Case No: 2300712/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr M Gould

Respondent: Daval International Ltd

OPEN PRELIMINARY HEARING

Held at: London South **On:** Wednesday, 26 July 2017

Before: Regional Employment Judge Hildebrand

Representation

Claimant: Mr C Rajgopaul, Counsel

Respondent: Ms L Bell, Counsel

RESERVED JUDGMENT

1. Time for submission of the Response is extended pursuant to Rule 20 (4) to the date of this judgment.

2. The Judgment signed on 3 May 2017 and promulgated by the Tribunal on 22 May 2017 is set aside.

3. The Respondent has 14 days from the date that this judgment is sent to them if so advised to amend the Response filed to respond in greater detail to the claim.

4. The case is to be listed for a final hearing for two days before a judge sitting alone with standard directions for an unfair dismissal case.

REASONS

1. This preliminary hearing was convened by a letter of the Tribunal dated 23 July 2017 directing determination of the following issues:-

    1) The Respondent's application for an extension of time to present the response;

    2) The Claimant's objection set out in their letter of 9 June 2017;

    3) Case management orders for a full hearing.

2. The Tribunal heard evidence in the form of written statements and cross-examination from the Claimant and on the Respondent's side from Mr Graham Ralph, Finance Director, Mr Stephen Hunt, a director assisting with fund raising and Mr Roger Beesley, Production and Distribution Director.

3. I received a skeleton argument from the Claimant's representative supplemented by oral submissions and the Respondent relied on the application found at page 22 of the bundle and the oral submissions of the representative.

The Findings of Fact

4. The findings of fact are as follows. The Claimant presented a claim to the Tribunal on 2 March 2017 alleging unfair dismissal, claiming a redundancy payment, notice pay, holiday pay and arrears of pay. At box 9.2 of the form the Claimant claimed unpaid salary for November 2016 in the sum of £6,000 net, unpaid salary for December 2016 for one week in the sum £1,500 net, a statutory redundancy payment based on 22 weeks at the statutory maximum £479, alternatively a basic award of £10,538, a compensatory award of three months net salary in the sum of £18,000, a claim for loss of statutory rights in the sum of £500, £18,000 for notice pay being 3 months net salary and £5,400 holiday pay being 18 days unused as net pay. The total, £59,938, is the sum claimed in the claim form. The claim was one of constructive unfair dismissal. The date of dismissal was said to be 7 December 2016 and the Claimant had an early conciliation certificate showing that conciliation began on 9 January and concluded on 6 February. There was no dispute regarding the time of presentation of the claim.

5. The claim was accepted and served by post on 10 March 2017 with a hearing date of 4 July 2017 by the Tribunal. The address for service was

taken from the claim form as 4a Gildredge Road, Eastbourne, East Sussex, BN21 4RL. The date for submission of the response was 7 April 2017. The Claimant was directed to supply a schedule of loss in the standard Tribunal orders. By e-mail of 12 May 2017 he supplied to the Tribunal a copy of the Schedule of Loss which he had supplied to the Respondent at the service address used on 30 March 2017. The total claimed in that document was £97,388.

6. Employment Judge Sage signed on 3 May 2017 a judgment pursuant to Rule 21. This was before the Tribunal received the Claimant's Schedule of Loss provided on 12 May 2017. The judgment was in the sum of £59,938 plus the issue fee of £250. Although the Judge gave directions for that Judgment on 3 April 2017 it was not signed until 3 May 2017 and was not promulgated by the Tribunal until 22 May 2017.

7. Solicitors instructed by the Respondent e-mailed the Tribunal on 31 May 2017. Audrey Williams, Of Counsel, wrote to say:-

   "I am instructed on behalf of the Respondent who are surprised to have been notified of a judgment as they have not been served with the proceedings. They were only alerted to this via a Google alert which is set up against the company name when the decision was posted on the register of judgments".

   The web link was then supplied. Ms Williams continued:-

   "I will be making a formal application for an extension of time and for the judgment to be set aside,..."

8. A trainee solicitor in the Respondent's representative's firm spoke to one of the clerks in Croydon who referred the matter on 1 June 2017 to Employment Judge Sage who directed acknowledgment and that the tribunal would await the application for an extension of time and the application to set aside the judgment.

