EMPLOYMENT TRIBUNALS

Claimant: **Miss N Croft**

Respondent: **SWR Energy Smart Limited**

Heard at: **Nottingham** **On:** **Wednesday 14 November 2018**

Before: **Employment Judge Britton (sitting alone)**

Appearances
For the Claimant: **In Person**
For the Respondent: **Mr R Chaudhary, In-house Solicitor, Peninsula**

JUDGMENT

1. The application to set aside the default judgment is refused.

2. Remedy will be assessed on Wednesday 21 November 2018 commencing at 10:30 am at Nottingham with a 3 hour time estimate before me.

REASONS

The procedural history and the application of the Respondent to set aside the default judgment.

1. The claim (ET1) was presented to the Tribunal by the Claimant on 21 September 2017. In it she set out how she had been employed by the Respondent and for that I would read as also its predecessor SWR Home Improvements Limited as a call centre operator from 21 March 2016 until 26 July 2017. Essentially, she set out how having disclosed her pregnancy and thence in the run up to her taking maternity leave that the attitude of the employer to her changed. The last straw so to speak was when she was informed that henceforth she would not receive wages for the hours she worked unless she achieved a commission target. In the context she became upset and she went home. That evening she e-mailed the employer what I have no doubt is a clear grievance in that I have the document before me. It could not be clearer in particularising her complaints. On an aside it follows that when in due course after their involvement Peninsula pleaded in the then response that there was insufficient particularisation that this is plain wrong. But that is not a criticism of Peninsula as it became clear during this hearing that it had not been provided with all the paperwork that had been generated in this case and which I have no doubt had been received by the Respondent.

2. There was a reply to that grievance on 31 July by David Wilkinson who according to company records is the sole director of SWR Energy Smart Limited, although I will accept that when it comes to the predecessor company the Director was Gary Hastings. I am currently not clear as to the extent of the shareholding of either of them. It matters not in that in terms of the Respondent company SWR Energy Smart Limited Mr Wilkinson and Mr Hastings worked very closely indeed in what is a small business with about 15 employees.

3. The reply was not satisfactory to the Claimant and thus she engaged the services of ACAS early conciliation. Sufficed to say that she makes a very serious allegation that having done so Mr Hastings made serious threats against her and her family. I am leaving that issue today because there is a clear conflict between the parties.

4. Be that as it may the Claimant therefore issued her claim to Tribunal on 21 September 2017. The address that she then gave for the Respondent was 17a Kingsway, Kirkby-in-Ashfield, Nottingham NG17 7BB this was correct as a company search subsequently carried out by the confirmed. It matters not therefore in that respect that at the beginning of 2018 the Respondent moved premises to Unit 6, Forum Road, Nottingham NG5 9RW. This was effective on 31 January 2018 in terms of changes in the registered details at Companies House. This is because well before that move the Respondent was duly served by the tribunal with the claim with the notice of the proceedings and the response document (ET3) for completion. This was on 28 September 2017. Set out in bold was that the last date for filing a response was 26 October 2017 failing which a default judgment would be issued. No such response having been filed the papers came before this Judge on 5 December 2017. He signed off a default judgment to be issued. Unfortunately, it never was issued.

5. However, in accordance with the already existing directions on 6 December 2017 the Claimant sent in her remedy claim and also set out in greater detail what her claim was about. According to the file that document was therefore then sent at that stage in terms of being copied to the current address as it then was of the Respondent. There was still no response.

6. On 6 December the parties were informed again by letter that there would be now a remedy hearing on 5 December 2017. Now of course that couldn't happen because the letter only went out on the sixth. I take that therefore to have been an error. So, there wasn't a remedy hearing at that stage. However, what is absolutely clear is that the Claimant was complying to the letter with the already existing directions for this case, hence her providing the first statement of loss to which I have referred and it being copied to the parties as to which see the letter sent out on 6 December where again the correct address is given for the Respondent. There was still no reply.

7. On 23 January the Claimant informed the Tribunal that the Respondent had moved to the address I have given at Unit 6.

8. On 24 February the Tribunal wrote another letter (doc 17) to principally the Respondent at in fact the correct new address. The letter had in bold at the top in upper case:

"NO RESPONSE RECEIVED."

