EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Ms M Cutler	and	Intelligent Modelling Limited

PRELIMINARY HEARING

Heard at: Reading **On:** 29 September 2017

Before: Employment Judge SG Vowles (sitting alone)

Appearances

For the Claimant: Ms M Scovell (Trade Union Legal Officer)
For the Respondent: Ms C Coram-Jones (Counsel)

RESERVED DECISION ON APPLICATION FOR RECONSIDERATION

Under Rules 70-73 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

1. It is not in the interests of justice to revoke the Rule 21 Judgment. The application is refused.

2. This decision was reserved and written reasons are attached.

REASONS

Background

1. This preliminary hearing was to consider the Respondent's application dated 8 May 2017 for reconsideration of the Rule 21 Judgment made on 12 April 2017 and sent to the parties on 25 April 2017.

Evidence

2. I heard evidence on oath from Ms Alexis Smith (CEO of the Respondent).

3. I also heard submissions from both representatives and read documents produced by the parties and documents on the Tribunal file.

Claimant's Claim

4. The Claimant was employed by the Respondent from 19 May 2016 to 3 November 2016. On 28 February 2017 she presented an ET1 claim form to the Tribunal claiming unauthorised deduction from wages and notice pay.

5. On 2 March 2017 the ET2 form was sent to the Respondent giving notice of the claim and setting the usual 28 day time limit in which to present a response. The time limit expired on 30 March 2017.

6. On 12 April 2017 no ET3 response having been received, a Rule 21 Judgment was made in favour of the Claimant. It was sent to the parties on 25 April 2017.

Application for Reconsideration

7. On 9 May 2017 the Respondent's solicitor wrote to the Tribunal as follows:

"Re: Claim Number 3300634/2017 [M Cutler v Intelligent Modelling Limited]
Request for a review reconsideration

We write further to the above.

We have been instructed by the Respondent in relation to the above.

We understand that the attached Judgment was entered. Our client advises that they never received the original ET1 claim and as a consequence no response was given. Our client was attempting to deal themselves but have now asked that we take over conduct on their behalf.

The Respondent seeks review of the Judgment ordered 12 April 2017, sent 25 April 2017. The Respondent seeks the Employment Tribunal set aside the Order 12 April 2017 and allow 14 days from receipt of copy of the original ET2 to file a Response (Form ET3)."

8. The application was accompanied by a statement of Ms Smith (the same statement she gave under oath at the hearing today) which included the following:

"I ALEXIS HANNAH SMITH of First Floor 60-62 High Street Burnham Buckinghamshire SL1 7JT will say as follows:

1. *I am the CEO of the Respondent Company.*
2. *I make this statement in respect of the Judgment given in default seemingly by the Employment Tribunal sent 25.04.2017, made 12.04.2017.*
3. *A relevant officer at the Respondent Company did not receive a copy of the ET1 or indeed any prior communication to the notice of*

> *Judgment and since that time I have been trying to piece together the sequence of events. I have still not seen the ET1 claim. It is I appreciate clear from the Judgment that the claim was for unlawful deduction and failure to make payment of notice pay."*

9. No draft ET3 was attached to the application as required by Rule 20.

10. On 18 July 2017 the Tribunal sent a Notice of Reconsideration Hearing listing the case for today's preliminary hearing.

Ms Smith's Evidence on Oath

11. Ms Smith attested to the statement which had been attached to the application for reconsideration and also gave some further evidence.

12. She said that because of a dispute with the landlord, access to her offices was denied between 13 January 2017 until early April 2017. During that period, she had no access to mail and when she regained access to the offices there was no mail waiting for her. She does not know where the mail went. She said that she had no knowledge of the Claimant's claim and first became aware of it when she saw the Rule 21 Judgment which had been sent to her on 25 April 2017. She said that she passed that to her solicitor, Mr Pollard, who then made the application for reconsideration on 9 May 2017.

13. She said that had she known of the claim she would have responded. When asked why she had not, even at the date of today's hearing, provided a draft ET3 response, she said that her solicitor asked her to draft the ET3 on a day earlier this week but she has been ill with stomach problems and stuck in bed since Sunday 24 September 2017. She said she was also dyslexic so would find it difficult to pull documents together. Another reason was that if the Respondent was not successful today in having the Rule 21 Judgment overturned, producing an ET3 would be a wasted effort and she did not have the time to spend putting an ET3 together. She was too busy and works 100 hours a week and has not done it as yet. She said that there was a draft in existence and given half an hour or so, she could put an ET3 together.

