May 2020 the claimant's solicitors applied for a default judgment to be entered against the respondent under Rule 21 of the Tribunal Procedure Rules.
- (9) On 7 May 2020 Employment Judge Snelson wrote to the respondent saying that he was considering the claimant's application for default judgment on account of her failure to present a response form and asking the respondent to provide her comments by 15 May 2020.
- (10) On 15 May 2020 the respondent wrote to the tribunal saying that the reason she had not presented her response was because she did not consider herself to be the correct respondent and that she was not the employer of the claimant.
- (11) On 27 May 2020 Employment Judge Adkin refused the claimant's application for default judgment and cancelled the final hearing that had been originally listed for 28-29 May 2020. He ordered a further case management hearing to be listed.
- (12) On 8 August 2020 the tribunal sent to the parties a notice of preliminary hearing. The hearing was listed for 11 November 2020 at 11am in person to identify the issues and to make case management orders.
- (13) At 10:05 on 10 November 2020 the claimant's solicitors sent to the tribunal and the respondent the claimant's case management agenda, the claimant's note for preliminary hearing and a PDF bundle of documents for the hearing. They

also asked the tribunal to confirm whether the hearing would still be conducted in person or by video or telephone. The claimant's note for preliminary hearing contained one issue on the draft list of issues:

"Who is the correct Respondent? Is it Naima El-Alaoui, or is it Fatima Moustouai?"

- (14) At 11:47am on 10 November 2020 the tribunal sent to the parties joining instructions for the preliminary hearing to be conducted by video.

Respondent's application to postpone

- (15) At 10:27am on 11 November 2020 the respondent's daughter wrote to the tribunal saying that, until receiving the tribunal's email with the joining instructions on 10 November 2020, neither she nor her mother knew that the hearing was due to take place, and that it was far too late for them to take part in the hearing.
- (16) The preliminary hearing started shortly after 11am. Ms. Urquhart, counsel for the claimant, the claimant and Ms. Moussaif joined the hearing. After some technical issues with the video signal from Ms. Moussaif device, I was able to commence the hearing. I was satisfied that the technology was working properly, and both parties were able to effectively participate in the hearing.
- (17) Ms. Moussaif confirmed that she was representing the respondent in this hearing. She applied for the hearing to be postponed on the ground that the respondent was unaware of the hearing until the day before the hearing. She said that it was a far too short notice, and the respondent was not there with her. She also said that she had checked with her mother who had she confirmed to her that she had not received the notice of hearing from the tribunal either by post or email.
- (18) Counsel for the claimant opposed the application. She said that it was only a preliminary hearing to determine primarily the issue of who the correct respondent was (the issue that the respondent had raised on 10 February 2020) and to give further case management directions. She also pointed out that the respondent still had not presented her ET3 and there was an outstanding application by the claimant for default judgment. I later corrected that and pointed out that the application was refused by Employment Judge Adkin on 27 May 2020, but the claimant was at liberty to renew it.
- (19) I refused the respondent's application to postpone the hearing for the following reasons:
- (i) The notice of the hearing was sent to both parties on 8 August 2020. The claimant received the notice. The notice contained the correct respondent's address and therefore was properly addressed. The address was the same respondent's address as on previous letters from the tribunal. The respondent replied to the tribunal's previous letters. There is no record of the respondent sending any change of address notification to the tribunal. Therefore, under Rule 90 of the

Tribunal Rules of Procedure the notice of the hearing of 8 August 2020 shall, unless the contrary is proved, be taken to have been received by the respondent on the day on which it would be delivered in the ordinary course of post, i.e. 20 August 2020.