And then the narrative stated:

> *"You did not present a response to the claim.*
>
> *Under Rule 21 of the above rules because you have not entered the response a judgment may now be issued. You are entitled to receive notice of any hearing but you may only participate in any hearing to the extent permitted by the Employment Judge who hears the case."*

9. This now for the first time elicited a response from the Respondent and there is a note on file from a very experienced clerk, Claire Johnson, as at 27 February 2018. It read:

> *"Not happy received (doc 17). Was waiting for a call from us (TCMD) – not his place to call us – changed address January – didn't advise us = we have his details.*
>
> *Explained we provided a telephone number. He then said he can't read and we're discriminating against him.*
>
> *He then gave me his e-mail address to send him an e-mail so he could respond."*

10. That clerk duly therefore provided him on the self-same day at 10:48 with the details for contact. This was followed up by an e-mail the next day to the tribunal from the Respondent headed in upper case from DAVID WILKINSON Sufficed to say that I am told that this is a template type letter which had been created for the new company by Ben Sweet. I have heard from him under oath. He has a full time job as an Advertising Account Executive but he gives help to the Respondent on an ad hoc unpaid basis primarily because of Gary Hastings dyslexia. He has done this for some years. Evidence on this point before me from the Respondent was otherwise unsatisfactory. Initially I was told by David Wilkinson who also gave evidence to me under oath that it wasn't him that penned this letter. When I put to him that Mr Hastings couldn't have done so because he tells me, also under oath, that he is unable to do so because of his dyslexia and I asked if Mr Sweet had and it was clear that he hadn't, Mr Wilkinson then offered that he had actually written this letter at the dictate of Gary. I am told that there is a difficulty even with David in writing in good English. For reasons I shall now come to I find that explanation deeply unsatisfactory. As to why, I need only refer to the content of the letter:

> *"I am writing in response to our conversation on Tuesday 26 February.*
>
> *As discussed due to my disability I was unable to read and understand your letter regarding the Tribunal case involving Ms N Croft.*
>
> *My interpretation of the letter due to my disability was that I would receive a call to discuss the hearing and filing a defence.*

Now I understand the position I would like to file a defence and defend my company's position in relation to this case.

I would be happy to have a telephone conversation with you so we can discuss the point above and also other points which I would like to clarify to defend this case.

I look forward to hearing from you…".

11. That letter to me shows that either Mr Hastings or Mr Wilkinson or both of them now knew if there had been any doubt what they were expected to do. Incidentally of course by now the time for holding the case management discussion which had been listed in the usual way at the issue of these proceedings had of course gone by and it had been cancelled indeed by an order from this Judge because there was now of course no need for a telephone case management discussion because of the failure to file a response. I should make clear that the parties have initially been informed that this case management discussion would take place on 5 December 2017 and they received that letter with the service of the response on 28 September 2017. So to turn it round another way it's a red herring because the parties were most definitely informed that that hearing had been cancelled by the letter that I directed to be sent out back on 6 December 2017; incidentally to the correct address then for the Respondent. This made plain that there would no longer be the 3 day hearing before a full panel as originally intended for this case which would have been in October 2018 but that it would now proceed to remedy, and that the Claimant would therefore provide details of her remedy; and her attention was directed inter alia to the presidential guidance on awards for injury to feelings which she undoubtedly looked at and to which I shall return.

12. So, I am somewhat sceptical about the explanation being given by the Respondent. I then factor in the following as I move along and having heard the evidence. There is no doubt that the Respondent had got the original set of pleadings of the claim with the letter to which I have already referred on 28 September 2017. Factoring Mr Ben Sweet in who I found an honest witness and who did not contradict himself unlike the other two, what happened is that Gary Hastings or David Wilkinson or both of them opened the aid envelope, ie from the Tribunal and which of course would have the Ministry of Justice stamp upon it. It looks very official. Mr Sweet was given said envelope, opened with the contents in it and asked to have a look at it. Mr Sweet didn't. He had got other things to do. He did his work for them on a purely friendly basis being as he was unpaid for it and he had got other things on his mind because he was moving house. Sometime thereafter on maybe more than one occasion, I am not sure, either Mr Hastings or Mr Wilkinson asked him if he had still got it and he said he thought so. It is only it seems in October 2018 and for reasons to which I shall come to that it was discovered that Mr Sweet had lost it in the move.

