**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4121214/2018**

**Held at Edinburgh on 9 January 2019**

**Employment Judge: W A Meiklejohn**

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| Mr Lucasz Szarafiniak | Claimant<br>In person |
| Compos (Scotland) Limited | Respondent<br>Represented by Mr O Celik, Director |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is as follows -

(1) The Respondent's application for reconsideration of the Default Judgment issued on 12 December 2018 in terms of Rule 21 contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is granted.

(2) The said Default Judgment is revoked.

(3) The Respondent's application for an extension of time for presenting its response to the claim is granted and the Respondent's ET3 is accepted.

(4) The Respondent is ordered to pay to the Claimant the sum of TWO HUNDRED AND EIGHTY NINE POUNDS and SEVENTY ONE PENCE (£289.71) in respect of unlawful deduction of wages.

(5) The Respondent is ordered to pay to the Claimant the sum of THIRTY ONE POUNDS and THIRTY TWO PENCE (£31.32) in respect of holiday pay.

(6) The said sums which the Respondent is ordered to pay to the Claimant shall be paid under deduction of all (if any) income tax and National Insurance contributions which the Respondent is required to deduct therefrom.

(7) The Claimant's claims of unfair dismissal, unlawful discrimination on the grounds of race and breach of contract, having been withdrawn by the Claimant, are dismissed.

**REASONS**

1. This case came before me in Edinburgh on 9 January 2019 for a Reconsideration Hearing. The Claimant appeared in person and Mr Celik appeared for the Respondent.

2. This Hearing had originally been listed as a Remedy Hearing following the issuing of the Default Judgment referred to above. It was converted to a Reconsideration Hearing after the Respondent submitted a letter to the Tribunal dated 16 December 2018. This letter was treated as an application for reconsideration under Rule 70 and as an application for an extension of time for presenting a response under Rule 20.

3. The Respondent had submitted an ET3 response form to the Tribunal on 16 November 2018 which was 4 days late. Accordingly the response had been rejected, and thereafter the Default Judgment was issued.

4. In deciding how to deal with matters at the Reconsideration Hearing I took into account the provisions contained in the following Rules –

"**2 Overriding objective**

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

**3 Alternative dispute resolution**

A Tribunal shall wherever practicable and appropriate encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement."

5. I engaged in dialogue with the parties at the start of the Hearing and established that –

(a) the Claimant accepted that he would not be entitled to compensation for unfair dismissal as he did not have the necessary 2 years' qualifying service required under section 108 of the Employment Rights Act 1996 ("ERA") and none of the exceptions to that requirement applied in this case;

(b) the Claimant accepted that he would not be entitled to notice pay (being the matter to which his breach of contract claim related) because he had been employed by the Respondent for less than one month and accordingly had not acquired the right to minimum notice under section 86 ERA;

(c) the Respondent accepted that the Claimant was entitled to be paid for the hours he had worked during his period of employment which had commenced on 15 July 2018 and had terminated on 22 July 2018; and

(d) the Respondent accepted that the Claimant was entitled to holiday pay accruing during his period of employment and that, having regard to Regulations 13, 13A, 14, 15A and 16 of the Working Time Regulations 1998, this entitlement amounted to half a day's pay.

6. I also established that the Claimant's race discrimination claim related principally to an incident which had occurred on 10 August 2018 when the Claimant alleged that he had been threatened and assaulted by Mr Celik. Mr Celik accepted that the Claimant had attended at the Respondent's premises on 10 August 2018 and that he (Mr Celik) had been angry at that time.

7. The Claimant accepted that the Respondent's workforce comprised persons of various races including another Polish person (the Claimant's own race). The Claimant indicated that he would be prepared to withdraw his race discrimination

claim if Mr Celik apologised for any offence which his behaviour towards the Claimant on 10 August 2018 might have caused. Mr Celik duly apologised and the Claimant accepted that apology and agreed to withdraw his race discrimination claim.

8. In view of the difficulties he faced in relation to his unfair dismissal and breach of contract claims (as detailed in paragraph 5(a) and (b) above), the Claimant agreed to withdraw these claims.

9. The parties agreed that matters could be resolved by payment by the Respondent to the Claimant of (a) the amount of unpaid wages specified in the Claimant's ET1 claim form (37 hours at £7.83 per hour) and (b) a half day's holiday pay (agreed to be 4 hours at £7.83 per hour).

10. In order to achieve this outcome I had to deal firstly with the Respondent's application for reconsideration. I considered it was appropriate, having regard to its terms, to treat the Respondent's said letter of 16 December 2018 as both (a) an application for reconsideration under Rule 70 and (b) an application for an extension of time for presenting a response under Rule 20 (as it had been treated when received by the Tribunal).

11. In dealing with the application for reconsideration I reminded myself of the terms of Rule 70 under which an application for reconsideration may be granted where it is necessary in the interests of justice to do so. This involved balancing the prejudice to the Claimant in losing the benefit of the Default Judgment against the prejudice to the Respondent in being unable to defend a claim to which he had a statable answer.

12. I was satisfied that in this case the assessment of the balance of prejudice favoured the Respondent. A plausible explanation for the failure to lodge the ET3 response form timeously had been provided by the Respondent. The Claimant would suffer no prejudice in relation to the parts of his claim which would not be successful in terms of an award of compensation as discussed at paragraph 5 above.

13. Accordingly I decided to grant the Respondent's application for reconsideration under Rule 70 and to revoke the Default Judgment.

14. I had to deal next with the Respondent's application for an extension of time for presenting a response under Rule 20. This effectively entailed the same balance of prejudice exercise as under Rule 70, and I considered that it was logical to come to the same conclusion. Accordingly I granted the Respondent's application for an extension of time and determined that the ET3 response form, which had previously been rejected, should be accepted.

15. The Respondent's position in terms of their ET3 response form was that they accepted that wages were due to be paid to the Claimant but alleged that they had not been able to make payment because they did not have all the necessary information including the Claimant's National Insurance number and bank account details.

16. The Claimant's position was that he had provided the necessary information at the start of his employment. The matter was resolved by the Claimant providing to Mr Celik at the Hearing the information which would be required by the

Respondent's payroll service provider in order to process payment of the amount due to the Claimant.

17. The parties agreed that the amounts due to be paid by the Respondent to the Claimant were (a) £289.71 in respect of wages and (b) £31.32 in respect of holiday pay. Those sums would be subject to deduction of income tax and employee's National Insurance contributions (if any were due). The total sum payable by the Respondent to the Claimant is therefore £321.03 before deductions (if any).

18. The Claimant duly withdrew his claims of unfair dismissal, breach of contract and race discrimination and these fell to be dismissed.

**Employment Judge: Meiklejohn**
**Date of Judgment: 10 January 2019**
**Entered into the Register: 11 January 2019**
**And Copied to Parties**