THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Ms L Henderson **Stessa Leisure (Tynemouth) Ltd**

JUDGMENT AT A RECONSIDERATION HEARING

HELD AT NORTH SHIELDS ON 17th January 2018
EMPLOYMENT JUDGE GARNON
Appearances : Claimant in person For the respondent Mr R Gibson Solicitor

JUDGMENT

I confirm my Judgment of 7th December 2017 because it is not necessary in the interests of justice to revoke or vary it .

REASONS

1. The respondent has applied for a reconsideration of a judgment on liability and remedy made by me under Rule 21 of the Employment Tribunal Rules of Procedure 2013 (the Rules) in circumstances where no response had been presented. . Claims of unfair dismissal and for a protective award were dismissed on withdrawal. A claim of failure to pay compensation for untaken annual leave was well founded and I ordered compensation of £ 486.80. A claim of unlawful deduction of wages was well founded and I ordered the respondent to repay £ 128. Claims of harassment as defined in s26 (2) of the Equality Act 2010 (the EqA) and victimisation as defined in s27 were well founded. I ordered the respondent to pay compensation of £7440 but no interest. The ground of the application is that the respondent had no notice of the proceedings.

2. The claim was presented on 9th October 2017 against Mr Adam Thompson, who controls the respondent, but rejected by me because the Early Conciliation (EC) Certificate showed the prospective respondent as "Stessa Leisure Ltd" . It was re-presented and accepted by Employment Judge Buchanan against "Stessa Leisure Ltd". Both the claim form and EC Certificate gave as its address "Fit4less, Preston Avenue, North Shields, Tyne and Wear NE30 2BE." The **claim was posted** to that address on Thursday **12th October 2017**. (Letter 1). Employment Judge Buchanan ordered a preliminary hearing for 7th December and **notice of that was sent** to the respondent **separately** (Letter 2) on the same day. All letters from the Tribunal have stamped on the back the title " Employment Tribunal " and a return address in case of non delivery.

3. No response was received by the due date of 9th November. Employment Judge Buchanan issued a detailed Order on 16th November sent to the claimant only, requiring further information which she provided on 20th November .Her reply was reviewed by

Employment Judge Shepherd who felt it was not sufficient to issue a Rule 21 judgment. He ordered the preliminary hearing to remain listed to afford an opportunity to clarify some matters. The respondent had been given notice of that hearing was entitled to participate fully **A letter (Letter 3) to that effect was sent** to the respondent as well as the claimant on **22nd November.** The respondent did not attend.

4. I signed judgment on 8th and it was sent to the parties on 12th December . It was sent by email to the claimant. I said in my reasons the claimant told me ACAS informed her they had a discussion with Mr Thompson. She emailed on 12th December to say this was wrong , which I accept. All she said was that an answer phone message was left. I also accept I referred to a Paul Langley, when his correct name is Paul Lazenby.

5. At the hearing the claimant told me "Fit4less" was the name of the gym at which she worked ,she thought the name has changed after a re-furbishment but it continued to be operated by the same limited company. Mr Anthony Michael Woodhouse gave evidence today for the respondent and confirmed that was so, though the trading name is now Energie Fitness .

6. Employment Judge Buchanan had performed a Company Search before issuing his Order and found no current company named Stessa Leisure Ltd. The claimant told me on 7th December she was never given a written statement of terms of employment or payslips. I too performed a Company Search and found a few companies starting with the words "Stessa Leisure". North Shields is in the area of Tynemouth and one such company was called Stessa Leisure (Tynemouth) Ltd. Its registered office is Newfield House, 9 Field House Close. Hepscott, NE61 6LU. The claimant told me this was the company which employed her and the address was the home of Mr Thompson. The judgment included a minor amendment to the respondent's name without the need for re-service simply to add the word "(Tynemouth)". I ordered it be sent to the address of the respondent, as shown on the claim form, and to Newfield House.

7. My written reasons ran to four pages because arguments are regularly put by respondents and claimants that crucial documents have not been received . I always in such cases direct myself to be wary of cynicism. I have heard many fanciful " lost in the post" arguments over many years but some genuine ones.. The more letters from the Tribunal sent in any case, the less likely none were received, so I detailed the three letters sent, as I have done above . No papers sent to the North Shields address were ever returned in the postal system.

8. The judgment was received by the respondent in the normal course of post no later than 14th December at both addresses. The first contact from it was a letter dated 15th December sent by e-mail by Samuel Phillips Solicitors . The respondent claimed not to have received the claim or any document before the judgment. It said the premises were closed for refurbishment from **July to November** 2017 "*during which time there was no substantive staff presence on site. There were contractors but that was all* ". It added the claimant's allegations, save in part for holiday pay, were all denied.

