



EMPLOYMENT TRIBUNALS

Claimant: Mr K Rybkowski

Respondents: (R1) Michael & Magdalena Willett
(R2) M W Statics Limited

Heard at: Lincoln **On:** Thursday 5 October 2017

Before: Employment Judge Hutchinson (Sitting Alone)

Representation

Claimant: Mr Lukomski, Concilium (UK) Limited
Respondent: Mr L Varnam of Counsel

RESERVED JUDGMENT

The application for reconsideration of the judgment signed by me on 31 March 2017 fails. The judgment is confirmed.

REASONS

Background and Issues

1. The Claimant presented his claim to the Tribunal on 11 January 2017. He named two Respondents namely M W Statics Limited and Michael and Magdalena Willett. He said that he had been employed by them as a driver between 9 March 2016 and 19 October 2016. He claimed:-

- Unfair dismissal
- Notice pay
- Holiday pay
- Wages
- That the Respondent had failed to provide him with a written statement of terms and conditions of employment.

2. The claim was accepted and sent to the two Respondents. In respect of Michael and Magdalena Willett this was addressed properly to them at:-

Starlite Bungalow
Gorse Lane
Grantham
Lincolnshire
NG31 7UE

3. The letter required the Respondents if they wished to defend the claim to file a response by 9 February 2017. The letter also gave various case management orders and listed the case for hearing on 10 May 2017.

4. The Respondents failed to file a response. Initially it was not possible to quantify the claims and a letter was sent to the Claimant dated 6 March 2017 requiring him to provide the details. These were provided by way of a letter also dated 6 March 2017.

5. In a further letter dated 29 March 2017 the Claimant requested that the judgment be issued again to Michael and Magdalena Willett.

6. After being provided with this information I signed a judgment dated 31 March 2017 which was sent out to the parties on 1 April 2017. This judgment was sent to the parties by way of a letter dated 3 April 2017.

7. On 3 May 2017 Mrs Willett asked for a copy of the claim acknowledging that she had received the judgment. Her solicitors, PGH Law, wrote on the same date asking for the judgment to be corrected saying that the Claimant had performed his services for M W Statics Limited. The Respondents were told that the matter could not be corrected in that way in the circumstances of this case.

8. On 6 June 2017 PGH Law then wrote applying to set the default judgment aside on the basis that:-

8.1 The Respondents had not received the claim.

8.2 Judgment had been entered against two incorrect Respondents namely Mr and Mrs Willett.

8.3 The Respondents had an arguable case that some or the entire awards made in the judgment would not have been made if the Tribunal had been in full possession of the facts.

9. They also applied to vary the Respondents under Rule 34 of the Rules of Procedure.

10. Although the Claimant objected to reconsideration I ordered that there should be a reconsideration hearing which would initially deal with the issue of whether the Respondents had received the notice of hearing and consider whether the judgment should be set aside. The case was eventually listed and was heard by me today.

11. After hearing the evidence and submissions I decided to reserve judgment and told the parties I would write to them with my judgment and reasons as soon as possible.

The hearing today and evidence heard

12. At today's hearing I heard evidence from both Magdalena Willett and Michael Willett. I was also provided with a bundle of documents from the Claimant's Representative. The only document that was produced on behalf of the Respondents was an invoice to Moulton Washway dated 25 July 2017 which obviously post dates the time of the Claimant's employment.

Apart from hearing the evidence from the two Respondents I also considered the draft response form and heard representations from Mr Lukomski and Mr Varnam, Counsel for the Respondents.

13. I did not accept the evidence given to me by Michael and Magdalena Willett. I found their evidence to be contradictory and unconvincing for the reasons I expound in my findings of fact.

My findings of fact

14. M W Statics Limited was incorporated on 8 January 2014. The only Shareholder of the company and Company Director is Magdalena Willett. She is married to Michael Willett who claims to have no involvement in M W Statics Limited. He is a Director of a company Cheverly Park Mobile Home Sales Limited. Mr Willett told me that he had been involved in mobile parks all his life as had been his father and grandfather.

15. Whilst he told me that he had no dealings with the Claimant he said that he had checked out the Claimant who was driving heavy vehicles for M W Statics Limited. He did, in giving evidence, accept that he did assist with issues of transport although he didn't accept that he had any involvement in the dismissal of Mr Rybkowski.

16. Mrs Willett had no prior experience in the caravan business. As described in her solicitor's letter dated 3 May 2017:

“Magdalena has never been self employed. She has only ever been a PAYE employee of unrelated employers such as when she worked for Morrisons and latterly as a PAYE employee of M W Statics Limited. She is not registered with HMRC as being self employed either as a sole trader or a partnership.”

17. That statement was contradicted by the Claimant who acknowledged that M W Statics Limited had no employees at all. She herself was not even employed by the company.

18. In that same letter of 3 May 2017 it was said:

“At all times the Claimant, Mr Rybkowski was engaged by M W Statics Limited as a HGV driver. He has never been employed or engaged by either Michael Willett or Magdalena Willett. All paperwork for deliveries he carried out was in the name of M W Statics Limited, not Mr and Mrs Willett personally. He was paid cash withdrawn from M W Statics Limited bank account.”

