



# EMPLOYMENT TRIBUNALS

**Claimant:** Anne Sayers

**Respondent:** John A Thompson Memorial Trust

**Heard at:** Southampton **On:** 10 May 2019

**Before:** Employment Judge Housego

## **Representation**

**Claimant:** In person

**Respondent:** Howard Robson, solicitor, of Warner Goodman LLP

## **JUDGMENT ON APPLICATION FOR RECONSIDERATION**

The judgment of the tribunal is that:

1. The time for lodging the application for a reconsideration is extended.
2. The Respondent's application for reconsideration is allowed.
3. The Judgment of 09 October 2018 is set aside.

## **REASONS**

1. The Claimant is the partner of Robert Russell who was employed by the Respondent from 30 October 2012 until 08 May 2018. He died on 30 May 2018. The Claimant is his executor.

2. The Respondent has applied for a reconsideration of the Judgment dated 09 October 2018 which was sent to the parties on 19 October 2018 (“the Judgment”). The grounds are set out in their solicitor’s letter dated 28 February 2018. That letter was received at the Tribunal office on that date, as it was emailed.
3. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 (“the Rules”). Under Rule 71 an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received outside the relevant time limit.
4. Under Rule 5 the Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in the Rules or in any decision, whether or not (in the case of an extension) it has expired.
5. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.
6. The application to set aside the judgment was made, as below and the remedy hearing that had been set for today was converted into a hearing to deal with that application.
7. The grounds relied upon by the Respondent are these:
  - 7.1. The Respondent states that it has never received any documentation about the claim.
  - 7.2. The claim is brought by the executrix of the late Robert Russell, who was an employee of the Respondent.
  - 7.3. The employment of Mr Russell was brought to an end by letter of 04 May 2018 by reason of his ill health, namely bowel cancer. He had not been able to work since July 2017. That letter was received by him on 08 May 2018 and that was the effective date of termination.
  - 7.4. On 30 May 2018 Mr Russell died, the cause of death being suicide.
  - 7.5. There was contact from ACAS, by telephone, but no correspondence was received.
  - 7.6. On 09 October 2018 judgment was entered in default as no response had been filed.

- 7.7. Shortly before a Board meeting of the Respondent to take place on 20 February 2019 Pamela Green, an employee who deals with the website of the Respondent, was updating the Respondent's website. She searched against the name of the Respondent and found the online entry of the Judgment.
- 7.8. Ms Green deals with all post for the Respondent. She had no knowledge of any post about this claim, and none was found subsequent to the discovery of the judgment, despite careful search for it, and enquiry of other members of staff.
- 7.9. The Respondent's address, 28 Festing Road Southsea Hants PO4 0NQ was correctly set out in the claim form, but the Respondent has a variety of addresses in Festing Road, 24 26 and 28. Post is often addressed to the Respondent but delivered to addresses other than 28 Festing Road.
- 7.10. The other premises of the Respondent have post boxes and post is routinely delivered at these properties in Festing Road. The Respondent has some 46 self-contained independent living flats for elderly individuals, of whom a number have symptoms of dementia.
- 7.11. Mail is delivered to each of the premises to a central hall and in addition some mail goes to the communal lounge at 26 Festing Road.
- 7.12. Receipt of mail is occasionally problematic with occupants of flats picking up mail to "*deliver*" to their neighbours.
- 7.13. The Respondent often receives post which is meant to be delivered to properties in Festing Grove and Festing Mews in the same area of Southsea. Post is frequently misdelivered to 24, 26 or 28 Festing Road for residents or trust management and trustees.
- 7.14. The trust manager, Pamela Green, is aware of the problems associated with postal delivery but given the nature of the independent living arrangements the difficulty with erratic hardcopy post has not yet been solved.
- 7.15. Whilst it is not disputed that in all likelihood the correspondence was correctly addressed and posted it was not received by the intended recipients, the Respondent.
8. The Claimant opposed the application, pointing to various letters she said that she sent but to which she says there was no response. She doubted that the Judgment was discovered in the way asserted.

9. I have considered Kwik Save Stores Ltd v Swain & O'rs [1997] ICR 49 and the overriding objective. I heard evidence from Pamela Green (who was cross examined by the Claimant), and submissions from both the Claimant and the solicitor for the Respondent.
10. I accept the evidence of Ms Green as credible. It is also plausible, as there would be no reason to ignore a claim stated to be of over £100,000. On 07 August 2018 Ms Green had replied to the Claimant stating that a subject access request made by her would not be actioned, giving as the reason a statement that such a request cannot be made in respect of a deceased person. There is every reason for Ms Green to have replied to the Tribunal to say that the Claimant had not shown that she had locus standi to bring a claim, had she received the claim form.
11. I decide to extend time for the making of the application, as it was made within a few days of the Judgment coming to the notice of the Respondent.
12. As the Judgment was in default of a response, and the Respondent did not know of the claim, I grant the application for a reconsideration of that judgment.
13. I have considered the merits of the claim and defence (without making any findings of fact). It is not disputed that the dismissal was shortly after the receipt of a 2 month fit note stating that Mr Russell would be unfit for any form of work for 2 months, taking his total absence to a year. It is not disputed that he fell within the disability provisions of the Equality Act 2010, but the Respondent says this was a standard capability dismissal, and more, one which Mr Russell regarded with equanimity. This is not an obviously spurious defence. The Claimant asserts that this was rushed through because Mr Russell had been told by his consultant that he was now fit to return to light duties and that his GP had said that she would issue a new fit note to say so when the consultant wrote to her to say so, that Mr Russell had told Ms Green this on the phone, and that such a letter from the consultant was in fact written to the GP soon after. This the Respondent denies. The difference is an issue of fact for a Tribunal to determine.
14. The ignorance of the Respondent of the claim, the size of the claim, the clear way it is set out (and the existence of a cogent defence to it) are good reasons to set aside the Judgment so that the claim may be decided upon its merits. There has been some delay to the swift progress of the claim (from August 2018 to May 2019) resulting from the making of the application, but there is no evidence to be obtained from Mr Russell, and the delay has to be seen in the context of a listing delay until January 2020.
15. I set aside the judgment.

16. I announced that decision in an extempore judgment and then made case management orders by consent as set out in the case management order of today's date. I also went through the likely progress of the hearing for the benefit of the Claimant, explaining the difference between asking questions, giving evidence and making submissions. I also let her know that she could attend another hearing to observe how they were run.

Employment Judge Housego  
Dated 10 May 2019