EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
1. **Edyta Sabat**	**v**	**SH Pratt Group Ltd**
2. **Judyta Marzec**		
3. **Tomasz Dziedzic**		

RECONSIDERATION JUDGMENT

The respondent's application for reconsideration of the decision is not well founded and is dismissed.

REASONS

Relevant legal provisions

1. Reconsideration of rejection

1.1 A respondent whose response is rejected under rules 17 or 18 may apply under rule 19 for a reconsideration of the rejection. It can do so on either of the following grounds:

- That the decision to reject was wrong.
- If the rejection was under rule 17, that the notified defect can be rectified.

(Rule 19(1).)

1.2 In addition, under rule 70, the tribunal can reconsider any decision "where it is necessary in the interests of justice to do so."

1.3 The overriding objective to deal with cases fairly and justly, set out in rule 2, will also be relevant. Dealing with cases fairly and justly includes the following:

- Ensuring that the parties are on an equal footing.

- Dealing with a case in ways which are proportionate to the complexity and importance of the issues.
- Avoiding unnecessary formality and seeking flexibility in the proceedings.
- Avoiding delay, so far as compatible with proper consideration of the issues.
- Saving expense.

1.4 Under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237 para. 72:-

> **72.— Process**
>
> (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.

1.5 Late presentation of response

The EAT in **Kwik Save Stores Ltd v Swain [1997] ICR 49** set out the test for tribunals considering whether to grant an extension of time for a respondent to present its response.

The employment judge should:

- Take into account all relevant factors, including the explanation (or lack of explanation) for the delay and the merits of the defence.
- Reach a conclusion which is "objectively justified on the grounds of reason and justice", balancing the possible prejudice to each party.

Other relevant factors identified in later cases include:

- Whether it is just and equitable to accept the ET3 out of time. (**Moroak (t/a Blake Envelopes) v Cromie [2005] IRLR 535**, **Pendragon plc (t/a CD Bramall Bradford) v Copus [2005] ICR 1671** and **British School of Motoring v Fowler UKEAT/0059/06**;
- Weighing up the balance of prejudice between the parties is more important than the respondent's reason for not presenting its response on time. (**The Pestle and Mortar v Turner UKEAT/0652/05**); In **Pendragon v Copus EAT/0317/0**, 11 July 2005 the EAT held that, in deciding whether to grant a review, the tribunal should apply the principles laid down in **Kwik Save Stores Ltd v Swain [1997] ICR 49**:
- The party applying for the review should put before the tribunal all the relevant documents and other factual material.
- The tribunal chair should take into account all relevant factors, including the explanation (or lack of explanation) for the delay and the merits of the defence.
- The tribunal chair should reach a conclusion which was objectively justified on the grounds of reason and justice, balancing the possible prejudice to each party.

1.6 These principles were also applied by the EAT in **Moroak v Cromie [2005] IRLR 535**.

The application

2.1 I have treated the letter of 12 March 2019 as an application for reconsideration and albeit out of time I considered it on its merits.

2.2 The letter seeking reconsideration dated 12 March 2019 gave no reasons or potential reasons for why the claim form was not received by the respondent. There was simply the bare assertion made it was not received. There was nothing presented to displace the normal inference that items posted to the correct address are normally received. All other correspondence has reached the respondent, including the judgment. There is no good explanation before me as to why the claim form was not received.

2.3 In the circumstances of this case, no explanation had been provided for the response form not being received. Other correspondence was duly received by the respondent, including the judgment and the correspondence after the response was not entered. Further, the relevant correspondence was received by the claimant. There is a simple bare denial without any further basis.

2.4 Following the guidance of the EAT in **Kwik Save Stores Ltd v Swain [1997] ICR 49** I considered the test for tribunals considering whether

to grant an extension of time for a respondent to present its response, I took into account all relevant factors, including the explanation (or lack of explanation) for the delay and the merits of the defence. I then sought to reach a conclusion which was "objectively justified on the grounds of reason and justice", balancing the possible prejudice to each party. In all the circumstances, I did not see any sound basis for granting an extension now.