9. On 2 June 2017 the Tribunal received from the Respondent's solicitors an application for an extension of time together with draft grounds of resistance. In light of extensive objections received from the Claimant's solicitor dated 9 June 2017 Employment Judge Sage directed that the matter should be listed for a one day reconsideration hearing before any of Judge without the issue of a fee. Before that was done the Employment Judge Martin directed on 14 June 2017 that a draft form ET3 would be required which was supplied by the Respondent on 15 June 2017. Directions were then given on 30 June 2017 for the case to be listed as set out above.

10. The bundle produced by the parties for this hearing runs to 180 pages. The testimony received establishes that the Respondent is a small private company specialising in pharmaceutical products. The company was set

up by Mr David Shotton and his wife Mrs Valery Shotton. Mr and Mrs Shotton are the father-in-law and mother-in-law of the Claimant. Sadly Mrs Shotton became unwell in 2015 and Mr Shotton stood down from the role of CEO and Mr Kevin Norville took over on 29 February 2016. Difficulties between the Claimant and the company date from this period.

11. In the context of service of papers the Respondent accepts that the claim form was sent to the registered office of the company. The Company's Finance Director, Mr Graham Ralph gave evidence that his accountancy practice operated from November 1999 to 2009 at the registered office address for the company. When Mr Ralph moved his practice in 2009 unusually he left the registered address for the Respondent, and it appears other companies for whom he was acting, at his former address.

12. The Respondent it is said operated without any PAYE employees, saving the disputed case of the Claimant, from Tudor House in Swanley, Kent.

13. A third address in this case is the address of Mr Ralph's practice from 2009 onwards. That is Natewood House, Polegate. Mr Ralph's evidence was that the current tenant of his former business address at Gildredge Road is a client of his accountancy practice. Arrangements are made for collection of post from that address three times a week to be taken to Natewood House and dealt with by Mr Ralph. Tudor House was as stated above the operating address for the Respondent used by the Claimant and Mr Beesley as warehousing and a base for product purposes.

14. Mr Ralph's evidence was that he was on holiday between 26 February and 5 March 2017 skiing. He states that he did not receive the notice of a claim. His business partner Hazel Mattock has confirmed to him that she has no recollection of opening post from the Employment Tribunal. Mr Ralph accepts receiving a letter from the ACAS conciliator dated 15 March 2017 and expecting that there would be some follow up from ACAS. He states he did receive the Rule 21 Judgment in default but cannot say when he received it and that he may have received it when a Google alert placed by Mr Hunt was triggered. Mr Ralph can not offer any explanation for the items of post sent by the Claimant to the Respondent for which certificates of posting were produced together with appropriate signatures of receipt not coming to his attention.

15. In relation to the merits it would be inappropriate to conduct other than an initial assessment at this stage. Issues in this case will involve a dispute whether the Claimant was an employee of the Respondent. Some PAYE payslips have been produced in the bundle about which there is dispute. Clearly evidence will have to be taken at length on whether these were created for the purposes of assisting the Claimant in connection with a loan he was seeking to obtain, or as demonstration of the net income he would earn if he moved, as the Respondents appear to contend, from self-employed to PAYE status or if some other analysis is correct.

Submissions: Claimant

16. The Claimant's representative submits that pursuant to Rule 90 there is deemed delivery of the claim form. A passage from IDS Handbook is quoted. It states among other things:-

    "The burden is on the party alleging that the document was not received to prove that this was so. It is usually difficult to prove the negative and rebut the presumption."

    The Claimant submits that the claim was served at the address for the registered office of the company and the correspondence address for the directors as recorded at Companies House and the address given on the ACAS Early Conciliation Certificate.

17. Letters had been delivered to the address by registered post and signed for. This had included reference to case management orders and the hearing date. It was contended that the Respondent could not discharge the burden of proving that the claim form was not received. The Claimant stated that it was extraordinary that the Respondent contended the Claimant was not an employee because it had failed to make PAYE deductions. The submission then dealt with some invoices said to been produced by the Claimant or on his behalf. The submission was that the claim was very strong even before the Claimant obtained the default judgment and the defence was hopeless.

