THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Ms D Adamson **The New Seaham Conservative Club**

JUDGMENT on RECONSIDERATION without a HEARING

HELD AT NORTH SHIELDS ON 29th June 2018
EMPLOYMENT JUDGE GARNON

JUDGMENT

I revoke my Judgment of 15th May 2018 because it is necessary in the interests of justice to do so and order the decision be taken again. I ORDER the respondent to send to the Tribunal and the claimant a fully pleaded response by 13th July 2018. The case will be listed for a case management preliminary hearing on the first available date after then with a time estimate of 90 minutes.

REASONS

1. I made a judgment, on 15th May, on liability only under Rule 21 of the Employment Tribunal Rules of Procedure 2013 (the Rules) in circumstances where no response had been presented . I upheld serious complaints of sex discrimination and harassment alleged to have occurred on 22nd December 2017 and been perpetrated by an official of the respondent club.

2. The claim was presented on 6th April 2018 and served on the respondent on the 13th. No response was received by the due date of 11th May. The file was referred to me on 15th May. Rule 21 (2) provides I must decide on the available material whether a determination can properly be made. Reading the content of the claim form and in the absence of any response, a determination on liability only could be made. Rule 21(2) then says in terms I **shall** issue a judgement accordingly. The general power under Rule 41 for the tribunal to regulate its own procedure does not appear to give me power to refuse to issue a judgment simply because I was surprised no response had been received and suspected that was due to some mistake by someone.

3. The judgment was sent to the parties on 16th May 2018. It would have been received by them in the normal course of post by 17th or 18th. At 14:33 on 16th, DAC Beachcroft Solicitors instructed by the respondent e-mailed the Tribunal, marked:
URGENT- APPLICATION FOR AN EXTENSION OF TIME FOR SUBMISSION OF ET3 RESPONSE" .

The email did not contain a draft response or explanation of why one could not be provided as required by Rule 20. It was copied to Thompsons, Solicitors for the claimant who objected, on 18th by email. Clearly, neither representative was aware of the judgment when they sent their emails.

4. On 21st May I used imprecise terminology when I wrote I had decided to treat respondent's application for an extension of time as an application to reconsider the judgment. On a strict literal interpretation of the Rules, there was no such valid application. I had actually decided to reconsider of my own initiative. Having been an Employment Judge for over 20 years, I have heard many spurious arguments by respondents to excuse late presentation of a response but many genuine ones too. I instinctively realised some breakdown of communication had probably occurred .

5. I sent a reasoned order to both parties inviting them to elect whether reconsideration should be at a hearing or upon consideration of written submissions. I postponed the remedy hearing listed for 8th June. Both parties elected I should deal with this application without a hearing.

6. I accept the evidence in the signed witness statement of Mr Alan Dougal of the respondent's insurance broker. The claim was served on Friday 13 April so would have arrived in the post on Saturday 14th or Monday 16th . Most clubs are run by committees of volunteers who may know little about various aspects of running a business so rely on professional advisors in many ways . The Club secretary, a Mr Remmer, on or about the 19th telephoned Mr Dougal saying employment tribunal claim papers (ET1) had been received. Mr Dougal asked they be forwarded to him, which they were.

7. Apparently the claimant had earlier on 16 February via Thompsons intimated a claim against the respondent for personal injury. That too was passed to Mr Dougal. He passed it on to the club's employers liability insurer , Covea, to deal with. On the day he received the ET1, knowing the club had legal expenses insurance through another company called ARAG, but also knowing this was connected with the insurance cover provided by Covea, he emailed the ET1 to the loss adjusters for Covea. They replied that day saying the ET1 should be sent to ARAG. Mr Dougal believed ARAG would not accept the claim without one of their claim forms being filled in by the club so he arranged for that to be done . He emailed the completed claim form to ARAG on 25th April together with the ET1. So far, within 10 days the ET1 had made its way to the professional advisor which the club and Mr Dougal believed would deal with it. That belief ,and the slight delays, were reasonable.

8. On 1st May Mr Dougal telephoned ARAG because they had not responded . He was told they would be in touch once the claim had been processed. On 4th May the club sent him more papers relating to the claim which he forwarded to ARAG.The ET3 return date was now only a week away.

9. Instead of contacting Mr Dougal, ARAG wrote direct to Mr Remmer saying they would not cover the club against the claim. Mr Dougal and one of his directors checked the

policy wording and decided the club may be covered under the policy with Covea, even though it had earller redirected the claim to ARAG. On Friday 11 May, the day the response should have been sent, Covea asked Mr Dougal to send him all the papers immediately. He did so. On Monday 14 May an employee of Covea accepted they would deal with the claim. It may well be through Covea that the respondent's present solicitors were instructed and they acted immediately.

10. I find no fault in Mr Remmer's actions. Mr Dougal's possible misunderstanding of which of two insurers covered the club was understandable. For the claimant, Mr O'Mahony Solicitor at Thompsons urges me not to revoke the judgment. He says "*confusion is no excuse* ". Although he does not put it in this way, it is commonly argued the law in relation to late presentation of claims under the Employment Rights Act 1996, governed by the "not reasonably practicable test" which case law has said should rarely be satisfied where professional representatives have made a mistake, should apply by analogy to situations of late presentation of a response.

11.The argument is flawed. The "not reasonably practicable test" involves the construction of a statute , strictly interpreted by case law for the better part of four decades. It often results in claims which may have been meritorious being struck out. This does not happen on the other test for late claims under the Equality Act of what is just and equitable where mistakes by professional representatives are frequently found to be sufficient reason to consider a claim issued prima facie out of time. Rule 2 provides the overriding objective of the Rules is to enable Employment Tribunals to deal with cases **fairly and justly**, and an Employment Judge shall seek to give the effect to the overriding objective in interpreting, or exercising any power given to him by the Rules. The test in the Rules is far closer to the just and equitable test.

12. The only ground for a reconsideration is whether one is necessary in the interests of justice. As I believe the respondent should not be deprived of an opportunity to answer a serious claim due to minor mistakes and confusion, I find it is in the interests of justice to revoke a judgment made without its response having been seen..

.

TM Garnon Employment Judge
Date signed 29th June 2018.