2.5 As to the substance (and merits) of the draft Response, submitted by the respondent, the Response read as follows.

> *"1 There are three claimants.*
> *2 Letters by email were sent by all three claimants as below*
> *Marzec sent on 18 March 2018,*
> *Dziedzic sent on 7 March 2018 dated 7 March*
> *Sabat sent on 7 March 2018 dated 7 March.*
>
> *3 The claim was received by the Tribunal on 6 June 2018*
>
> *4 The claim being made by Marzec Sent on the 18th of March is out of time and should be struck out.*
>
> *5 The respondents commenced a consultation process on 5 February 2018 with all staff who were employed on what the company called legacy terms and conditions*
>
> *6 The purpose of the consultation was to make agreed changes to these t's and c's with all affected staff and union representatives.*
>
> *7 The proposal being made was to remove the legacy enhancements from being able to be accrued and replace them in with an increased basic pay and an additional overtime rate of 1.25% (time and a quarter) for all hours worked in excess of their revised contracted hours*
>
> *8 Consultation was due to end on 11 March 2018 when the new t's and c's took effect.*
>
> *9 Of the 98 staff affected by the change the claimants were the only ones who left.*
>
> *10 The claimants resigned their employment prior to the consultation ending, so had not given the respondent the opportunity to resolve any concerns they had.*
>
> *11 The respondent contends that the authority* ***Greenway Harrison v Wiles*** *applies.*
>
> *The respondent also contends that* ***Kerry Foods Ltd v Lynch*** *does apply as the changes were not in place when the claimants resigned*

2.6 I went on to consider whether the response indicated a substantive defence with potential merit.

3 **No notice actually served**

3.1 I see nothing in the draft response to displace my original finding that the employer had not served valid notice of dismissal as at the date the employment ended. The employer had merely threatened to do so. I distinguish ***Kerry Foods*** in this case.

3.2 The respondent maintained the position in the draft Response that the changes would take effect on 11 March 2018 with no further payment or notice. But this was not a case of actual dismissal by the employer.

4. **Constructive dismissal**

4.1 Turning to the issue of constructive dismissal, there is nothing in the draft Response to cast doubt on my original finding that a threat of dismissal was made first in a letter dated 5 February 2018 stating the changes would take effect from 6 March 2018.

4.2 The position remained that this first letter made no reference to the need to give notice or to the need to pay the employee during notice. That letter was not giving of notice itself, so it wrongly suggested the changes would take effect from 6 March 2018. This still appeared to be a misleading description of the contractual position. Not only was no notice given in this letter, but the contract made no mention of the rights of each claimant to be given 10 weeks' notice under s86 ERA 1996. The letter implied that the respondent did not need to give any notice to effect the change on 6 March 2018 and/or did not make reference to the 10 weeks' notice due under each contract. I see nothing to disturb or question my findings on the letter from the respondent of 7 February 2018 or the letter of 27 February 2018.

4.3 The position also remained that the letters in combination led the claimants to believe, on their cogent and consistent evidence, that there would be no payment or notice period given if they refused to accept the change and/or that the changes were going to take effect on or about 7/11 March 2018 (and not after 10 weeks' notice).

4.4 I see nothing to materially question my finding that the employees resigned on that date in response to the employer's breach.

5. **Express term as to notice**

5.1 There was also nothing in the draft Response to call into doubt my finding that the letters from the respondent, read together, amounted to a threat that the employer would not observe the express terms of the contract as to notice and/or the need to give 10 weeks' notice.

5.2 Nor was there any new material to suggest that such threats did not amount to a breach/an anticipatory breach of the express terms of the contract as the employer was threatening to avoid the full notice

process and not serve notice properly if the employee did not accept, or the finding that the employees resigned without notice in response to that breach or that employee did not delay unreasonably before resigning.

