EMPLOYMENT TRIBUNALS

Claimants
Mr P G Harris
Mr S R Kirkpatrick
Ms L R Stewart

Respondent
Priory Coach and Bus Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL AT A RECONSIDERATION HEARING

HELD AT NORTH SHIELDS ON 25th JULY 2018
EMPLOYMENT JUDGE GARNON (sitting alone)

Appearances
For Claimant: Ms H Abraham Solicitor
For Respondent: Ms C Widdett of Counsel

JUDGMENT

1 Under Rules 70-72 of the Employment Tribunal Rules of Procedure 2013, (the 2013 Rules) I refuse the respondent's application for reconsideration of my Judgment of 12th April 2018 because it is not necessary in the interests of justice to reconsider it .

2. The case will now be listed for a remedy hearing, before me, for up to three days in November or December 2018. The parties must provide a time estimate and unavailable dates by 3rd August 2018.

REASONS

1. The respondent has applied for a reconsideration of a judgment on liability only, that all three claims of unfair dismissal were well founded, made by me on 12th April 2018 under Rule 21 in circumstances where no response had been presented.

2. The 2013 Rules include
70. A Tribunal may, .. . on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.
71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the 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 within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

72.—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.
(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

3. The written reasons for my judgment set out the claims were served on 9th March 2018.The first two were posted in separate envelopes on that day which was a Friday. The third was also posted but on Monday 12th March. They were addressed to the registered office of the respondent as confirmed by a Companies House search. A response was due by 6th April 2014 in the first two claims and 9th April in the third. None were received. The claim papers were never returned by Royal Mail.

4. I decided a determination could be made on the available material as to liability only because the claim form gave sufficient information to enable me to find the claims proved on a balance of probability. I was then obliged to issue a judgment which was shown as sent to the parties on 21st April 2018. That was a Saturday, when Tribunal administrative staff were working overtime but postage would have taken place on Monday 23rd April. The judgment would have been received by the respondent in the normal course of post on 24th April .

5. Mr Harris and Ms Stuart contacted ACAS to commence Early Conciliation (EC) on 30th January and Mr Kirkpatrick on 25th January. ACAS issued certificates to all on 8th March. Regulation 6 of the Employment Tribunal (Early Conciliation etc) Rules of Procedure Regulations 2013 say EC lasts 4 weeks unless both parties consent and the conciliation officer thinks there is a reasonable prospect of conciliation, in which case the period may be extended by up to 14 days. There must have been contact between the respondent and ACAS. When EC failed, the respondent must have known a claim against it was likely to follow. Today, I heard evidence only from Mr Fakhar Ahmed, the General Manager , who agreed that was so.

6. In their claims Mr Harris describes himself as an Engineer, Mr Kirkpatrick as Transport Manager and Ms Stuart as Accounts Manager. All three say they were employed as well as being directors and shareholders. They resigned as directors on 23 December 2016 when a sale of the shares took place to Rothbury Securities Ltd . At a meeting in advance of that in November 2016 they met with Mr Ahmed and agreed to stay with the company as employees on the same rate of pay with 25 days per annum plus bank holidays. That they were directors and shareholders does not mean they cannot also have been employees. One defence now sought to

be advanced by the respondent is that they all lack continuity of employment which it says commenced in January 2017. No evidential basis for that has been advanced.

7. Mr Robert Currie, CEO of Rothbury Securities Ltd and of the respondent sent an "all staff" email on 17 November 2017 saying Mr Harris and Mr Kilpatrick had been dismissed. They also received an email directly from Mr Currie advising that as the purchase monies for their shares had now been paid to them, in the absence of resignations, their employment was terminated with one week's notice. Their last day was 24 November. Mr Harris was actually on holiday when these emails were sent. Ms Stuart claim is somewhat different in that she was not expressly dismissed. She resigned on 29 December and claims constructive dismissal.

