EMPLOYMENT TRIBUNALS

Claimant: Miss Suzanne Daniels

Respondents: 1. Hilbre Care Limited
2. Della McManus

HELD AT: Liverpool **ON:** 15 February 2018

BEFORE: Employment Judge Robinson
(sitting alone)

REPRESENTATION:

Claimant: Mr Davies Solicitor
Respondents: Mr Maratos, Consultant

JUDGMENT

The judgment of the Tribunal is that:

1. The default judgment signed by Employment Judge Robinson on 23 November 2017 is rescinded and both respondents are entitled to defend these proceedings.

2. Further directions have been made and are set out in a separate document.

3. As regards the application for costs, both respondents are jointly and severally liable for certain costs and expenses of the claimant thrown away in these proceedings for the reasons set out below.

4. The respondents shall therefore pay forthwith to the claimant the sum of £1,728 together with VAT at 20% making a total of £2,073.60.

5. The respondents shall also pay to the claimant the sum of £70.40 with regard to the expenses for today that the claimant has incurred.

6. No further order or direction need be made with regard to costs.

REASONS

1. Two short judgments were sent out respectively on 15 February 2018 with regard to costs and 16 February 2018 with regard to the default judgment being

rescinded. Peninsula acting for both respondents have asked for written reasons in an email dated 27 February 2018, but they have not indicated for which judgment they require reasons.

2. Consequently I have given below reasons for both judgments.

3. Dealing firstly with the rescinding of the default judgment, having heard both Mr Davies and Mr Maratos and also having heard from Della McManus, a director of the first respondent, I considered that in the interests of justice both respondents should be able to defend the proceedings despite both the officers of Hilbre Care Limited and Mrs McManus' cavalier attitude to process and procedure and time limits.

4. In coming to my conclusion I accepted Mr Ryan Watson's argument from Peninsula in his letter to the Tribunal dated 8 December 2017. He confirmed that the respondents have an arguable defence to the claim and that the claimant may receive a windfall in compensation if liability is not contested. For those two reasons I decided that it was appropriate to set aside my judgment of 23 November 2017 and to cancel the remedy hearing which was to take place today if I had not granted the respondents' representative's application.

5. Turning now to the issue of costs, I awarded costs to Miss Daniels together with her travel expenses and loss of wages for the day under rule 76(1)(a) of the 2013 Rules because Mrs McManus and other officers at Hilbre Care Limited had acted unreasonably in the way that the proceedings, thus far, have been conducted.

6. Mrs McManus gave evidence on her own behalf and on behalf of the first respondent. She was cross examined by Mr Davies. Mrs McManus' evidence did not impress me for the reasons which I set out below.

7. Mrs McManus is a businesswoman who owns a number of care homes in Hoylake on the Wirral. Her office is at the Chalet, St Margaret's Road, Hoylake, Wirral, CH47 1HX.

8. The proceedings issued by Miss Daniels were received by the Tribunal on 10 October 2017. With those proceedings came an early conciliation certificate for both the first and second respondents; in other words the claimant had proceeded in an appropriate way.

9. On 19 October 2017 the Administration of the Employment Tribunal in Manchester sent to Della McManus notice of a hearing on 15 December 2017 (the preliminary hearing) and a further letter, again addressed to Della McManus at the correct address on the same date, informing Mrs McManus that if she wished to defend the claim then the responses from her and her company (the first respondent) should be received at the Tribunal office by no later than 14 November 2017.

10. Nothing was heard from Mrs McManus or Hilbre Care Limited by the due date, and so on 23 November 2017 I issued a rule 21 default judgment and informed the parties that the hearing on 15 December 2017 would deal with remedy. I gave judgment only with regard to liability.

11. On 6 December 2017 the Manchester Employment Tribunal received an email from Peninsula Legal Services informing the Tribunal that they had been appointed to represent both Hilbre Care Group and Della McManus and asking for all correspondence to be addressed to them.

12. On 8 December 2017 Peninsula sent in an application under rule 20 of the 2013 Rules for an extension of time for presenting the response giving reasons why they felt the judgment should be set aside, and also attaching to that letter a draft ET3 response.

13. The hearing on 15 December 2017 was postponed and Employment Judge Slater directed that the preliminary hearing should take place on 19 January 2018. Again that date had to be postponed and this hearing took place in person before me on 15 February 2018. Having heard evidence from Mrs McManus I considered the submissions from Mr Davies and Mr Maratos.

14. At the hearing on 15 February 2018 I confirmed I would deal with the following four issues:

(1) Whether the respondents' application for filing a response out of time would be allowed.

(2) If it was allowed, whether the default judgment should be rescinded.

(3) If the respondents were not successful in the first two applications then remedy would be dealt with immediately.

(4) If the respondents were successful then directions for the future good conduct of the proceedings would be made.

15. As the application by Mr Maratos was successful I went on to make directions for the future good conduct of these proceedings, and those directions were promulgated by the clerk at Manchester on 21 February 2018 with a final hearing now fixed for two days on 25 and 26 June 2018.

16. I accepted that, as Peninsula's legal arm as (opposed to their insurance department) only received the papers on 6 December 2017 from Mrs McManus, they acted with sufficient speed (i.e. within two days) in putting in an application for an extension of time with a draft response to the ET1 attached thereto.

17. However, Peninsula had been involved earlier in the process as they insure Hilbre Care Limited with regard to employment issues.

