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EMPLOYMENT TRIBUNALS

Claimant: **Mr D Andargachew-Gatelo**

Respondent: **Alpha Security Solutions Ltd**

Heard at: **East London Hearing Centre**

On: **15 August 2017**

Before: **Employment Judge Russell (sitting alone)**

Representation
Claimant: **Ms A Oyedeaji (Solicitor)**
Respondent: **Mrs A Beatie (Litigation Manager)**

JUDGMENT

The judgment of the Employment Tribunal is that:-

(1) The judgment entered against the Respondent pursuant to Rule 21 will be set aside.

(2) The Respondent's ET3 is accepted as of 7 August 2017.

(3) Within 14 days, the Respondent shall pay the Claimant's costs assessed in the sum of £780.

REASONS

1 The Claimant was employed by the Respondent as a Security Officer between 4 June 2014 and 4 January 2017. In a claim presented on 21 April 2017, the Claimant brings a complaint of constructive unfair dismissal, breach of contract and unauthorised deduction from wages. The claim form refers to victimisation but there is no protected act pleaded.

2 The claim was served on the Respondent at an address at Fortis House, 160 London Road, Barking. This is a suite of serviced offices owned and operated by the Regis Group. A company, such as the Respondent, has no physical office presence there, rather Regis provide a receptionist and the company pays an amount of money to use the premises as required. The Fortis House address is not the registered office

at Companies House. Nevertheless, it was a proper address for service not least as it is an address the Respondent continues to publish on the internet as being a contact address for them.

3 The Respondent anticipated that there would be a claim arising out of the Claimant's resignation. The Claimant had entered into an early conciliation period between 9 and 29 March 2017 with ACAS. I accept that the certificates and contact with ACAS were handled predominantly through the Respondent's advisors, Croner, and/or were sent by email. The ACAS certificate also gave the Respondent's address as Fortis House 160 London Road.

4 The Respondent failed to present a Response by the prescribed date of 24 May 2017. The file was referred to a Judge and, on 7 June 2017, Judgment on liability was issued under Rule 21 in favour of the Claimant. The Judgment was served on the Respondent at the Fortis House address. A Notice of Hearing listing a remedy hearing for today was sent to the parties on 8 June 2017.

5 On 7 August 2017, the Respondent's representatives wrote to the Tribunal asking for an extension of time within which to lodge an ET3 and/or for a reconsideration of the Rule 21 Judgment. The reconsideration was presented out of time. I have treated the application today as one made under Rule 20(4) for an extension of time and setting aside of the Judgment.

6 The Respondent's grounds are that it had in place a service whereby post received at Fortis House would be forwarded to an address at 311 Hoe Street, Walthamstow. This appears to be the home of Mr Khalish who gave evidence today. The application letter states that a representative of the Respondent attended Fortis House on Thursday 27 July 2017 whereupon he realised that post received there had not been forwarded by the management team at Fortis House. The application refers to a practice where post is received at its accountant's office which is then scanned and sent by email to the Respondent. Read fairly, I do not consider that this asserts that post received at Fortis House was also scanned and sent to the Respondent. The Claimant opposed the application for an extension of time.

7 At the outset of the hearing today, I was provided with skeleton arguments on behalf of the Claimant and the Respondent, a copy of **Kwik Save Stores Ltd v Swain** [1996] ICR 49, a copy of a Regis service invoice for the month of June 2017, a report of the Respondent's accounts for the year ended 31 October 2016 and some emails exchange on 11 August 2016 between Ms Harbukova and Natasha (the Regis receptionist at Fortis House). I was not provided with any witness statements or other documentary evidence relied upon by the Respondent in its application. This was rather surprising, not least as Ms Beatie's skeleton argument averred that the Respondent did not receive the Tribunal correspondence until Thursday 3 August 2017. In other words, an entire week after the date relied upon in the application.

8 The absence of evidence was unhelpful. It is not sufficient for a respondent to attend to make a contested application relying upon mere assertions in a skeleton argument, unsupported by evidence and contradicting the grounds of a written application and expect it to find favour with the Tribunal. It should be appreciated, as Mummery J noted in **Swain**, it is incumbent upon the applicant for an extension of time

to place all relevant documentary and other factual material before the Tribunal in order to explain (a) non-compliance of the rules and (b) the basis on which it is sought to defend the case on the merits.

9 Ms Harbukova was present at Tribunal and Mr Khalish attended following a short adjournment. Both were able to give evidence on behalf of the Respondent as to when the correspondence was first received from the Tribunal. In the interests of justice, I decided to permit both to give evidence on oath in support of the application following a short adjournment during which Ms Beatie was directed to draft a witness statement and provide it to Ms Oyedeaji in advance of reconvening. Ms Oyedeaji pragmatically dealt with matters and was able to advance the Claimant's challenges to the witness evidence in cross-examination. A draft ET3 setting out the Respondent's case on the merits had already been provided.

Law

10 It was common ground that the approach to be adopted to an application for an extension of time is set out in **Kwik Save Stores v Swain**. In exercising its discretion, the Tribunal should take into account three particular factors although no single factor is decisive. First, the extent to which an explanation has been provided for non-compliance. Second, some broad examination of the merits of the case. Third, the balance of prejudice between the parties.

Conclusions

11 Dealing first with the explanation given by the Respondent for the delay. I accepted the evidence of Mr Khalish that post had not been received from Regis for some significant period of time and, whilst it was anticipated that there may be a claim from the Claimant, this was not certain given that there had previously been periods of time when the Claimant had not corresponded with the Respondent. I accepted Mr Khalish's evidence that he attended Fortis House on 3 August 2017 and obtained for the first time the post from Regis. This was the first time that the Respondent was actually aware that a claim had been made against it.

