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EMPLOYMENT TRIBUNALS

Claimant: Miss Maria Kennedy
Respondent: Barts Health NHS Trust
Heard at: East London Hearing Centre
On: 14 June 2018
Before: Employment Judge C Hyde, sitting alone

Representation

Claimant: Ms C Jennings, Counsel
Respondent: Ms H Patterson, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. the default judgment (Rule 21) which was sent to the parties on 4 April 2018 is hereby revoked and the Respondent is granted an extension of time under Rule 20 of the Employment Tribunals Rules of Procedure 2013 to present its response until 23 April 2018.
2. the Respondent is to pay the Claimant's costs thrown away in the sum of £600 with VAT which totals **£730**.

Employment Judge Hyde

6 July 2018

REASONS for setting aside default Judgment

1 [the Tribunal made no criticism whatsoever of Mrs Basra's dealings with the claim].

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3 This is the hearing of an application under Rule 72 of the Employment Tribunals Rules of Procedure 2013 to consider the Respondent's application for reconsideration of what I am going to refer to is a default judgment which was sent to the parties on 4 April 2018 and also subsidiary application to grant an extension of time to the Respondent until the date on which the proposed or draft response was submitted on 23 April 2018. Although I am satisfied having been given the email print out document by the Respondent's counsel that that document was sent to the Tribunal on that date and similarly the Claimant received a copy of it on that date the Tribunal have to acknowledge that it does not appear to have reached the Tribunal file I have not made a search and I do not think it necessary in terms of the email itself but there is no challenge to the email but I just mentioned that because there are situations where things do wrong in bureaucracy.

4 The factual background in not in dispute in terms of chronology of the claim form having presented on 12 January 2018 and a notice of the claim being sent to the Respondent on the same date then early April there were three pieces of correspondence including that notice of the claim which was sent to the Respondent and which the Respondent says they did not receive. It is accepted that all of them were wrongly addressed in what might normally be considered a minor respect namely that the street which is 9 Prescott Street had an extra T at the end of the name. In any event the

response was not presented by the Respondent by the due date which should have been 21 February 2018 and this case proceeded as frequently happens in those circumstances with the issuing of the default judgment.

5 The hearing of 9 April had been set up initially as a Preliminary Hearing (Closed) to consider the sex discrimination complaint but on the issuing of the default judgment it was converted into a remedy hearing. The Respondent then heard before that hearing from Acas and Acas communicated with the Human Resources Manager who has given evidence in this case Ms Basra and as a result of her becoming aware of the claim steps were put in place for the Respondent to attend and to make an application for reconsideration of the default judgment to attend on 9 April. That hearing before Employment Judge Reid was postponed effectively and the application before me to determine. The Respondent attended on that occasion and obviously has attended today as well.

6 I heard evidence from Ms Basra and subsequently on 23 April the Respondent also presented a proposed draft response. Counsel do not have any disagreement as to the principles which apply and I have been helpfully referred to the rules and also to two cases the latter of which is perhaps more relevant which was the case of *Pendragon Plc v Copus [2005] ICR page 1671* that was the judgment of the Employment Appeal Tribunal. I was also referred to the earlier judgment also in the Employment Appeal Tribunal in the case of *Kwik Save Stores Ltd v Swain [1997] ICR page 49*. The principles applicable are summarised in the head note I am not going to repeat those but in the course of considering the situation the Employment Appeal Tribunal commented or remarks on the fact that there was no question of any deliberate default and that even though there was no satisfactory competent explanation given for the delay that did not prevented the Tribunal from setting aside the default judgment. There was also reference to the fact that

it was a matter of discretion for the Tribunal and that various matters such as the respective prejudice on the parties the merits or possible merits of defence should be taken into account in reaching a conclusion that was objectively justified on the grounds of reasons and justice.

7 In this case also it is not been said that there was any intention on the part of the Respondent to avoid or fail to respond or ignore the Claimant's claim and Ms Jennings has argued that it was really an example of gross negligence and in particular she refers to the facts that on the information available to us there was also a letter which was sent to the Respondent by Acas on 5 February 2018 which the Respondent accepted they received at the relevant office and it was sent from the first floor of Prescott Street down to the ground floor and at the ground floor office a manager of the same level as the witnesses given evidence today opened it and then left it on the desk of a more junior member of staff for her attention and it appears that the more junior member of staff was an interim employee and obviously not familiar with this and I have not heard from either her or from the manager but it does raise numerous questions about what sort of instruction she was given and what sources of information she felt able to access on order to deal with this letter appropriately. It is obvious that the letter had the information which could have alerted the Respondent to the fact that there was currently a claim outstanding even if they had not received the documents related to it. I have also however had regard to Ms Patterson's submissions that the central issue is to consider whether the Respondent had received the claim form and although she characterises the Acas letter as a red herring or distraction it does appear to me that it is important that the Respondent take seriously the fact that because the claim was missed as claims would periodically be missed in a large organisation and including that the Employment Tribunal sending documents out and the post office deals with it and then the Trust which is also a large

