EMPLOYMENT TRIBUNALS
at a Reconsideration Hearing

Claimant: Mrs N Law

Respondent: The Carpet Cleaners Association Ltd

Heard at: Leicester

On: Friday 14 September 2018

Before: Employment Judge P Britton (sitting alone)

Representation
Claimant: Miss S Bowen of Counsel
Respondent: Mr I Lewis, Solicitor

JUDGMENT

1. The application to reconsider and set aside the liability judgment in this case is dismissed, it not being in the interests of justice to grant the application.

2. There will now be listed a remedy hearing at which the Respondent will of course be entitled to make representations as to the measure of loss.

3. The remedy hearing is accordingly listed for one day on 11 December 2018 at the Leicester Hearing Centre, Kings Court, 5a New Walk, Leicester LE1 6TE.

REASONS

Introduction

1. This is an application by the Respondent pursuant to the provisions commencing at rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 that I reconsider and set aside what is known as a default judgment and which was issued in this case on 4 April 2018, the Respondent having failed to file a Response. Essentially, my function is to decide on what I have heard today whether it is in the interests of justice to grant the application, which is opposed. In the context of that fundamental is for me to decide apropos for instance ***Migwain Ltd v TGWU [EAT 1979] ICR 579*** whether the proceeding was received by the Respondent, working of course on the fundamental premise to the effect that if a document has been sent through the post, it is deemed to have been received in the ordinary course of posting unless

the contrary is proved on the balance of probabilities by the Respondent.

2. I have heard the evidence under oath of Lewis Scroby (evidence in chief by a witness statement) who is the office manager for the Respondent. I have a bundle before prepared by the Respondent plus legal authorities. I have heard submissions. What I am first of all going to do is to set out the procedural history in this matter and then I will give my findings of fact for the purposes of this application.

Background to the application

3. The claim ET1) was presented to the tribunal by Nicola Law on 21 December 2017. It is a claim for disability discrimination pursuant to the provisions of the Equality Act 2010 (EqA), and also a claim for unfair dismissal pursuant to s95 and s98 of the Employment rights Act 1996 (the ERA). She was employed between 2 March 1998 and 10 February 2018 as the marketing and communications person in this very small trade association. It is a company limited by guarantee She was entitled to bring the claim when she did because she had already been served with notice and so jurisdictionally the claim was properly presented. It does show a prima facie case to answer.

4. I am now well aware that prior to the proceedings, there had been party and party correspondence between the lawyers on each side over the issues in November 2017, which of course would fit that there was an ACAS early conciliation certificate for this matter in terms of the conciliation procedures which ran between 7 November and 7 December 2017.

5. On 29 January 2018 in the usual way, the proceedings were served out by post by the tribunal with a notice headed in bold capitals that it included the notice of hearing and directions. The notice gave a deadline for filing a Response of 26 February 2018. This part was also set out in bold. It was addressed to the Respondent as per the ET1 the address is the registered office of the Respondent. No Response was received by the appropriate deadline and thus on 4 April 2018 a default judgment was issued for liability only Again a notice was sent out including that notice of a remedy hearing would follow. The Claimant by now had filed her schedule of loss.

6. This meant that in terms of the default judgment, the then scheduled substantive hearing of the matter, which was to take before a tribunal panel at Leicester between 2 and 4 January 2019, was cancelled. The Claimant is in remission for breast cancer. Miss Bowen does suggest in terms of the interests of justice element of my adjudication that therefore she would be prejudiced by the ordeal of a further lengthy time before the hearing could be reinstated, but on the other hand, she is in remission (which I am very pleased to hear) and she is in fact advancing the proposition that but for her dismissal, she would have been able to have returned to work for the Respondent. So, I do not find that that would be a strong argument in terms of the interests of justice test.