13. In any event moving back to the factual scenario in this case failure to issue a default judgment was cured when on 31 May, Employment Judge Evans signed off one. This was then sent out to the parties on 25 June 2018. As to the accompanying notice, I will use for that purpose page (Bp) 28 in the Respondent's bundle. It was very clear indeed. It reiterated what had previously emanated from the Tribunal namely that the hearing before a full panel between 8 and 10 October 2018 was postponed and that a notice of remedy hearing would follow in due course.

Then was set out in bold, upper case:

> **EMPLOYMENT TRIBUNAL JUDGMENT**.
>
> *A copy of the Employment Tribunal Judgment is enclosed. There is important information contained in **"The Judgment"** booklet which you should read…*
> *The judgment booklet explains that you may request the Tribunal to reconsider a judgment or decision. It also explains the appeal process to the Employment Appeal Tribunal. These processes are quite different, and you will need to decide whether to follow either or both. **Both are subject to strict time limits**. An application for a reconsideration must be made within 14 days of the decision being sent to you…"*

14. Albeit the address unfortunately of the letter was to the old address of the Respondent, it doesn't rescue it because going back to that discussion on 24 February to which I have referred, henceforth everything was also being sent to the Respondent at their e-mail address and so this document went out in that way again on 25 June via another very experienced clerk Michael Hammonds.

15. On the 19 July the parties were informed by notice that the remedy hearing would be heard on 17 October at the Nottingham tribunal hearing centre commencing at 10 am with a three hour time estimate. Again this was sent out by e-mail to both sides.

16. Finally on the 21 August this was reiterated in the letter of Patrick Edgar, another very experienced clerk. This went to the correct Respondent address and again was also e-mailed. The Respondent, who via its witnesses today does not challenge receiving this documentation, did nothing. The explanation I have received today repeatedly is that they didn't think they had to because all they needed to do was to turn up at the originally planned hearing but that doesn't make any sense because it had been cancelled and they had been so informed at least twice from the correspondence that I have referred to. Mr Choudray, doing his valiant best for them, mitigates on the basis that this was down to their hiding their heads in the sand. Also both rely on that they were very busy running the business. Thus by way of explanation inter alia Mr Wilkinson told me:

> *"I'd have flick read the top of the letter of 25 June but I didn't read the bit relating to Employment Tribunal judgments."*

17. I now turn to in that context to the application (Bp14) by Pensinsula dated 9 October 2018 to set aside the default judgment. This inter alia referred to the difficulties of Gary Hastings in reading and writing and needing Ben to assist. But absolutely no mention was made of David Wilkinson who it is quite clear is able to take translation, if that be the right word, from Gary Hastings and convert the same into, ie 24 February, an articulate, well-structured and spelt correctly detailed letter. And he has told me that in any event from then henceforth he was actually dealing with the matter rather than Gary.

18. So far, the evidence before me demonstrates at best a cavalier approach. What then happened says Mr Wilkinson is that they only realised how serious this all was when they received the Claimant's schedule of loss and this would have been on 1 October when she also provided even more further and better particulars of her claim in terms of the factual scenario. Do I accept that? Well

the trouble I have is that as I have already said the Respondent was being copied into via e-mail everything the Tribunal was receiving and doing from as early as 24 February. It follows that I am deeply unconvinced with that explanation.

19. What reinforces my view is as follows. Having appointed Peninsula to act by 9 October at which stage the application to set aside the default judgment was at long last made, on 12 October Peninsula applied to adjourn the remedy hearing. The reason given was:

> *"The Respondent's manager and shareholder, Gary Hastings is unavailable… due to having to attend a funeral of a family member …is the only witness to the hearing. Gary was informed of the funeral date on 11 October…*

20. The Claimant objected on 12 October, primarily because of the long delay to date. Then on the next day she went further and provided photographic evidence that Mr Hastings was actually on holiday abroad; furthermore that as is by now self evident that David Wilkinson could explain the Respondent's failure to provide a response. As it is the adjournment was granted but it was made plain that the Respondent would need today to deal with the holiday issue.

21. In the Respondent bundle at Bp58-59 I now have the booking details. This last minute all inclusive holiday to Turkey was only booked on the 10 October. The Claimant, his partner, and young child flew out on the 11 October. They landed back at Birmingham airport at 16.55 on the 17 October.

