**RM**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Miss G Rodrigues**

**Respondent:** **Neil's Healthcare Limited t/a Kare Plus Chelmsford**

**Heard at:** **East London Employment Tribunal**

**On:** **9 March 2018**

**Before:** **Employment Judge Brown**

**Representation**

**Claimant:** **Mr A Passman (In writing)**
**Respondent:** **Mr G Lomas, Consultant**

**UPON APPLICATION** made by letter dated ***10 November 2017*** to reconsider the judgment under Rule 71 ET Rules of Procedure 2013 dated **31 October 2017.**

# JUDGMENT

**1. The judgment is revoked.**

**2. The response has been accepted.**

**3. The claim is listed for a Final Hearing on 24 April 2018 at 10am for 1 hour.**

# REASONS

**Background - Facts**

1. By a Claim Form presented on 20 August 2017 the Claimant brought complaints of unlawful deductions from wages and failure to pay accrued holiday pay against the Respondent, using its trading name, Kare Plus Chelmsford.

2. The Claimant gave the Respondent's address as Suite 1 & 2, Rochester House, 145 London Road, Chelmsford, Essex, CM2 0QT. That address was

correct in all respects, save that the Respondent's premises are at 145 New London Road.

3. The Tribunal served the Claim Form and a Notice of Claim and Notice of Hearing on the address stated by the Claimant in her Claim Form. It was not returned undelivered. The Respondent did not present an ET3 Response. The Tribunal proposed entering a Default Judgment against the Respondent. There was some confusion about the correct name for the Respondent, as the Respondent incorrectly does not put its correct legal title on its payslips, only its trading name. The Tribunal made a rule 21 ET Rules of Procedure 2013 Default Judgment against Kare Plus Limited and sent this to the Respondent and to Kare Plus Limited, at its Companies House registered address, on 31 October 2017. The Default Judgment ordered the Respondent to pay the Claimant £550 for unlawful deductions from wages and £2,205.50 for accrued holiday pay.

4. The Respondent made an application to reconsider the rule 21 ET Rules of Procedure 2013 Default Judgment on 10 November 2017, enclosing an ET3 Response and asking that it be accepted as the Respondent's Response.

5. Some further correspondence ensued between the Tribunal and the parties. The Tribunal substituted the correct name for the Respondent into the Default Judgment. A Reconsideration Hearing was listed for 9 March 2018.

6. The Respondent attended the hearing on 9 March 2016 and the Claimant's representative sent in written submissions.

7. The Respondent's Director gave a witness statement, saying that the Respondent had not received the Claim Form and original Notice of Hearing. He said it and had only received a copy of the Rule 21 Default Judgment when this was forwarded to it by Kare Plus Limited, of which the Respondent is a franchisee. He said that there are two "London Road" addresses in Chelmsford, one with a CM3 2EX postcode and, the other, a CM2 8TG postcode.

8. The Respondent contended that it had shown a defence to the claim on the merits because the Claimant was only off work, sick, for a small number of days and could not possibly be owed £550 in wages. It further said that the Respondent's holiday year runs from 31 March to 1 April and holiday entitlement cannot be carried over from one year to the next, so that the Claimant could not be owed £2,205.50 for accrued holiday when her employment ended on 24 April 2017, only 3 weeks into the holiday year.

**Law**

9. In *Pendragon plc (t/a CD Bramall Bradford) v Copus* [2005] ICR 1671, EAT, Burton J said that the power to review a Default Judgment under and to review a decision not to accept a Response should be exercised in the same way, in accordance with the principles set down in *Kwik Save Stores Ltd v Swain [1997] ICR 49,* EAT. In *Kwik Save* the EAT said that all relevant documents and other factual material must be put before the tribunal to explain both the non-compliance and the basis on which it is sought to defend the case on its merits, and the employment judge in exercising his discretion must take account of all relevant factors, including the explanation or lack of explanation for the delay and the merits of the defence, and must reach a conclusion which is objectively justified on the grounds of reason and justice, 55 B - D. At para 17, Burton J said

that the absence of a good reason for delay in presenting a Response does not rule out consideration of 'all the other matters, which inevitably must be considered on a discretionary decision by the tribunal, including, but not limited to, the reasonable prospect of success'.

10. In *Kwik Save, M*ummery J commented that an important part of exercising discretion will be to take account of the prejudice to each party, p55C- D. Another factor to take into account is the merits of the case. “Thus, if a defence is shown to have some merit in it, justice will often favour the granting of an extension of time, since otherwise there will never be a full hearing of the claim on the merits. If no extension of time is granted for entering a Notice of Appearance, the [employment ] tribunal will only hear one side of the case. It will decide it without hearing the other side. The result may be that [a Claimant] wins a case and obtains remedies to which he would not have been entitled if the other side had been heard. The Respondent may be held liable for a wrong which he has not committed.. This does not mean that a party has a right to an extension of time on the basis that, if he is not granted one, he will be unjustly denied a hearing. The applicant for an extension has only the reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner. This will involve some consideration of the merits of his case.”

**Decision**

11. I considered that the Respondent had shown a defence on the merits and that the Respondent would be prejudiced if it were not permitted to pursue that defence at a full hearing. Conversely, if the judgment were reconsidered, the Claimant would still be entitled to a hearing on the merits. The only prejudice to her would be that she would lose a Default Judgment giving her a remedy to which she might not be entitled on the merits. It appeared to me that the balance of prejudice clearly favoured reconsidering and setting aside the Default Judgment.

12. I was sceptical about the Respondent’s contention that it had not received the original Notice of Claim and Notice of Hearing. The documents had not been returned undelivered to the Tribunal. Respondents frequently claim not to have received documents from the Tribunal until a Default Judgment is entered against them and the Respondents spring into action. However, I accepted that the Tribunal had sent the original Notice of Claim and Notice of Hearing to a slightly incorrect address and that it was possible that the documents had been delivered to one of the two “London Road” addresses in Chelmsford, either at CM3 2EX, or CM2 8TG. I accepted the Respondent’s evidence that it did not receive the original Notice of Claim and Notice of Hearing and that this was why it did not originally enter a Response.

13. I considered that, in the circumstances, justice required that the Default Judgment be set aside and a final hearing, on the merits, be listed. I listed the final hearing on **24 April 2018 at 10am for 1 hour.**

Employment Judge Brown

9 March 2018