EMPLOYMENT TRIBUNALS

Claimant: **Ms DL Baldwin**

Respondent: **UK English International**

UPON APPLICATION made by email dated 11 December 2018 to reconsider the judgment dated 14 November 2018, and sent to the parties on 28 November 2018, under Rule 71 Employment Tribunals Rules of Procedure 2013, and without a hearing

and

UPON APPLICATION made by email dated 11 December 2018 under Rule 29 Employment Tribunals Rules of Procedure 2013 to set aside the strike out of the response on 11 September 2018

JUDGMENT

1. The judgment dated 14 November 2018 and sent to the parties on 28 November 2018 is revoked.

2. The decision to strike out the response is also set aside.

3. Case management directions including the date of the hearing will be sent to the parties in due course.

REASONS

Background

1. By a claim form received at the tribunal on 2 September 2017 the claimant brought a claim against the respondent for unfair dismissal. The claimant says she was employed as a residential ESL teacher by the respondent from 20 July 2017 until 24 July 2017. The tribunal wrote to the claimant on 11 September 2017 saying, under section 108 of the Employment Rights Act 1996, claimants are not entitled to bring a complaint of unfair dismissal unless they were employed for 2 years or more except in certain specific circumstances. Accordingly, the claimant was asked to give reasons why her claim should not be struck out. The claimant replied the same day explaining her claim was one for automatic unfair dismissal. In particular, the claimant says she was dismissed for asserting statutory rights in relation to, among other things, being paid the minimum wage and holiday pay. Notice of claim was then sent to the respondent on 4 October 2017 with a hearing date of 31 January 2018. Included in the notice were a series of case management orders. The claim was served on UK English International.

2. The tribunal wrote to the claimant on 23 November 2017 explaining the name appears to be a trading name only. Accordingly, the claimant was asked to provide the full correct name of her former employer. The claimant wrote to the tribunal on various dates in November 2017. This resulted in the direction from Acting Regional Employment Judge Livesey that the claim be re-served on UK English International at two addresses in Rome. This was done on 11 December 2017. The notice provided that if the respondent wished to defend the claim a response must be received at the tribunal office by 8 January 2018. Because the claim was re-served the original hearing date of 31 January 2018 was vacated. After further investigation the claim was re-served again on a different address on 26 February 2018. This time a response was required by 26 March 2018. A response was received at the tribunal on 23 March 2018.

3. The name of the respondent, set out in the response form, was UK School of English. The email address provided for contact was info@UKEnglish.it. However, in the body of the response, the respondent referred to itself as UK English International. It was explained that UK English International was an English branch of the organisation, but due to the high cost of offices it was closed in 2017.

4. According to the respondent, the claimant was a freelance teacher and not an employee. In addition, the respondent says the claimant caused a commotion at the office which resulted in the termination of her engagement. In addition, the respondent says the claimant agreed and signed a written contract setting out terms which were adhered to. It was also said that she was not supervising students during meal times. The claims were denied on this basis.

5. Notice of hearing was then sent to the parties on 23 March 2018 for a hearing on 13 and 14 September 2018. Again, case management orders were included in the notice. These included that by 9 May 2018 the claimant and the respondent shall send each other a list of any documents they wish to refer to at the hearing or which are relevant to the case. The bundle was to be prepared by 23 May 2018.

6. On 9 June 2018 the claimant emailed the tribunal, copying in the respondent to its info@UKEnglish.it email address, saying she had not received a list or copy of documents from the respondent in breach of case management orders. This prompted an email from Employment Judge Harper requesting that the respondent provide comments on the correspondence by 16 July 2018. Because no reply was received the tribunal wrote again by email to the respondent and the claimant on 27 July 2018 requesting a reply by return. Still no reply was received from the Respondent.

7. Employment Judge Harper then caused a letter to be written to the respondent on 11 August 2018 saying on the tribunal's own initiative he was considering striking out the response because it was not being actively pursued. The respondent was given an opportunity to object to this proposal by 20 August 2018. In the event, and after no further response or comment from the respondent, Employment Judge Harper struck the response out on 11 September 2018 because the response was not being actively pursued. The strike out judgment was sent to the parties on 11 September 2018.

8. The claimant, who was in Rome, emailed the tribunal on 10 September 2018 saying she would be unable to attend the hearing, by then listed for 11 September 2018. In correspondence with the tribunal she explained that she would limit her claim to four weeks employment at £450 per week, totaling £1,800. She also claimed the cost of the hearing and legal costs. Judgment was then provided pursuant to rule 21 of the Employment Tribunal Rules 2013 in the sum on £1,800 gross on 14 November 2018, which was sent to the parties on 28 November 2018.

