EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss L Kail	AND	SBFM Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 17 October 2018

EMPLOYMENT JUDGE N J Roper

Representation:
For the Claimant: **In person**
For the Respondent: **Did not attend**

JUDGMENT ON APPLICATION TO RECONSIDER RULE 21 JUDGMENT

The Judgment of the Tribunal is that the Respondent's application for reconsideration is refused.

REASONS

1. The respondent has sought a reconsideration of the administrative decision of the Employment Tribunal by letter dated 8 August 2018 to the effect that its response was not entered in time and that it could take no further part in the proceedings save to the extent permitted by an Employment Judge. The respondent has made an application for reconsideration of this decision, and for an extension of time to serve its response. Its grounds are contained in its emails to the Tribunal dated 9 August 2018 and 13 September 2018.
2. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2015 ("the Rules"). Under Rule 18 a response shall be rejected if it is received outside the time limit, and under Rule 19 a respondent may apply for reconsideration of that decision. In addition, an application for

extension of time for presenting the response must be made in accordance with Rule 20, which sets out the reason why the extension is sought and include the proposed response.

3. Under Rule 19(2) an application for reconsideration under Rule 19 must be made within 14 days of the date on which the was sent to the parties. The application was therefore received within the relevant time limit.
4. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.
5. The background to this case is that the claimant was employed by the respondent as a cleaner from 14 February 2015 until 31 March 2018 when her employment passed from the respondent to a different company namely Regent under the TUPE Regulations 2006. The claimant issued proceedings on 13 June 2018 claiming that there had been a failure to inform or consult under those Regulations.
6. The grounds relied upon by the respondent are that the late delivery of the response was due to an error following the annual leave of staff in the HR Department, leaving staff members unfamiliar with the procedures, and that (as set out in its response), the respondent has a defence to the claimant's claim by way of a letter dated 9 March 2018 to the claimant explaining the proposed TUPE transfer to Regent.
7. The claimant opposes the application on the basis that the respondent is a large employer with sufficient resources to receive advice in connection with the claim, and that the tribunal time limit was made clear to them from the outset. The claimant does not accept that they have a credible excuse. In addition, the claimant denies ever having received the letter which effectively is the respondent's defence to the claim. Furthermore, the claimant suggests that the respondent would often fail to attend Tribunal hearings on other cases, and the respondent has similarly failed to attend today to pursue its application.
8. This position is analogous with an application for reconsideration of the judgment which has been entered under Rule 21. Under the previous Rules of Procedure (relating to the review of what were called Default Judgments) the EAT gave guidance on the factors which tribunals should take into account when deciding whether to review a default judgment in Moroak t/a Blake Envelopes v Cromie [2005] IRLR 535. The EAT held that the test that a tribunal should apply when considering the exercise of its discretion on a review of a default judgment is what is just and equitable. In doing so, the EAT referred to the principles outlined in Kwik Save Stores Ltd v Swain and others [1997] ICR 49.
9. In the Kwik Save decision, the EAT held that "… the process of exercising a discretion involves taking into account all relevant factors, weighing and balancing them one against the other and reaching a conclusion which is objectively justified on the grounds of reason and justice". The case established that an Employment Judge should always consider the following three factors. First, the explanation supporting an application for an extension of time. The more serious the delay, the more important it is

that the Employment Judge is satisfied that the explanation is honest and satisfactory. Secondly, the merits of the defence. Justice will often favour an extension being granted where the defence is shown to have some merit. Thirdly, the balance of prejudice. If the employer's request for an extension of time was refused, would it suffer greater prejudice than the employee would if the request was granted?

10. I have taken into account all the relevant factors. The respondent's explanation for the delay is not particularly convincing, although the delay was not lengthy. The respondent has failed to attend today to pursue its application, and no reasons for its non-attendance have been provided. The claimant disputes that there is any merit to the defence because it is based on a letter which she has never received. In my judgment the greater prejudice would be suffered by the claimant in allowing this application in the absence of the respondent given that the claimant has complied with Tribunal orders and attended the listed hearing, whereas the respondent has failed to do so.
11. Accordingly, I refuse the respondent's application for reconsideration and its late response is not accepted. Judgment has now been entered for the claimant under Rule 21 by way of a separate document.

_____

Employment Judge N J Roper

Dated: 17 October 2018