14. She could not recall receiving any call from ACAS although she had seen e-mail correspondence from the Claimant's trade union regarding the Claimant's dispute with the Respondent in December 2016.

15. She accepted that she had access to emails during her eviction from the office but could not recall receiving any e-mails from ACAS.

16. She did not ask the Post Office for re-direction of mail because it takes such a long time.

17. She was asked if she wrote to the people in possession of the office at that time to pass on post and she said "*probably*".

Respondent's Submissions

18. The Respondent submitted that it was in the interests of justice to revoke the Rule 21 Judgment. The Respondent did not have access to its office and so the claim form had not been received. When the Rule 21 Judgment was received, the Respondent acted proactively and instructed solicitors. The Respondent had a good defence to the claim and should be given the opportunity to defend it. A draft ET3 response form could be provided swiftly.

19. It was said that in accordance with the overriding objective, it would be fair and just to grant the application.

Claimant's Submissions

20. The Claimant submitted that the Respondent had not at any stage asked the Claimant for a copy of the ET1 claim form and even now, no ET3 response had been produced. Reference was made to the cases of Moroak v Cromie [2005] EAT and Kwiksave Stores Ltd v Swain [1997] ICR 49 EAT.

21. It was submitted that there was no good explanation for the delay. Reference was also made to two other cases involving former employees of the Respondent, namely:

    Mr D Cummins - case No. 3300051/2017 in which a Rule 21 Judgment was made on 16 February 2017;

    Ms Hart - case No. 3300403/2017 in which a Rule 21 Judgment was made on 27 April 2017.

22. This showed a pattern of the Respondent ignoring Tribunal claims and failing to present responses, resulting in Rule 21 Judgments being made against it.

23. It was pointed out that since the Rule 21 Judgment in the case of Cummins was made on 16 February 2017, the claim form must have been served on the Respondent before 13 January 2017 when the Respondent was evicted from its offices. That cast doubt on the Respondent's assertion that, in all three cases, it had not responded because it did not receive the claim forms in consequence of the office eviction.

24. It was pointed out that the Respondent has been legally represented since May 2017 at the latest and even as at today, no ET3 response form has been presented.

25. It was said that the prejudice to the Claimant was that almost a year had passed since the payments of wages and notice pay were due and that was due to delay and evasion by the Respondent.

Employment Tribunal File Documents

26. During a short adjournment, the Employment Judge discovered documents on the Tribunal file which he had not previously noticed.

27. Firstly, an e-mail from Ms Smith to the Tribunal as follows:

> *"From: Alexis Smith*
> *Sent: 04 April 2017 16:36*
> *To: WATFORD ET*
> *Subject: 3300364/2017 Ms m cutler vs intelligent modelling ltd*
>
> *To whom it may concern:*
>
> *We sacked Melissa for gross misconduct. Melissa has not worked for the period she sates so we wish to file a defence. Can you please send me the correct forms as we have not received them from yourselves.*
>
> *Many thanks"*

28. Receipt of that e-mail prompted a standard letter dated 25 April 2017 to be sent to the Respondent headed "*Rejection of Response*" and stating "*I have received your response but am required to reject it and return it to you because it has not been presented on an a prescribed form as required by Rule 16 of the above Rules. To present the response again you must use the prescribed Response Form enclosed with this letter or alternatively submit your response via our website at www.justice.gov.uk/Tribunals/employment/claims/responding".*

29. Attached to the standard letter was a prescribed form under Rule 17(1)(a) setting out how the Respondent could present a response in the correct format and stating how an application for an extension of time could be made.

30. Upon discovering this documentation which neither party referred to, copies were made by the Tribunal clerk and handed to the parties and they were given an opportunity to consider the documents and make further submissions.

Respondent's Further Submissions

31. The Respondent submitted that these documents cast doubt on the validity of the Rule 21 Judgment. The Tribunal had regarded the e-mail of 4 April 2017 as a response but it was not rejected until 25 April 2017. The Rule 21 Judgment had been made on 12 April 2017.

32. Rule 21 had not therefore been complied with because there was clearly a response which had not yet been rejected at the time the Rule 21 Judgment was made.

Claimant's Further Submissions

33. The Claimant submitted that this submission was a technicality and the e-mail of 4 April 2017 was not a valid response.