19. Despite that statement no evidence was produced to me of any employment by Mr Rybkowski by M W Statics Limited. There is no contract of employment and no payslips. There are no records that would be necessary with HM Revenue and Customs regarding tax and National Insurance. Indeed Mrs Willett contradicted the evidence of her solicitor by saying that there were no employees of the company.

20. In their evidence to me Mr and Mrs Willett both accepted (they could not deny) that the Tribunal had sent the claim form to the correct address. They say that they did not receive that letter. They also say that they did not receive the letters sent by the Claimant's Representative. Mr Lukomski told me and I accept that he had written to the Respondents on 7 February 2017 with a schedule of loss and on 21 February 2017 sending them a list of documents. The Respondents say they did not receive those letters either.

21. I also asked the Respondents about communication from ACAS. They accepted that a letter had been sent to M W Statics Limited but denied receiving any letter in their own name. I am satisfied that ACAS would have written to the Respondents Mr and Mrs Willett about the early conciliation procedure.

22. The explanation by the Respondents is that there had been problems with their post. They said that there had been a change in the postman and they received a number of different letters from different people and that this was a "big issue for them". They produced no evidence in support of their contentions.

23. I do not believe them. I do believe that they did receive the letters from ACAS, from the Tribunal and from the Claimant's Representative. They accept that they received the letter relating to the judgment. I am satisfied that they ignored the letters they received in respect of the case and had every opportunity to respond to the claim but chose not to do so. They only chose to defend the claim once they had seen the size of the judgment made against them. That judgment is against them personally.

24. I see that on the company search that on 3 January 2017 there was a Gazette notice for compulsory strike off in respect of the company, although that strike off action has now been suspended. Mr and Mrs Willett clearly do not wish to be personally liable for the debt they owe to Mr Rybkowski.

The law and submissions

25. The application for reconsideration is made under Rule 70 of the Employment Tribunals Rules of Procedure 2013. That provides:-

"A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or an 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."

26. It is accepted that this general power under Rule 70 is wide enough to include judgments made under Rule 21. This is also confirmed by the Presidential Guidance on Rule 21 judgments issued on 4 December 2013.

27. There are two bases upon which Mr Varnam says that it's in the interests of justice to reconsider the judgment made under Rule 21 in this case. They are:-

27.1 That the Respondents did not receive notice of the proceedings leading to the decision.

27.2 That they have a genuine defence to the proceedings which should

be heard as set out in the draft ET3.

28. As acknowledged by Mr Varnam I have a wide discretion and there are other matters that I need to take into account when deciding whether I should exercise my discretion.

29. There is an underlying public policy principle in all proceedings of a judicial nature that there should be finality in litigation. Reconsiderations are therefore a limited exception to the general rule that Employment Tribunal decisions should not be reopened and re-litigated.

30. I should also acknowledge that “interests of justice” has to be seen from both sides. In this case the Claimant’s employment ended in October 2016 and through no fault of the Claimant there has already been a considerable delay in getting to this stage. If I grant the application there will be further delays before the Claimant could have his case heard.

My conclusions

31. I am satisfied that I should not exercise my discretion and revoke the judgment entered against Mr and Mrs Willet in this case. It is not in the interests of justice to do so.

32. I have seen no evidence that satisfies me that the Respondents did not receive the correspondence from the Tribunal informing them of the claim made by Mr Rybkowski. Ms Willett tells me that she received the letter enclosing the judgment but not any other correspondence in respect of the case. This is not credible. I do not believe her. The Respondents have produced no evidence in support of their contention that there was any issue with the post at their property and say that they did not receive an e-mail that was sent by the Claimant’s Representative in respect of this either. Ms Willett used the e-mail account in respect of the business which still operates and yet says to me that she did not see the e-mail from Mr Lukowski until a few days ago. This is not believable.

33. I am also satisfied having considered the draft ET3 that any defence to this claim would have failed in any event. The company M W Statics Limited has no employees and are not registered with HM Revenue and Customs. Mrs Willett accepts that she at no time issued a contract of employment in the name of M W Statics Limited and at no time supplied the Claimant with a payslip which showed who his employer was. The Claimant was in fact paid cash and no tax and National Insurance was deducted as of course it should have been.

34. The business may well have signage at its entrance bearing the name “M W Statics” but that does not mean that the Claimant was employed by M W Statics Limited.

35. I take into account that there should be finality in litigation. I am satisfied that the Respondents had an opportunity to defend the claim but they chose not to. It is not appropriate at a later stage to give them an opportunity to enter a defence to the claim particularly when on consideration of it; it has no real prospects of success.

36. Finally I take into account that the Claimant was dismissed from his employment some 12 months ago and there has been considerable delay in these proceedings caused entirely by the Respondents. It is not in the interests of justice for the Claimant to suffer a further delay in receiving the monies that he is entitled to.

37. For these reasons the application for reconsideration fails and the original decision is confirmed.

Employment Judge Hutchinson

Date 7 November 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
20 November 2017

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FOR EMPLOYMENT TRIBUNALS