12 Accepting this evidence, I conclude that there was no contumelious or deliberate failure to comply by the Respondent. Nevertheless, I consider that where the Respondent knew that there had been a period of ACAS early conciliation and a certificate issues and received by the Respondent, the likelihood of a Tribunal claim was sufficient that it was seriously negligent for the Respondent simply to wait for four months without realising that it was not receiving post from Fortis House and/or going to Fortis House to check for post.

13 Turning next to the balance of prejudice between the parties, I am satisfied that there will be prejudice to the Claimant if the application is successful. He loses the benefit of a Judgment which has been validly obtained and which was due to be quantified by way of remedy today. Time limits are important and are not targets to be aimed at or expressions of hope to be waived lightly. Failure to comply with the rules causes inconvenience, results in delay and increases costs. I accept that there is further prejudice to the Claimant by way of the additional legal costs caused to him by the Respondent's unreasonable conduct of the case to date. The Claimant has paid

for legal representation to resist an application apparently made 11 days after the post was collected when, in fact, the application was made swiftly only four days later. If the correct date and evidence in support had been provided with the application, it may not have been opposed. However, I also take into account the prejudice to the Respondent if the application is refused. In that event, the Respondent would be subject to a Judgment without having had the merits tested after evidence has been heard. There are powerful interest of justice require a case to be heard where possible, particularly as here where the delay is relatively small, the quality of the evidence will not have been affected and the question of increased costs can be addressed by way of an appropriate order (see below).

14 Finally, considering merits, the strength of either party's case in a constructive dismissal case will inevitably turn upon the quality of their evidence at the final hearing. This is particularly so where the term relied upon is that of trust and confidence as there will only be a breach if the Respondent has acted without reasonable and proper cause. At the heart of this case, is the disciplinary procedure commenced against the Claimant which will require an assessment of the evidence in order fairly to determine whether or not it was or was not a breach. In other words, the defence is arguable but cannot at this stage be said to be strong or weak. By contrast, the defence to the pay claim is not strong. The Respondent does not deal in the draft ET3 with the allegation that a deduction from his wages was made in November 2016 some two months prior to his termination of employment purporting to recover the sum of £532.11 in respect of overpaid holiday. Rather, the Respondent pleads that by the date of termination, the Claimant had been overpaid by 20.97 hours holiday.

15 Taking all of these factors into account, and with some sympathy for the Claimant, I concluded that it is appropriate to set aside the Judgment and to grant the extension of time to permit the Respondent to defend the claim. As the prejudice to the Claimant can be minimised in terms of cost and delay (the final hearing will take place on 2 and 3 November 2017 and I deal with the costs of today below), on balance I concluded that the prejudice to the Respondent in not being permitted to defend a claim not in fact received by it was such that justice requires a hearing of the claim on its merits. I considered whether or not to maintain the Judgment in respect of holiday pay and/or wages but given the overlapping nature of the issues to be determined in the constructive dismissal claim, I concluded that it is appropriate that the Judgment be set aside in its entirety and accordingly I do so.

Costs

16 I had regard to the power within the Tribunal Rules to make an order for costs. First, I considered whether the Respondent has (itself or through its servants or agents) conducted proceedings in a manner which is unreasonable. I have set out the chronology to this claim and the Respondent's failure to make adequate checks for a claim which could reasonably be anticipated. Ms Harbukova gave evidence that ACAS matters were being dealt with by their representatives and she believed that ACAS may have contacted them directly. Moreover, the preparation of this application by the Respondent was inadequate. The grounds set out in the application letter were factually inaccurate on the central of point of the date upon which the Respondent became aware of the claim. No witness evidence was going to be adduced and the documents which were provided did not deal with the postal arrangements at the

material time of service of the claim in April 2017. I am satisfied that the Respondent's conduct of the proceedings to date has been cavalier, showing a failure to appreciate the seriousness of its position and requiring a hearing today. In resisting an application for costs against her client, Ms Beatie suggested the hearing today was required because the Claimant had maintained that post was scanned and so disputed the Respondent's knowledge of the claim. I do not agree.

17 The Claimant made clear in his objection on 9 August 2017 that he did not accept that there was valid evidence or explanation of the reasons for delay. The Respondent did not address this concern by producing (as one would expect) a witness statement or relevant documents. Even when that matter was put to bed it appeared that further evidence may have been required for Ms Harbukova to deal with the deduction point. On balance, I conclude that there has been unreasonable conduct in failing to check that its postal service of recording mechanism is in place and secondly in making its application to ensure that it was set out fully and frankly as required so that the Claimant could properly consider whether or not to object.

18 Having decided that the conduct threshold had been met, I considered whether an award of costs was appropriate and, if so, in what amount. If a Response had been presented within the prescribed period, the case would have been listed for final hearing with standard directions without any Preliminary Hearing as it is a money and unfair dismissal case. Having realised that Judgment had been entered against it, had the Respondent properly prepared its application and provided the Claimant with evidence in support, upon legal advice he could have made an informed decision not to oppose the application, today's hearing would have been vacated and directions given on paper. Overall, I am satisfied that it is appropriate to order the Respondent to pay the Claimant a sum in respect of his costs of attending today.

19 I have had regard to the financial resources of the Respondent, as detailed in its accounts figures which I was given. Whilst not a large company, I am satisfied that it is reasonable to require it to pay the full amount of the Claimant's legal costs of today's hearing. I accept Ms Oyedeaji's submission that that cost is £650 plus VAT. The Respondent shall therefore pay to the Claimant costs in the sum of £780 within 14 days.

Employment Judge Russell

15 September 2017