8. When the claims were served they were automatically listed under the fast track procedure for 29th June 2018 and directions were given including that the claimants provide schedules of loss by 6th April and 9th in Ms Stuart's case They were provided on Monday 9th by email to the Tribunal and a copy hand delivered to the respondent's office a few yards from Ms Abraham's . The respondent accepts this was received and that it was made aware of the hearing date.

9. The first contact from it was a telephone call to a Tribunal clerk from a Mr Hassan, Group Accountant, on 24th April who claimed the respondent had not received any of the three claim forms . The clerk told him to write to the tribunal and he replied he would be seeing his lawyer.

10. The next contact was an email from Bermans Solicitors on Friday 4th May, the last day for applying for a reconsideration. It repeated the claim forms had not been received . It did not contain a draft response but said one would be provided when they had full instructions. I ordered such details by 8th May to enable me to consider the application under Rule 72 (1). Some detail came on 10th May . The headline defence was length of service. Still there was no draft response because Bermans lacked full instructions. I did not refuse the application under rule 72(1) but ordered a hearing at which the claimants may attend but need not. Copies of the claim forms were sent to Bermans on 15th May. The parties were told of this hearing by notice on 21st June.

11. On 13 July, Bermans come off record due to lack of instruction. On 20th July they came back on record .Their letter of 23rd July requested a postponement of the first two claims to take instructions. They also said the claim of Ms Stuart had the wrong particulars attached to it. When the copies were sent particulars of a case between different parties were attached That was a pure administrative error of the tribunal which can easily be corrected and will be . I do not accept from my perusal of the file the wrong particulars were attached to the claim form posted on 12th March.

12. Bermans tendered as the reason for not receiving instructions that three members of the family of "our client " had died between16-18 June and organising 40 days mourning fell on him. By "our client " they mean Mr Ahmed. The respondent is a small limited company but now owned by Rothbury Securities Ltd which is not. Active parts have been been played in the history of the matter by Mr Ahmed Mr Hassan and Mr Currie. Had this been a small business with only one manager, I would not only have had every sympathy with Mr Ahmed , which I expressed to him

today, but may have been persuaded it excused lack of instructions. However, it is not such a company. There was also in the letter a statement potential civil claims for breaches of warrenties in a Share Purchase agreement are in contemplation . They have not yet been commenced or any pre-action protocol steps taken.

13. I heard Mr Ahmed's evidence the respondent did not receive the claims in March but what he really means is the manager at the registered office, a Mr Watson, and the administrator there who open the post and **should** scan anything important to the head office of Rothbury Securities Ltd in Manchester where Mr Ahmed is based, have **told** Mr Ahmed nothing arrived. Even if they misjudged the importance of the document it would be left in a tray for Mr Ahmed when he visited the registered office premises in North Shields which he does at least once a fortnight. In the very unlikely event an entire bag of post sent by the tribunal on 9 March was lost, is truly beyond belief that a letter sent on 12 March encountered the same fate. Everything I have read and heard leads me to conclude they were all received and either the staff at the registered office failed to forward them or more senior managers received and ignored them. The singular lack of urgency with which they have dealt with matters since the claims did come to the attention of Mr Ahmed Mr Currie and Mr Hassan supports that conclusion. The number of applications which are received following rule 21 judgments in which respondents claim not to have received the original claim form is substantial. I always guard against cynicism and I am prepared to accept a single letter can go astray in the post. In this case I would have to accept the three such letters went astray. I do not.

14. Although my primary decision is that the claims were **actually received** , I will deal with an alternative. In Zietsman and Du Toit t/a Berkshire Orthodontics-v-Stubbington 2001 EAT 345 the question on the appeal was whether an Employment Tribunal was entitled to conclude Mr Du Toit, had been properly served with the proceedings. It accepted he had not actually received the claim because he had ceased to practice from the address to which it was sent, did not visit the premises, nor make arrangements for mail to be forwarded to him. The Tribunal regarded that as thoroughly irresponsible conduct, to which his ignorance of the proceedings was wholly attributable. In those circumstances they declined to review their original decision against Mr DuToit. On appeal His Honour Judge Peter Clark accepted whether Mr DuToit was **deemed to** have received documents for the purpose of Rule 11(1)(b) was to be determined by the statutory provisions in the 1993 Rules, read in conjunction with Section 7 of the Interpretation Act 1978 following Migwain Ltd v TGWU [1979] ICR 597and T & D Transport v Limburn [1987] ICR 696.Section 7 of the Interpretation Act 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."