7. Thus, having said that, let me go back to the fundamental here. On 9 April 2018, Bray and Bray came wrote in to the tribunal. From the content of that letter, it is self-evident that the Respondent had received the default judgment and what was being said is that the Respondent prior thereto had no knowledge of the proceedings. So, there was an application pursuant to the provisions

commencing at rule 70 of the 2013 Rules that the default judgment be reconsidered and set aside, it being in the interests of justice to judgment to do..

8. One of my colleagues, having in mind the old Rules which were clearer in this respect, ordered that first of all a draft Response be presented. I am sure that he had in mind that under the old Rules, in terms of applications to set aside default judgments, part of the application required presentation of the proposed defence in order that the tribunal could be satisfied that there was a reasonable prospect that that defence might succeed. Turn it around another way, a misconceived defence with no merit would normally not provide justification under the interests of justice test, which has always been there including under the old Rules, to set aside any default judgment.

9. So, a draft Response duly came in. Suffice it to say that for my purposes, that there is a viable defence just as much as there is a viable claim. I make plain that by now the Claimant had made clear that she opposed the setting aside of this judgment and was wholly unsatisfied that the Respondent, because of the history, did not receive the said claim.

10. In its application and the further and better particulars so to speak of it in terms of the correspondence, Bray and Bray acting for the Respondent made plain that it is just as much inconceivable that the Respondent would have ignored the claim given the party and party correspondence to which I have referred and its involvement in the ACAS EC process. That is the background to today.

Findings of fact

11. As I have already said, the trade association is very small indeed. I have heard from Mr Scroby, who I consider to be an honourable witness. There are only two full-time members of staff – Mr Scroby and his colleague, Lauren. In the background so to speak, there is David Wheadon (DW), who was one of the founders of this trade association, was a Director and now holds the position of Chief Executive Officer. It seems he works on a sub-contracting basis and he lives in Gloucestershire. Reading the Response, he is clearly the lead player in the actions taken by the Respondent.

12. Mr Scroby has informed me that all post is opened by either himself or his colleague, Lauren and that it is inconceivable that if the claim had come in from the tribunal, that if he did not open the post, Lauren would have done. He is clear that the notice of proceedings was not received or the second document issued on the same day by the same clerk giving notice of what would have been a case management discussion in the usual way to be held in this matter on 12 April 2018. He has also described the layout. This very small office shares premises with a Chinese restaurant and a hairdresser. From time to time, correspondence has been received by those businesses for the Respondent and has usually got through to the trade association. There also appears to be an alleyway at the bottom of which is a bungalow and from time to time, the postman has posted to the bungalow documents intended for the trade association. On occasion, not often, those documents have not got to Mr Scroby or Lauren and because members of the association have queried whether they have received something and they have occasionally traced them to the bungalow.

13. As to DW, he has a key for the premises. The evidence as I have it is that there might be occasions when he might go into the office. I am told that it would be unlikely that he would attend out of office hours because he lives in Gloucestershire. The problem is that I have not heard from him. That is rather important in this matter because what I have learned today is that on 16 February 2018, ACAS having had notice of these proceedings, wrote in the usual way to the Respondent. It gave the number of the proceedings and that indeed ACAS had been sent a copy of the claim and it was therefore setting out in its standard letter that it was the conciliator and suggesting that the Respondent, or its representative, make contact.

14. Mr Scorby has very honestly told me that that document was received and that he passed it to DW. Mr Lewis has checked his file and there is nothing on it to indicate that DW passed it through. I have no doubt that Bray and Bray, being a well-known and respected law firm, would, had it received that document from DW, have via Mr Lewis immediately have done something about it.

15. So, what does that mean to me? The burden of proof is course is on the Respondent to prove to me on a balance of probabilities that the Claim Form was not received from the tribunal. I do not accept that it was not sent. The clerk concerned with this matter is to my knowledge a very experienced and highly efficient clerk. I am not persuaded therefore that there was in this case some sort of error by the tribunal secretariat and as the Respondent has got the burden of proof, if it was so arguing, I would have expected it prior to today to have suggested to the tribunal that the clerk be called to give evidence. I bear in mind that all the documentation to which I have referred was received by the Claimant. So, I do not accept that on the balance of probabilities the claim was not sent in the usual way to the Respondent.