Respondent's Application

9. On 11 December 2018 the respondent emailed the tribunal with an application to reconsider the judgment sent to the parties on 28 November 2018. The respondent used a different email address and explained that info@UKEnglish.it was out of service. The email went on to explain that UK English International was only a trading name and not a company name. Points were also made about the substantive defence of the case. However, it was accepted that the weekly fee was £450 per week.

10. The tribunal then wrote to the respondent on 10 January 2019 pointing out that the response had in fact been struck out on 11 September 2018. Accordingly, the respondent was asked to clarify whether the application applied to the decision to strike out the defence of the claim and, if so, why the application was not made in time.

11. The respondent replied on 16 January 2019 explaining that it was not aware of the 20 August 2018 deadline because emails were not received. The server was said to be down from 10 August 2018 until 20 September 2018 which was after relocation of offices on 10 August 2018. The Respondent went on to explain that the email system it uses does not keep records of web emails from its provider. Around this time their software technician was on annual leave for two weeks thereby exacerbating the problem. Accordingly, it is said that there was an outage of the email system and records were lost.

Claimant's response

12. The claimant points out that the respondent failed to comply with previous case management orders and provided no explanation for this failure. It is further pointed out that once the respondent realised all email correspondence had been lost they ought to have contacted the tribunal.

Dealt with on paper

13. Both parties were given the opportunity of having a hearing in person or over the phone. In the event, both agreed that I should deal with the matter on paper.

Outline of law

14. Rule 70 of the Tribunal Rules 2013 provides an employment tribunal with a general power to reconsider any judgment where it is necessary in the interests of justice to do so. This power can be exercised either on a tribunal's own initiative or on the application of a party. Rules 71–73 set out the procedure by which this power can be exercised.

15. An application by a party for reconsideration may be made at a hearing or in writing. If it is made in writing, it must be presented, with copies to all other parties, within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties, or, if later, within 14 days of the date that the written reasons were sent, and it must set out why reconsideration of the original decision is necessary. However, Rule 5 which deals with extending or shortening time provides that: "The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired".

16. Interests of justice as a ground for reconsideration relate to the interests of justice to both sides.

17. Under the Tribunal Rules 2004, if a party did not receive the notice of a hearing and this led to a judgment being made at the hearing in his or her absence, this provided a legitimate ground for a review - old rule 34(3)(b). This may provide an equally legitimate basis for a reconsideration under the interests of justice ground under rule 70 of the Tribunal Rules 2013.

18. Where a response is struck out, the effect is as if no response had been presented — rule 37(3). In these circumstances, in accordance with rule 21, an employment judge will decide whether, on the available material, a determination of the claim can properly be made. The striking out of a response does not constitute a judgment as defined in rule 1(3)(b) and therefore cannot be reconsidered under rules 70–73. The striking out of a response puts the respondent in the same position as if it had failed to present one and the respondent is therefore liable to have a default judgment issued against it.

19. This type of automatic strike-out order can, however, be varied or revoked in accordance with a tribunal's general power to manage proceedings contained in rule 29. Rule 38(2) also provides the respondent with the right to apply to the tribunal within 14 days of the

date when the response is struck out for a failure to comply with an unless order to have the order set aside on the basis that it is in the interests of justice to do so.

Conclusions

20. The essence of the respondent's case is that they did not receive relevant correspondence from the tribunal due to a failure of its server. Previous correspondence is also said to have been lost or inaccessible at the material times.

21. On the basis of the limited information before me, and without the benefit of witness evidence, I am satisfied that the respondent did not have access to its email account at this time. This situation was made more problematic because of an inability to access old emails.

22. However, the respondent is still at fault for failing to comply with previous case management orders. Further, once the respondent became aware that email was problematic it was open to it to contact the tribunal and alert them to this fact.

23. I take into account that the period when this was happening also coincided with a premises move for the respondent. It is likely to have been a busy and disruptive time which was exacerbated by the absence of their software technician.

24. The respondent has an arguable defence to the claim. Another factor is that the name of the respondent needs to be amended in any event.

25. Against this, I must consider the interests of justice from the claimant's perspective. She has already been put to the trouble of chasing the respondent. However, the claimant has not had to attend a hearing and delay will not prejudice her evidence.

26. Taking all this into account, I determine that the interests of justice favour (i) extending the time to apply for reconsideration and set aside, and (ii) set aside of the strike out of the response and revocation of the judgment. In this instance, the interests of justice favour the merits of the case being considered.

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Regional Employment Judge Pirani

Date: 28 February 2019