



EMPLOYMENT TRIBUNALS

Claimant: Thomas Mallon

Respondents: (1) Secrets Euston Ltd
(2) John McKeown Clubs Ltd

**London Central
Employment Judge Goodman**

8 January 2020

JUDGMENT

1. The claim against the first respondent is dismissed.
2. The claim against the second respondent is well founded. The second respondent is ordered to pay the claimant the sum of £33,886.65. This is made up of a basic award of £2,032, loss of earnings £19,305.28, notice pay £2,032, holiday pay £406.67, unpaid wages £3,333.37, and an increase of 25% to reflect failure to heed the provisions of the ACAS Code on Discipline and Grievance of £6,777.33.

REASONS

1. The claimant was employed as a waiter by the first respondent at a club in Euston from November 2014. He says that in August 2018 a new remuneration structure was introduced which altered an entitlement to receive 50% of the service charge paid by customers. He did not agree to the changes.
2. On 4 February the claimant was informed by the first respondent that the second respondent was taking over and he was invited to a meeting with the new manager on 7 February. Staff were told they would have individual meetings to discuss the transfer. The second respondent and the claimant had a short discussion on 7 February, when he was identified as the employee who had had a grievance and told they would have a discussion next week, but he never received a date for a further meeting and the claimant considers his employment terminated as of 11 February 2019.

3. He presented a claim to the employment tribunal on 11 April 2019. He claims unfair dismissal and for unlawful deductions from wages.
4. The claim form was sent by the tribunal to both respondents at separate addresses on 17 June 2019. The respondents were told there was a hearing on 13-15 January 2020 and that they must respond to the claim by 15 July 2020.
5. On the evening of 15 July, Zameer Nazarali, Managing Director and Employment Lawyer of Simplifier.co.uk, emailed the tribunal on behalf of the respondent to the claim (whether for one or both was not stated, but clearly he was aware there was more than one, as the email is headed: "Application to Extend ET3 submission – Mellon v Secrets Euston Ltd and others"). He said: "despite our best efforts we have not received the claimant's ET1 form and particulars of claim, and are in a position of not being able to properly respond to the claim, as we have not had sight of the claim itself". The phrasing of this strongly suggests that one or both respondents had seen the claim and noting the deadline the respondents had asked Mr Nazarali to act, though at the time Mr Nazarai himself had not seen the papers.
6. In the absence of ET3 the preliminary hearing for 20 August was postponed. On 19 August the tribunal asked the respondent to check and to consider presenting evidence in support of an application to extend time. To this Mr Nazarali responded on 26 August that neither he nor his clients had seen the claim form or particulars of claim by post or email.
7. At Judge Glennie's direction, the tribunal wrote to the respondents on 6 September at their separate addresses sending further copies of the documents sent on 19 June. The claimant was asked to say if there objection to an extension of time. The parties were asked to liaise on this by 20 September.
8. On 30 September, nothing having been heard from either party, Employment Judge Wade ordered that the respondent's time to respond was extended to 21 October 2019. This letter was sent to the first respondent but not the second respondent.
9. On 28 October, nothing more having been heard from the respondents or their representative, the claimant was asked to serve a schedule of loss by 11 November in case a default judgment could be given without a hearing.
10. The claimant sent a schedule to the tribunal on 14 November 2019. They were asked by the tribunal to send it to the respondent. Then on 6 December E J Wade wrote to both parties that the claimant was to identify against which respondent he sought judgment, and told that if the claimant wanted payment of the claims for expenses and future loss, there would be a hearing, otherwise the claimant was to send a revised schedule of loss. The claimant did send a revised schedule of loss, deleting these claims, to the tribunal and the respondent's representative, on 10 December 2019.
11. On 19 December Mr Nazarali wrote "we acknowledge receipt of correspondence, albeit after the proposed Tribunal deadline. However,

despite several previous requests, we are yet to receive the ET1 nor grounds of claim, and therefore we cannot possibly (sic) make an assessment of the claim at hand. We will be writing further to the tribunal following our previous application for extension of submission to the ET3. Please would you kindly forward this to us at your earliest convenience”.

12. On 21 December Mr Nazarali wrote saying he had now seen the claim, provided by the claimant’s solicitors, and asked for more time to serve a response. He also asked for postponement of the hearing date. He adds: “please do keep in mind that my client is not privy to all the background of the claim circumstances, given that the original complaint was against a previous owner, and this information was not forthcoming”. He added that the second respondent had never been the employer, and was “simple (sic) a lease holding company” and asked for the second respondent to be “deleted from the claim”.
13. Nothing more has been heard from him. There is no draft ET3.
14. Rule 20 of the Employment Tribunal Rules of Procedure states:

Applications for extension of time for presenting response

20.(1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reasons why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and if the respondent wishes to request a hearing this shall be requested in the application.

15. Rule 21 goes on that where a response has not been presented in the time allowed:

An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone.(3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.

16. Decisions of the employment tribunal must have regard to the overriding objective to deal with cases fairly and justly, having regard to avoiding delay, saving expense, and ensuring the parties are on an equal footing.
17. If it is right that the respondents or their representatives never saw the claim form until 20 December (the 21st being a Saturday), it would be just to extend time to 17 January and postpone the hearing listed for 13 January. However, this is hard to believe. One or both respondents must have seen the tribunal letter and claim form, because of the email sent by Mr Nazarali on 17 July. I would be surprised if the tribunal staff had not send copies on receipt of that email, as they usually do, but what is very odd indeed is that when the tribunal wrote to both on 6 September saying

that the claim form was now enclosed and they should liaise by 20 September, neither respondent, nor Mr Nazarali, wrote to say the documents had not been enclosed with that letter. Nor did the respondents or Mr Nazarali respond or question any lack of documents when given an extension. Nor, knowing now what the claim is about, and that it has been delayed for some time, has either of them filed a response. I consider it relevant that Mr Nazarali does not complain that the addresses for the respondents on the claim form he has now seen are wrong. There must be a strong presumption, in the absence of information and explanation, that a response could have been filed had the respondents wanted to. Whether blame lies with the respondents or their representative is not a matter for the tribunal.

18. The claimant meanwhile has been waiting for a decision on his claim for many months, and if the claim is contested and a three day hearing is postponed it may not come back into the list this year.
19. I conclude that it is just to enter a default judgment. If there is an innocent explanation for the serious delay in responding to the claim it is of course open to the respondent(s) to apply for reconsideration of the judgment. Under the rules they must do so in 14 days and set out the grounds for its making not being in the interests of justice.
20. This judgment is against the second respondent, at the claimant's request. Accordingly, the claim against the first respondent is dismissed. If however the second respondent succeeds in an application for reconsideration, the tribunal may decide to reconsider its decision to dismiss the claim against the first respondent as well, as the assertion that the second respondent holds the lease only may indicate a dispute whether there was a relevant transfer from the first to the second respondent.
21. There will be no hearing on 13-15 January 2020.

Employment Judge Goodman

Date 9 January 2020

JUDGMENT SENT TO THE PARTIES ON

9 January 2020

FOR THE TRIBUNAL OFFICE