The 2013 Rules now say in Rule 86 (*1) Documents may be delivered to a party (whether by the Tribunal or by another party)— (a)by post…* My secondary decision is that the claims were **deemed to have been received.**

15. Under the 2013 rules, the only ground for a reconsideration is whether one is necessary in the interests of justice. That means justice to both sides and to other litigants. The prejudice to the claimants of a reconsideration would be delay, expense and having to start afresh to deal with such points as length of service and, in Ms Stuart's case, whether she was constructively dismissed.

16 In Kwik Save-v-Swain 1997 ICR 49 delay in responding was, as Mummery P said, " *as the result of a genuine misunderstanding or an accidental oversight* ". That is not so here. Under the 2004 Rules, which in my personal view were too prescriptive, in Pendragon plc-v-Copus Burton P confirmed the discretion to accept late responses is broad and is to do whatever is just and equitable. Both these cases were under earlier and different versions of Employment Tribunal Rules.

17. The whole purpose of ACAS and the Employment Tribunals is to provide a means of resolving employment disputes quickly. The requirement for EC came into force a few months after the 2013 Rules .Parliament clearly intended to have a modernised system with rules designed to do justice between the parties but requiring the respondent to the claim to put forward its arguments 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 hearing if they follow the rules to avail themselves of that right. Ms Widdett submitted there was a strong defence. Although a Tribunal should always weigh all factors including the apparent strength or weakness of the proposed defence, it cannot in my view be expected to conduct a " mini trial". Frankly in this case the respondent's length of service argument appears weak. Ms Stuart's claim of a breach of the implied term of mutual trust and confidence is powerful. As for the dismissals, the chances of a finding other than they were at the least procedurally unfair is negligible.

18. Again, under the 2004 rules, DH Travel -v-Foster decided even where what was called a "default judgment" on liability was not set aside, a respondent still had the right to appear at the remedies hearing. Such instructions as Ms Widdett had point to an argument on remedy which could have been put forward much earlier. She said the share purchase agreement envisaged the claimants remaining in what could broadly be described a consultancy role **for a limited time**. If evidence to that effect were accepted, although the claims would still succeed and the claimants all receive a basic award, a compensatory award may be limited if, had a fair procedure been followed, they may have been fairly dismissed by a specific time as redundant or for some other substantial reason. That is why at this stage I am erring on the high side in asking for availability for up to three days for a remedy hearing.

19. The 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. To allow a respondent, who has not taken advantage of the opportunity to defend, to do so after a Rule 21 judgment would make a mockery of the system. That is my view of what Parliament intend should happen under the 2013 Rules.

20. If there is to be an appeal in this matter it would be helpful to have guidance on the extent to which some of the older authorities I have cited are still good law under the current rules, where the there is only one ground for a reconsideration

"necessary in the interests of justice" . Also there is no present guidance, as far as I am aware, to help Tribunal in a situation such as my alternative basis for my decision which is the claim should be deemed to have been served. It is also a common occurrence in the tribunal for documents addressed to a last known place of business, or in many cases the registered office of the limited company, simply to be returned with someone having written on the envelope words to the effect "gone away". As every document from the tribunal is sent in an envelope with the tribunal's return address emblazoned on the back, claiming to have vacated the premises by returning the envelope unopened is another way of avoiding having to answer a claim. HH Judge Clark dealt robustly with that in Stubbington. I believe the 2013 Rules should not be seen as a licence for respondents either to ignore proceedings until judgment arrives, or take insufficient precautions to ensure Employment Tribunal papers come into the correct hands where they will be dealt with.

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TM GARNON EMPLOYMENT JUDGE

SIGNED BY EMPLOYMENT JUDGE ON 25th JULY 2018