6. **Trust and confidence term**

6.1 There was also nothing material to call into question my finding that, in the alternative, there was a constructive dismissal in relation to the implied obligation of trust and confidence. The fact that these employees were the only ones who left is not probative.

6.2 The claimants had given clear evidence about their serious concerns over the letters sent to them; the lack of explanation given and the closed approach of the employer.

6.3 The employer in the draft Response appeared to accept that these "legacy terms" and rates of pay had prevailed for many years.

6.4 There was still no explanation before me as to the business reasons the changes were being made, save a saving of money by cutting the overall pay rates.

6.5 The draft response did not address or explain the employer's letter of 5 February 2018, or give information to show that there was meaningful consultation.

6.6 There was still no evidence or basis before me to show that the employer had undertaken a proper assessment of the impact of the changes on employees and whether it had genuinely considered alternatives to any changes.

6.7 The employer's motives for introducing the changes remain unclear save a desire to save money by changing long standing contractual terms to their benefit.

6.8 There was still no evidence before me of consideration being given to the employees' reasons for rejecting the changes.

6.9 There was still no basis to suggest that the employees had been given reasonable warning of the proposed changes (after around ten years of these terms applying).

6.10 There was also still no evidence that the changes and full effect of those changes had been sufficiently and clearly explained to the employees.

6.11 I find nothing in the draft response to suggest that the employer's conduct as a whole in the way it went about seeking to impose the changes in terms and conditions (before actually giving notice) did not fundamentally breach the implied term of trust and confidence.

7. I also found there to be no substance in the respondent's submissions as to time limits and/or any of the cases being out of time in the light of the dates of submission of the claims and the ACAS certificates obtained**.**

8. **Was dismissal in breach of contract?**

   8.1 There was also no cogent evidence or argument that the claimants were not each constructively dismissed without notice.

9. **Was dismissal unfair?**

   9.1 I still had no cogent evidence to demonstrate the changes were for sound business reasons.

   9.2 I also note the following five points relevant to fairness remain unaffected by the draft Response:

   9.3 There was little or no evidence of a meaningful or genuine consultation process.

   9.4 There was no evidence the employer had undertaken an assessment of the impact of the changes on employees and whether it had genuinely considered alternatives to any changes.

   9.5 The employer's motives for introducing the changes remained unclear.

   9.6 There was little or no evidence of consideration being given to the employees' reasons for rejecting the changes. The employees did not appear to have been given much reasonable warning of the proposed changes.

   9.7 There was no evidence the changes and full effect of those changes had been sufficiently and clearly explained to the employees and/or balanced.

   9.8 The facts in this case remain similar to those in ***Banerjee v City and East London Area Health Authority [1979] IRLR 147***.

   9.9 As to the cases relied on in the draft response both cases cited were each considered in detail in the prior hearing of this matter already.

   9.10 I could see nothing in the purported response which suggested it was likely that there would be any different decision made. I had already carefully considered and applied these cases.

   9.11 I considered the position further by reference to:

   - Ensuring that the parties are on an equal footing.

- Dealing with a case in ways which are proportionate to the complexity and importance of the issues.
- Avoiding unnecessary formality and seeking flexibility in the proceedings.
- Avoiding delay, so far as compatible with proper consideration of the issues.
- Saving expense

10. In my view, the claimants would suffer material prejudice by reference to further delay in having this matter resolved and their compensation paid. Added cost would also be incurred.

11. In all the circumstances, no good reason has been provided for the failure to provide a response and there is very little if anything to suggest that allowing a response to proceed now would make any difference. I consider the merits of the defence, so far as a case in response is put before me, to be very weak.

12. Weighing all the relevant factors, I do not consider it would be in the interests of justice to permit a response to be filed now.

13. For all these reasons I consider that there is no reasonable prospect of the original decision being varied or revoked.

14. The application for reconsideration is dismissed for all of the above reasons

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Employment Judge Daniels

Date: 12.06.2019……..

Sent to the parties on: .....

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For the Tribunal Office