- (ii) Even if the respondent had only become aware of the hearing a day before, her daughter, acting as her representative, was able to join the hearing.
- (iii) During the hearing Ms. Moussaif was able to communicate with the respondent by telephone to take instructions.
- (iv) It was clear, and then made explicit in the claimant's Agenda and the draft List of Issues, that the question of the respondent's correct identity needed to be decided once and for all.
- (v) Ms. Moussaif has been acting for the respondent from the start of this case and knew this issue well. This was not a new issue.
- (vi) It was the respondent who claimed that she was not the correct party to the proceedings. Therefore, there appeared to be no good reasons why Ms. Moussaif could not fully argue the issue on behalf of the respondent at the today's hearing.
- (vii) The documents, upon which the claimant relied at the hearing to show that the respondent was his employer, had been provided to the respondent on 10 March 2020. There were no other documents in the hearing bundle (which was only about 50 page long), which would be unfamiliar to the respondent. The claimant was not giving any oral evidence.
- (viii) This matter is long overdue for resolution and it was not in the interests of justice to delay.
- (ix) I concluded that no serious prejudice would be caused to the respondent by continuing with the hearing and that it would not be in the interests of justice to postpone it.

Findings of Fact and Decision

- (20) I invited Ms. Moussaif to make her submissions on the issue of whether her mother was the correct respondent. Ms. Moussaif said that her mother was not a guardian of Mr. Noredine El-Alaoui, for whom the claimant had been acting as a carer. Instead it was her mother's mother, Ms. Fatima Moustouai, who was the guardian of Mr. Noredine El-Alaoui, and the one who made all decisions in relation to his carers, including the decision to terminate the claimant's employment as a carer for Mr. Noredine El-Alaoui. She said that her mother had simply been following the instructions given to her by her mother and therefore was not the correct respondent in these proceedings.

- (21) Ms. Urquhart argued for the claimant that the documents clearly showed that the respondent was the employer of the claimant. She signed his contract of employment, the contract names her as the employer, she also had been signing off his timesheets. The fact that she was not a guardian of Mr. Noreddine El-Alaoui did not mean she was not the employer of the claimant. There were no evidence to show that in the five years that the claimant had been working for the respondent she ever suggested to him that she was not his employer, or that she was acting as an agent for Ms. Fatima Moustouai. There is nothing in the claimant's employment contract or other available documents to show that the respondent had entered into the employment contract with the claimant as an agent for her mother.
- (22) Ms. Urquhart also referred me to the respondent's emails of 10 February and 20 April 2020, in which the respondent claims that she was not the right party to the proceedings. Ms Urquhart pointed out that in those emails the respondent did not claim that she was not the claimant's employer.
- (23) In reply to Ms. Urquhart submissions, Ms. Moussaif said that the claimant had been repeatedly warned by the respondent's mother about issues, which ultimately had let to the termination of his employment, and that the claimant knew the reason for his termination. Ms. Urquhart replied that these issues might be relevant for the determination of the claimant's claim, but did not explain why the respondent was not the correct respondent in these proceedings.
- (24) Having considered the parties submissions and having reviewed the documents in the hearing bundle, I decided that the respondent was the claimant's employer and therefore the correct respondent in these proceedings. I reached this decision based on my following findings fact:
- (i) The respondent is named as the employer in the claimant's contract of employment, she signed it as the claimant's employer.
 - (ii) The contract does not say that she was acting as an agent for her mother. The respondent did not provide any evidence to show that she was acting as an agent for her mother with regard to the claimant's employment.
 - (iii) The respondent was signing off the claimant's timesheets and giving instruction to the payroll company in relation to the claimant's pay.
 - (iv) The respondent did not provide any evidence to show that what she had been doing over the five years' period of the claimant's employment was inconsistent with her being his employer.