9. Mr Woodhouse said in evidence today the refurbishment started in the first week of August. The gym equipment was put in a marquee a short distance away where it was used. Post was received by any of the personal trainers or sales staff on site and handed to him or Mr Ed Savage, the " Cluster Manager" .The gym reopened fully **on Monday 16th October**. The first two letters would have arrived on Friday 13th or Saturday 14th. The one I describe above as Letter 3 would have arrived later when the gym had been fully operational for about six weeks

10. On 18th December I considered the application on a preliminary basis under rule 72 I could not say it had no reasonable prospect of success without hearing the one argument to excuse failure to respond to the claim, being non-receipt at the address where the claim and other documents were sent. A claim may be validly served on a limited company at its place of business or its registered office. On 7th December when I gave judgment I was convinced the claim has come to the notice of the respondent.

11. The argument in Samuel Phillips letter that all communications prior to the judgment went to premises under refurbishment which no officer or manager visited was not the line taken by Mr Woodhouse today. The gym is in the same building as Percy Park Rugby Club though accessed through a different door. Even if letters were pushed through a letterbox in the gym building when construction work was going on, I cannot credit no-one would collect them. More importantly the refurbishment work was finished by the time they arrived.

12. Rule 86 (1) says " *Documents may be delivered to a party (whether by the Tribunal or by another party)— (a) by post…."*
Section 7 of the Interpretation Act 1978 provides
"Where an Act authorises or requires any documents to be sent by post (whether the expression 'serve' or the expression 'give' 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be affected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

13.1. The Employment Tribunal Rules of Procedure 1993 at Rule 11(1)(b) gave power to review (the word then used for "reconsider") a decision on the ground *"(b) a party did not receive notice of the proceedings.".* In Zietsman and Du Toit t/a Berkshire Orthodontics-v-Stubbington the question on the appeal was whether an Employment Tribunal was entitled to conclude Mr DuToit, had been properly served with proceedings and consequently to dismiss his application for a review of a decision upholding complaints and awarding compensation. It heard evidence from Mr DuToit, **none of which it rejected**

13.2. Ms Stubbington was employed by a firm called Berkshire Orthodontics which carried on business from 37 Crossway House, High Street, Bracknell, Berkshire. From 1998 Mr Zietsman and Mr DuToit as partners were jointly and severally liable as Ms Stubbington's employer. In 1999, the Berkshire Health Authority attended the firm's premises, removed certain files and a fraud investigation commenced. On the same

day, Mr DuToit flew to South Africa on a pre-booked holiday. The following day Mr Zietsman walked out saying he did not intend to continue the practice. Thereupon the employment of the staff, including Ms Stubbington, ceased.

13.3. On 7 June 1999, she presented her complaint to the Tribunal, naming Berkshire Orthodontics at 37 Crossway House as respondent. No response was entered. At that time "Default Judgments" (now Rule 21 judgments) were not possible so on 1 October 1999, the complaint came before a Judge sitting alone. He ordered an amendment to the Originating Application (now called "claim form") , to name Mr Zietsman and Mr Du Toit, trading as Berkshire Orthodontics, as respondents and then proceeded to hear the claim in their absence. He upheld the complaints by a decision promulgated with summary reasons on 18 October 1999 (the original decision). There was no criticism directed by the EAT at the minor amendment which was no less substantial than the one I made to the title of this respondent.

13.4. On 28 October 1999, Mr DuToit lodged application for "review" of the original decision saying he had received notification of the decision on 22 October but did not know about the Tribunal case until that date. That review application was heard by a full Tribunal on 21 January 2000. By a decision with extended reasons, (the review decision) dated 10 February 2000, the Tribunal dismissed the review application.

13.5. It concluded the proceedings were served at the Bracknell premises of which Mr DuToit remained a lessee. He had ceased to practice from that address after his return from South Africa. By then Mr Zietsman had left the scene. Mr DuToit had transferred his personal practice to Fleet, Hampshire. Having done so, he did not visit the Bracknell premises, nor make arrangements for mail to be forwarded. The Tribunal regarded that as thoroughly irresponsible conduct, to which his ignorance of the proceedings was wholly attributable. In these circumstances they declined to review the original decision.