Submissions: Respondent

18. The Respondent submitted that the only useful guidance in relation to rule 21 was to be found in ***Kwik Save Stores Ltd v Swain 1997 ICR 49***. There were three limbs which were discretionary factors. These included explanation for delay, prejudice and the merits. The Respondent had not wilfully ignored the claim. The Tribunal might be critical at what Mr Ralph said, but the Respondent should not be penalised for a genuine oversight. In the authority of ***Pendragon v Copus UKEAT 0317/2005*** the principles in the **Kwik Save** case were held to apply to the rules then in force. The absence of a good reason for delay in presenting the Response was not a barrier to an extension if there merit in the proposed defence. The discretion is a broad just and equitable one. Here the prejudice against the Respondent was significant. This present case was a judgment obtained on a technicality. No evidence had been considered. On the basis of the merits and the authority of ***Kwik Save*** the case should be heard. The merits require consideration of an unfair dismissal claim focusing on status and jurisdiction. Complex questions of fact and law were involved. There was no written agreement. The case had a long and complex history and involved a triable issue. This was not a situation where it was so obvious that the response had no merit at all of succeeding. Mr Ralph was adamant that he did not get notice of the claim. There was no evidence to

rebut that Mr Ralph did not receive the case management orders. There was oral evidence to rebut the deemed postage.

Conclusion

19. Having considered the matters raised above I set out the provision of Rule 20.

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 reason 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.
(2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.
(3) An Employment Judge may determine the application without a hearing.
(4) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside.

Rule 20(4) provides that if the decision is to allow an extension any judgment issued under Rule 21 shall be set aside. The requirement that it should be just and equitable to extend time is subsumed in the overriding objective to deal with cases fairly and justly. The authority of **Kwik Save** remains relevant. The explanation for delay, the balance of prejudice and the merits of the defence are the factors which must be considered.

20. Considering the merits of this case I analyse whether there is some merit in the defence put forward.

21. It would be impossible on the facts of this case to say that there was no merit in the defence. The unusual arrangements of this case must be the subject of careful consideration by the Tribunal. The Claimant states that his pay was £6,000 per month net of tax. That is a relatively exceptional description for salary. It appears that no tax or National Insurance has ever been paid over the lengthy period of the engagement. While those aspects are not in any sense determinative a consideration of them can lead to other relevant aspects in relation to the true nature of the relationship between the Claimant and the Respondent. It can not be said on any basis that this was a conventional employment relationship. On the Claimant's own case the sums claimed by the Claimant in the claim form do not appear to have been intended to represent the value of the claim. The Claimant's schedule of loss seeks a sum approximately twice the amount awarded in the Rule 21 Judgment. The Claimant has not argued his prejudice in relation to the loss of the possibility of that additional sum if the judgment stands. That is an added component to this most unusual case.

22. I therefore consider that there are merits in the Respondent's defence. Those require a trial.

23. The Respondent has produced evidence rebutting receipt of the claim and there is nothing to suggest that it was wilfully ignored particularly given the promptness of the action upon notification being received via the Internet. While the Respondent candidly acknowledges the unsatisfactory nature of the method of dealing with post addressed to the Respondent's registered office, it is not suggested by the Claimant that the Respondent adopted a strategy of allowing the judgment to be entered and then delaying the case by applying to set it aside. I accepted the evidence of Mr Ralph that he did not receive the Claim form sent to the registered office.

24. Further the prejudice to the Respondent given the size of the judgment in this case would be significant if a trial is not undertaken. The Claimant would receive a windfall based on figures which have not been tested and without any consideration of the compensatory award for unfair dismissal reflecting the just and equitable requirement of section 123 of the Employment Rights Act 1996.

25. I therefore extend time for the response and direct that the judgment is set aside. The case is to be listed for two days with standard directions for an unfair dismissal case.

26. The Respondent has 14 days from the date this judgment is sent to them to amend the Response filed to respond in greater detail to the claim which it appears was not in their possession at the time the draft response was prepared.

Regional Employment Judge Hildebrand

22 August 2017 London South