CASE MANAGEMENT

- (25) Having determined that issue, I proceeded to discuss with the parties further case management issues. I explained to Ms. Moussaif that if her mother wished to defend the claim, she must apply to the tribunal for an extension of time and present her draft response (ET3 form) together with the application. I told her that it would be at the tribunal's discretion whether to grant the application and allow the respondent's late ET3, and briefly explained the legal test that an employment judge would apply in deciding on the application.
- (26) I further explained that the application could be opposed by the claimant, and that it could either be decided on paper or at a hearing, which the respondent could request, but it would be for an employment judge to decide whether to hold a hearing. I said that if the respondent wished to make an application she would have to present all relevant evidence to explain why she did not present her response in time and why the tribunal should exercise the discretion at allow her to present her response now. I asked her whether she was ready to make an application at the today's hearing and if she had a draft response prepared.
- (27) Ms.Moussaif asked for a short adjournment to speak with her mother, after which she confirmed that her mother intended to make an application for an extension of time and present a response, but was not ready to do so today.
- (28) Ms. Urquhart submitted that in the light of already a very considerable delay caused by the respondent's failure to present a response the respondent should be given only a limited time to make her application.
- (29) I decided to allow the respondent until 20 November 2020 to make her application and provide a draft response (ET3 form), and if the claimant intended to oppose the application he must present his submissions to the tribunal within seven days after receiving the application.
- (30) I explained to Ms. Moussaif that if her mother wished to join Ms. Fatima Moustauoui to the proceedings as another respondent, she needed to make an application to the tribunal, and she should do that at the same time as applying for an extension of time to present her response.
- (31) Finally, I explored with the parties the possibility of referring the dispute for judicial mediation and briefly explained the process and the benefits of it. After a short adjournment Ms. Urquhart confirmed that the claimant was prepared to do that, however, Ms. Moussaif said that her mother did not wish to engage in mediation.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Respondent's response

- 1.1 The respondent must on or before **20 November 2020** present an application to the tribunal for an extension of time for presenting a response together with a draft response (ET3).
- 1.2 The respondent's application must be accompanied by all relevant documentary and other evidence the respondent wishes to rely upon in support of her application. The respondent attention is drawn to Rule 20 of the Employment Tribunal Rules and to the Employment Appeal Tribunal decision *Kwik Save Stores Ltd v Swain and ors 1997 ICR 49, EAT*, which explains the test the tribunal will apply in determining the respondent's application. The respondent may request a hearing.
- 1.3 If the respondent wishes to add Ms. Fatima Moustououi as second respondent, the respondent must apply to the tribunal on or before **20 November 2020** for an order to make Mrs. Fatima Moustououi a party to the proceedings. The respondent must explain what issues there are between Ms. Fatima Moustououi and the claimant and/or the respondent falling within the jurisdiction of the tribunal which it is in the interests of justice to have determined in these proceedings.
- 1.4 If the claimant wishes to oppose the respondent's applications, he must do so **within seven days** of the receipt of the application.
- 1.5 The respondent's applications may be determined with or without a hearing. If an employment judge decides that a hearing is necessary, a notice of hearing and further directions will be issued to the parties.
- 1.6 If the respondent does not make an application for an extension of time for presenting a response or does not present her draft response (ET3) within the time limit set out in this Order, a judgment might be made against the respondent without a hearing, and if a hearing is ordered by a judge, the respondent will only be entitled to participate in the hearing to the extent permitted by the judge. The respondent's attention is drawn to Rule 21 of the Employment Tribunal Rules.

2. Other matters

- 2.1 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
- 2.2 The attention of the parties is drawn to the following:
 - The Tribunal's Rules of Procedure, which can be found at:

<https://www.gov.uk/courts-tribunals/employment-tribunal>

- Guidance which has been prepared by the President of the Employment Tribunals on managing cases generally, including preparing for a hearing, disclosure of documents and preparing and exchanging witness statements which can be found at:

www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/

- 2.3 The parties are reminded of rule 92: “*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of “cc” or otherwise)...*”. **If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.**
- 2.4 The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal
- 2.5 **Public access to employment tribunal decisions** - All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.
- 2.6 **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.**

**Employment Judge P Klimov
16 November 2020**

Sent to the parties on:

16th Nov 2020

For the Tribunal:

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