22. As to the funeral it was at Redhill, I assume in Surrey, on the 18th October. The church service was to start at 10am. Mr Hastings was informed (Bp57) on the 5th October. Today he tells me his partner booked this as a last minute surprise and knowing he was under stress, albeit he says that he does not take work home and thus she was unaware of the proceedings. I gather he went to the funeral on the 18th.

23. What is clear is that the tribunal was mislead by Mr Hastings via Peninsula. No mention was made of the holiday. And of course Mr Wilkinson could have attended on the 17th October as he has today.

24. This only reinforces my conclusion that the Respondent has behaved unreasonably at best.[1]

Overturn the default judgement or not? Conclusions

25. As to nevertheless overturning the default judgement and letting the Respondent back in, it is a question of where on balance the interests of justice lie and it is of course for the Respondent to persuade me to allow it to defend.

26. First and foremost the Claimant has now through no fault of her own had justice delayed for well over a year.

27. Second the scenario as now set out shows a wholesale cavalier disregard by the Respondent and indeed misleading of the tribunal.

[1] I should make it clear that in giving my extempore reasons at the hearing which occupied the day I inadvertently omitted this section albeit I had most thoroughly explored this issue. It was also addressed by Mr Choudhary in particular in his submissions and also the Claimant.

28. Going back to the application I also observe that it was said:

> "During the move of the offices all paperwork went missing. The Respondent's been unable to locate this."

Only to day has this been corrected to that it was the unfortunate Ben.

29. In closing Mr Choudhry submits that the Respondent didn't understand the gravity of the situation and did not comprehend that a judgment could be made if they did not respond to the claim. I simply don't buy that from the clearest possible language in all the documents that I have now referred to as emanating from the Tribunal.

30. Second that the Respondent one only became aware that a judgment had been made when they received the e-mail of 1 October from the Claimant enclosing a statement and a schedule of loss. That simply doesn't square for reasons I have already given with inter alia the Tribunal's notice of 28 June 2018.

31. As to the respondent "hiding its head in the sand" it is for the reasons I have now given, far more than that.

32. The application to reconsider is of course way out of time. The explanation for that is in effect the same explanation for never having filed a response before Peninsula came on the line. I find it deeply unconvincing particularly given the clear wording of the notices. [2]

33. As to the balance of the prejudice, well of course the Respondent is stood out from the justice seat and is at risk of having to pay damages to the Claimant. On the other hand, the Claimant has done everything to comply with the Tribunal's directions in this case and she has done it to the letter. Why should she be prejudiced in losing out when the Respondent has been in this case so cavalier and disingenuous in dealing with matters? It follows that I conclude the balance of prejudice weighs in favour of the Claimant.

34. Now of course there is a third factor I have to consider and that is the merits of the defence. Yes, at the heart of it is, did in fact the Respondent punish the Claimant so to speak because she was pregnant and going to go on maternity leave by unilaterally and only in relation to her, removing the guaranteed wages so to speak and saying unless she reached a given target she wouldn't get paid a penny. There is a conflict on that issue. If it goes the distance it will need resolving but it's only one factor in the balance of the scales. I have already made clear that the first two weigh in the balance overwhelmingly in in favour of the Claimant. It follows that in this case I have therefore determined that the default judgment will not be set aside.

35. That of course brings us back to remedy. I am well aware of recent

[2] 32 Mr Chaudhary reminded me that although there is really no guidance at Rule 70 of the 2013 Tribunals Rules of Procedure as to what is the test for reconsideration other than look at it in the interests of justice, that there is guidance in terms of the old rules that I should follow as per **Quick Save Stores Limited v Swain and Others** [1997] ICR 49 EAT as to which see the commentary at paragraph 617394 of the IDS Employment Handbook Tribunal Practice and Procedure 2014 Edition.

authority on the topic of remedy so Mr Chaudhary doesn't need to address me, a Respondent is entitled to be heard on remedy and to ask questions and make representations. But what it cannot do is to readdress the factual issues because the default judgment means that the case is proven.

36. What I intend to do as the hour is late is to adjourn the remedy hearing.

37. Therefore, I shall hold the remedy hearing on 21 November 2018 at 10:30 am.

Employment Judge Britton

Date: 19 November 2018