organisation receives it or does not received it as the case may be that when the process allows for the Respondent to be alerted after the existence of such a claim by some other means then it is really very disappointing as I said that the member of staff concerned and the colleagues who she apparently spoke to did not feel able to either pass it up the line to the relevant managers to deal with or to make a phone call to Acas. In any event I do take on board the point that this does not go to the point about whether the claim form was received by the Respondent and while on the one hand it may seem coincidental that three letters addressed identically but just a small error in the address went astray. There is a degree of consistency in that picture and the letter which the Respondent accepted they did receive as I say it does not bear the same error and came from a different source. The prejudice to the Claimant is obvious in the sense that she has had a valid judgment, a regular judgment and Ms Jennings described it as but she would also have known that it was not based on an investigation of the merits and that very soon after this judgment was issued the Respondent disputed it. The prejudice to the Respondent is also obvious if the judgment stands which is that they would stand to be found to have discriminated against the Claimant and have a judgment against them in a very serious matter.

8 On balance it seems to me as far as the balance of prejudice was concerned that the balance was very heavily in favour of revoking the judgment as far as the balance of prejudice is concerned. The other point as well was about the merits of the case and it appeared to me that like all discrimination cases there is room for considerable conflict on the fact. I am not in a position today to say that the response does not have reasonable prospect of success. I have taken on board the points made about the claim but equally it is not appropriate for me to express the view about the merits of the complaint except observe as I think I can ?? without prejudicing any part of the claim that there are some parts of the claim which on their face would face some time points but again Ms Jennings

has a response for that but it appears to me that those are all matters of fact which may be I cannot decide one way or the other at the moment but as I said it appears to me that the issue about the prejudice being in favour of the Respondent as far as keeping the judgment in place determinative in this case in the circumstances and I am satisfied that it is appropriate to revoke the default judgment and I repeat however that it is incumbent upon large bureaucracy to have systems within themselves. Yes, it is important that steps are made to try to get the Tribunal to send claims to particular address or what various other things that other people can do but the organisation needs to look itself and make sure it has proper system and I say this because Mrs Basra confirmed that there had been other occasions prior to this when it would appear ET1s had not been received. The Tribunal obviously also has some responsibility and do not ?? that.

9 After I announced my judgment in relation to allowing the Respondent back in by revoking the default judgment and also extending the time which I have done the Claimant made an application for costs on the alternative bases with either there had been unreasonable conduct by the Respondent or that I could make an order for costs because there have been conduct resulting in a postponement under Rule 76 at paragraphs 1 and 2 and I think I have said quite a lot about the background of this I am not going to repeat it in my earlier judgment I think it is important to acknowledge that whatever other force there might have been the Claimant is blameless in terms of the delay that has occurred and I can give more weight to the handling of the Acas Letter I think in this part of the consideration than I fail proper to give in the earlier part of my reasons I do however also repeated I said earlier on that I do not consider this is a matter of a junior person making an error I think it is unattractive for large organisation like this with considerable resources to effectively blame a junior member of staff when it looks from what I have heard and I completely accept they had not had a full investigation in this matter that there were a

number of assistance which fell down within the Respondent for the position to have been arrived at where a letter from Acas was received and was opened by a manager and then was not appropriately dealt with by a more junior temporary member of staff and I think also the point I made about the fact that this sort of issue has happened before and the system should not be dependant on the HR Manager who is dealing with the case happening to be there to deal with the correspondence from Acas. Anyway I do not want to keep repeating myself but it seems to me I am not going to do it on the basis of unreasonable conduct that I think under more open discretion that I have under Rule 76(2) where there has been conduct resulting in a postponement I do think it is appropriate to make an order for costs in relation to the costs that were thrown away on the last occasion.

10 The application has been made for both counsels fees and the fees of the solicitor in reviewing the witness statement and again I think I will tend to favour the submission by Ms Patterson that I should not grant the solicitor's fees because that is quite considerable and the Respondent had quite properly written to the Tribunal which the Claimant would have had the details of in which they set out the points about what had happened in terms within the Respondent. I do not criticise the solicitor by the way I am just saying I do not think that it is something that I need to make the Respondent pay for but I do think there is some force in saying that the Respondent should pay the Claimant's costs thrown away in the sum of £600 with VAT which total £730.