13.6 The EAT held that, as the Employment Tribunal pointed out, it is a simple matter to make arrangements for collection or redirection of post addressed to a place of business. It held the proceedings were "properly addressed" to the firm's last known place of business. There was no evidence the proceedings and notice of hearing were not delivered in the ordinary course of post, only that Mr DuToit did not personally receive them. In the circumstances, his appeal was dismissed. The EAT considered Article 6 of the European Convention on Human Rights did not compel it to find section 7 of the Interpretation Act 1978, by which a person is deemed to have notice under the domestic legislation was incompatible with the right to a fair trial

14 Kwik Save-v-Swain and Pendragon plc-v-Copus are commonly cited authorities which concern delay in responding, as Mummery P said in Kwik Save, " *as the result of a genuine misunderstanding or an accidental oversight* ". A Tribunal should be " *more willing to allow the late lodging of a response* " if there had been a genuine mistake. All these cases were under earlier and different versions of Employment Tribunal Rules.

15. Under the 2013 Rules, the only ground for a reconsideration is whether one is necessary in the interests of justice. If I believed notice of the proceedings had not been received by " the respondent" I would find it was in the interests of justice to revoke any judgment made without them having had the opportunity to be heard.

16. I have heard, but wholly reject, the respondent's evidence that **it** did not receive notice of the claim. Everything I have read and heard leads me to the view at least one person in managerial charge received the claim , knew it was vulnerable and ignored the proceedings hoping they would " go away" .Who ignored them is a different matter .

17. I was not convinced by Mr Woodhouse's evidence that he did not know of the claim. However, if I give him the benefit of the doubt, neither he nor Mr Thompson was there every day. Mr Savage was most days and the claimant says he was responsible for not treating seriously her complaints about sex harassment and then ostracising her . Mr Lazenby and personal trainers including Mr McLean, who were accused of sex harassment, were regularly there. Any one of these could have seen letters endorsed with the Employment Tribunal return address and ensured they never reached higher level managers.

18. Just as in Zeitsman no company should let this happen, refurbishment or not. Letters arriving at the premises may contain payment to the company , demands for payment from the company or legal process like this claim . A process for ensuring all letters received come to the attention of an appropriate person is the least one can expect. Mr Woodhouse today could not say who might pick up a letter and what they would do with it. The claimant, as a former receptionist, said that was not what happened when she was there when all mail received was handled as it would be in any sensibly run business. I do not believe Mr Woodhouse was being frank, but if he was he was describing a situation of chaos entirely of the respondent's own making

19. The 2013 Rules were intended to be a modernised system, designed to do justice between the parties but requiring the respondent to the claim to put forward its defence in a prescribed way at a prescribed time. The system also made far greater provision for determinations without a hearing. Everyone is still entitled to a fair hearing if they follow the Rules to avail themselves of that right. Employment Tribunals send to every respondent very detailed explanations of what they must do , when they must do it and the consequences of not complying. This respondent ignored the claim, a procedure followed which resulted in a judgment. It would cause the claimant and the Tribunal and other litigants delay and expense to revoke the judgment and start afresh. To allow a respondent, who has been given but not taken advantage of the opportunity to defend, to do so after a Rule 21 judgment would make a mockery of the system.

20. Following a Rule 21 judgment on liability only, a respondent who has not put in a response is entitled to be heard on remedy. I considered whether to allow something similar in this case by varying the judgment to re-open issues of remedy . In the reasons for the original decision I said
16. In respect of this, and her loss of earnings , she could have argued for more compensation . There is also enough information to make an increase to the awards under s 38 of the Employment Act 2002 because the claimant was not given a statement of terms and conditions of employment, but I do not make an increase because there is no forewarning to the respondent in the claim form, one may be made.

17. However, every other aspect of this judgment can not possibly be said to take the respondent by surprise. The choice facing both the claimant and myself today was between using Rule 48 to finalise the claim or incurring delay by giving directions for, and fixing, a remedy hearing at a later date which would cause additional public expense in a case where the respondent had chosen to take no part. ***If the respondent applies for a re-consideration and its application is granted, the decision may be taken again. That may result in a greater rather than a lesser award.***

21. I am convinced my judgment was not for any greater sum than would have been awarded had I heard the respondent on remedy. Its proposed defence is a blanket denial of liability for the Equality Act claims which were plainly made in the claim form. In terms of financial loss and injury to feelings my awards were not high. If, as Mr Gibson suggests the notice pay was paid and the holiday pay is less than I ordered the respondent has only it self to blame. Mr Woodhouse accepted the claimant had sent emails about these matters to Mr Thompson which he said he thought Mr Savage was dealing with when plainly he was not. The emails the claimant produced today were well before she issued and helped me very little , save that they added to a picture of a respondent who adopts the policy of ignoring an employee's demands in the hope they will " give up " I therefore confirm the original judgment in its entirety.

TM Garnon Employment Judge
Date signed 17th January 2018.