Employment Judge Questions

34. The Employment Judge asked the Respondent whether, in view of the date and content of the e-mail of 4 April 2017, the Respondent stood by Ms Smith's evidence on oath that she did not know anything about the claim until she received the Rule 21 Judgment on or after 25 April 2017.

35. Ms Smith was not recalled to give evidence but her representative said that she had spoken to Ms Smith and that the e-mail of 4 April 2017 was prompted by a visit by bailiffs to the Respondent's offices in connection with Mr Cummins' claim. She had phoned the Employment Tribunal and was told that there were other cases pending against the Respondent and given the case numbers but was told that no other information could be given. That was how she came to know the matters set out in the e-mail of 4 April 2017.

Relevant Law

36. Employment Tribunals (England & Wales) Presidential Guidance – Rule 21 Judgments (2013):

7. Any party who wish to ask for reconsideration of such a decision must make such an application in accordance with the provision of Rules 70-72.

37. Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:

Rule 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 21

(1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the Respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.

(2) 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.

Rule 70

A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

Rule 71

Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

Rule 72

(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can

be determined without a hearing. The notice may set out the Judge's provisional views on the application. …

Decision

38. I did not find Ms Smith to be a reliable witness.

39. The e-mail of 4 April 2017 shows clearly that she knew about the Claimant's claim by that date. It is addressed to "WATFORDET", contains the case number and the name of the case, refers to "gross misconduct" (relevant to the claim for notice pay) and also challenges the dates of employment given by the Claimant.

40. I am satisfied from that e-mail that Ms Smith received a copy of the ET1 claim form no later than 4 April 2017 and that her evidence under oath that she knew nothing about the claim until receipt of the Rule 21 Judgment was untrue. Even if the Respondent's representative's account of Ms Smith having a conversation with the Employment Tribunal on 4 April 2017 was correct – and I do not accept that submission as it was not mentioned at any stage before Ms Smith was presented with a copy of the e-mail – even then it is clear that she did know about the Claimant's claim on 4 April 2017 and her evidence under oath to the contrary would still be untrue.

41. I reject the submission that the Rule 21 Judgment was not valid because there was an outstanding response which had not been rejected. The Tribunal letter headed "*Rejection of Response*" was a standard letter sent in response to any communication from a Respondent who had written to the Tribunal but had not provided a response. It did not validate the e-mail of 4 April 2017 as a response, and the e-mail could not, in any sense, be regarded as a formal response.

42. I have considered the matters which the Employment Appeal Tribunal said must be considered when exercising a discretion in respect of the time limit in Kwiksave Stores Ltd v Swain [1997] ICR 49 as follows:

    42.1 The employer's explanation as to why an extension of time is required. The more serious the delay, the more important it is that the employer provide a satisfactory and honest explanation.

    42.2 The balance of prejudice between the parties.

    42.3 The merits of the defence.

43. I do not accept the Respondent's explanation as to why an extension of time is required and why an ET3 response has not yet been produced. As stated above, I found Ms Smith to be an unreliable witness for the reasons given. The Respondent has not given a satisfactory and honest explanation for their default.

44. I considered the balance of prejudice between the parties. The Respondent would of course lose the opportunity to defend the claims if the application for reconsideration was refused. But the failure to provide a defence in the form of a response, even now, 7 months since the ET1 was sent to the Respondent, and 5 months after the Rule 21 Judgment was sent, is entirely due to its own inactivity. Ms Smith said in her evidence that it was in part because she was too busy. The Respondent had the benefit of legal advice from 9 May 2017 at the latest. Despite knowing that a response would normally be expected within 28 days of receipt of the claim form, no response has been produced. The Tribunal's refusal (dated 11 April 2017) of an application for extension of time in the case of Cummins confirmed that an application for reconsideration of a Rule 21 Judgment required a draft response. The Respondent's solicitors would be aware of those requirements.

45. The prejudice to the Claimant is that because of the protracted and apparently deliberate delay and inactivity by the Respondent and its solicitors, she continues to be deprived of resolution of her Tribunal claim presented on 28 February 2017 and deprived of the monies which she claims she is entitled to receive in respect of her former employment and owing since 3 November 2016.

46. I find that the balance of prejudice weighs more heavily in favour of refusing the application, and that it is fair and just to do so.

47. So far as the merits of the defence are concerned, it is not possible to make an assessment of that because, as stated above, no ET3 has been presented.

48. It is not in the interests of justice to revoke the Rule 21 Judgment. The application is refused.

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Employment Judge Vowles

Date: 12 October 2017

Sent to the parties on:

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For the Tribunals Office