16. Was it received? Mr Lewis makes the eloquent point that why would DW, if he had by happenchance been in the office and intercepted so to speak said post decided to ignore it, that this simply does not fit with what was otherwise going on. I hear that but why is it DW did not pass through the ACAS letter or straightway contact the tribunal direct? I say no more than this, it is in my extensive experience sometimes the case that in a bitter scenario as there is in this case in this case from the pleadings self evident in this case that a party may simply decide to ignore the proceedings and for instance throw away in anger a communication such as the claim or subsequent notification such as the ACAS letter.

17. So, I have this failing to act on the ACAS letter, which even if the proceedings had previously not been received surely would have meant DW would have acted with promptitude if he was about making sure that the claim was defended as soon as possible. The inference is that he ignored it. Mr Scroby is very much just an office manager and it is clear to me that DW is the player: having handed said document to Mr Scroby he assumed he would do something about it and he did not.

18. What it means is, the burden of proof being upon he Respondent, the most important witness for them is singularly absent. They have had plenty of time to prepare for this hearing today. Thus, I have concluded, and not without considerable thought, that I am therefore not persuaded on the balance of probabilities that the claim or subsequent notice of it ie the ACAS letter was not

received.

19. Of course, that turns on its head the application based as it is on the no knowledge of the proceedings until notice of the default judgment was received circa 6 April 2018: and in my judicial experience an errant respondent who up to then might have hoped the case had gone away would be jerked into action as there was now the real prospect of having to pay compensation.

20. Of course, the Respondent could have dealt with the matter by calling DW because it is obvious that he must have known about the ACAS letter. It follows that there is a question mark about the credibility of the Respondent's application. Thus, it follows that on that premise I have concluded that it is not in the interests of justice to set aside the default judgment. Today of course was not scheduled for a remedy hearing. As it is, I could have dealt with the remedy simply by applying the usual principles to that schedule of loss and hearing the Claimant.

21. However, on the remedy point as legal authority has of recent time reaffirmed, the Respondent is entitled to be heard and make representations as to the measure of compensation.

22. There will now be listed a remedy hearing for one day before another Judge sitting alone here in Leicester. The Claimant has already provided her schedule of loss; therefore the only direction I need to make is that the Respondent can provide a counter schedule. It accepts that the Claimant was a disabled person at the material time. The issue will therefore appear to be what should be the award for injury to feelings. As to compensation for loss of earnings the primary issue will be whether or not the Claimant sufficiently tried to mitigate her losses by obtaining alternative employment.

Directions – Limited to remedy only

1. By **19 October 2018**, the Claimant will serve upon the Respondent the following:

1.1 A statement dealing with the impact upon her of the disability and unfair dismissal treatment, including addressing the issues that would be relevant to injury to feelings but also addressing the issue in terms of mitigation of loss of job seeking. She will supply with that statement documentation principally along the themes of first of all her medical notes as she has submitted with her schedule of loss a fit note that she has depression. She will also supply the job seeking documentation that I have referred to. I observe that Miss Bowen has reserved on the basis that she will be taking instruction as to whether there may be revisions to the current schedule of loss and apropos for instance the depression issue. I factor in that there is liberty so to revise in the context of the orders that I have now made.

1.2 The Respondent then has the right of reply, obviously it will be able to submit a counter schedule of loss and any additional documents it will be relying upon or requires must be made plain to the Claimant. It can also, if it so wishes, file a counter statement but of course confined to the remedy issues. It will do all this by **16 November 2018.**

1.3 If required, the Claimant will then prepare and serve a copy upon the Respondent of a combined bundle and this will be by **30 November 2018**.

Employment Judge Britton
Date:22 November 2018

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

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