18. Mrs McManus told me that she was aware of employment tribunal practices because she has another employment claim at present in the Liverpool Employment Tribunal which pre-dated this application. She accepted that she knew that there was a time limit when it came to filing her response to any claim.

19. Mrs McManus has no, or, at its highest, very lax, procedures when dealing with correspondence coming to the Chalet. Part of the claimant's claim is that she submitted a grievance complaining about a number of health and safety breaches at one of the residential care homes owned by Mrs McManus and Hilbre Care Limited.

She received from Mrs McManus an assurance on 31 July 2017 that "someone from Peninsula will probably be in touch in the next few days".

20. The claimant never heard from the respondents or Peninsula again and the grievance was never dealt with.

21. Mrs McManus told me that she usually passed all documents and emails to Peninsula as soon as she received them. However, her evidence was unclear as to when she did this with regard to this claim. She could not give me dates and times. She suggested, at one point, that her secretary, Chris Williams, opened the post and that the documents were put in a drawer in her office, then forgotten and only found by accident some time later. She also told me that she got no response from Peninsula when she sent the documents to them, but she did accept that ACAS had been in touch with her. She told me that any post that comes in is logged in a post book but she could not tell me whether the documents received from the Employment Tribunal in this case had been logged in that book, nor did she produce a copy of the book for me to inspect. She told me that she "assumed" Chris Williams had opened her post. No one person is responsible for dealing with the post.

22. Mrs McManus could not tell me who eventually found the papers. It was not her. She told me that Chris Williams informed her that there was a court case in the Tribunal against Hilbre Care Limited and she told Chris Williams to send everything to Peninsula. She suggested she could have produced to me today emails to Peninsula informing them that proceedings had been issued. Mr Maratos had no information for me in that regard.

23. Mrs McManus does not open the post as she is too busy and it was the role of her secretary and only her secretary, Chris Williams, to deal with post.

24. Mrs McManus then contradicted herself. She said that two other members of staff might open her post, because Chris Williams only worked Monday, Thursday and Friday. She admitted that she did not know who had opened the post containing this ET1. Unfortunately there was no attendance by Ms Williams so I was unable to ascertain what she had and had not done with the paperwork received from the Tribunal. Any such documents are likely to have been delivered on or about Wednesday 18 or Thursday 19 October 2017. I gave the respondents the benefit of the doubt and put the likely date of receipt as the latter date.

25. Later in her evidence Mrs McManus suggested that when the grievance was put in by Mrs Daniels in July 2017 she was in Menorca. She again, she asked Chris Williams to deal with it. She repeated that everything, in those circumstances, would be sent to Peninsula.

26. Mrs McManus confirmed that she had received advice and assistance from Peninsula over the last five years.

27. Those are the facts. The respondents had a reasonable opportunity to make representations to me with regard to whether a costs order should be made.

28. Employment Tribunals have discretionary powers to make costs orders but only where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably (rule 76(1)(a) of the 2013 Rules).

29. I applied the two stage test to Mr Davies' application for costs thrown away. Firstly I asked myself whether the party's conduct falls within rule 76(1)(a) and then (as I must) I asked myself whether it was appropriate to exercise my discretion in favour of awarding costs against a party.

30. I considered the nature, gravity and effect of the party's unreasonable conduct, and in exercising my discretion I looked at the whole picture with regard to the conduct of Mrs McManus and the officers at the first respondent. I was also conscious that I must not penalise the respondents for their actions or lack of actions in presenting their ET3.

31. However, applying those principles to the facts of this case the claimant has been put to extra cost because of the respondents' negligence in dealing with the documentation. They clearly received the documentation before the time limit for entering a response expired. They opened (or at least someone did) the documentation. It is not clear why or when the documentation went into a drawer and why it was left there, but both Mrs McManus and other officers of the first respondent demonstrated a disdainful and dismissive attitude when dealing with such important papers.

32. Mrs McManus is a hands-on director who goes into work six days a week and her office is at the Chalet where all the documentation had been sent. She also knew that proceedings were likely to be issued and she knew that ACAS had been involved. If she relied on Chris Williams, her secretary, to deal with such issues then we needed to hear from Chris Williams as to how, why and in what circumstance the documentation was left in a drawer. I needed to understand why Mrs McManus did not take responsibility for dealing with the post or hear something as to the processes in place to deal with any post that arrives in her office. I also needed to know who dealt with the post on the days when Ms Williams was not in work. I heard nothing, save for a confused and contradictory account from the second respondent.

33. Given the circumstances of this case I felt that it was appropriate to award costs because of the unreasonable behaviour of, in particular, Mrs McManus but also other officers at the first respondent.

34. I heard Mr Maratos' submissions on costs. No real argument was put forward as to why costs should not be paid. It was the amount of costs that were disputed by Mr Maratos. I noted that Mrs McManus owns a number of Nursing Homes. Consequently I awarded the costs as set out in the judgment. Mr Davies charges at £192 per hour. He has had six hours of preparation and three hours in attendance today. The costs of the claimant being requested were reasonable as were her losses in having to attend with her solicitor. Mr Davies and his client have had to be ready to deal with any or all of the issues set out in paragraph 14 above.

35. Consequently the respondents should pay the sum due forthwith.

Employment Judge Robinson
07-03-18

JUDGMENT AND REASONS SENT TO THE PARTIES ON

8 March 2018

FOR THE TRIBUNAL OFFICE