EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113368/2018

Held in Glasgow on 2 April 2019 (Reconsideration Hearing)

Employment Judge: Ian McPherson

Miss Margaret Johnston	**Claimant** **Represented by:** **Mr A McIntosh - Solicitor**
(1) Govanhill Youth Project Management Committee (a registered Scottish charity, SCO 22154) c/o Colin Simpson	**First Respondent** **Represented by:** **Mr C Simpson - Acting Chairperson**
(2) Mr Colin Simpson, Acting Chairperson Govanhill Youth Project Management Committee	**Second Respondent** **In Person**
(3) Mrs Elizabeth Painter, Vice-Chairperson Govanhill Youth Project Management Committee	**Third Respondent** **In Person**
(4) Mrs Karen Park, Treasurer Govanhill Youth Project Management Committee c/o Colin Simpson	**Fourth Respondent** **Not present, but represented by Second Respondent Mr C Simpson - Acting Chairperson**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that: -

(1) Having heard oral submissions from the respondents' representative, and objections from the claimant's solicitor, at this Reconsideration Hearing, on (a) the respondents' opposed application to reconsider the **Rule 21** Default Judgment dated 27, and entered in the register and copied to

parties on 28, September 2018, finding the claim successful and ordering a Remedy Hearing, and (b) the respondents' opposed application to allow an extension of time under **Rule 20** for their ET3 response intimated on 21 December 2018 to be received late, and to revoke the Default Judgment and let them contest both liability and remedy, at a Final Hearing in due course, the Tribunal reserved judgment.

(2) Having now had private deliberation in chambers, and it being in the interests of justice to so order, the Tribunal **grants** the respondents' opposed application, under **Rule 20 of the Employment Tribunals Rules of Procedure 2013**, for an extension of time for presenting their ET3 response and, having done so, the Tribunal **allows** the ET3 response submitted on 21 December 2018 for the respondents to be accepted by the Tribunal, and the case to proceed as defended, and, in terms of **Rule 20(4**), the Tribunal **revokes** the Default Judgment which is accordingly set aside.

(3) Further, the Tribunal **reconsiders** the Default Judgment, under **Rule 70 of the Employment Tribunals Rules of Procedure 2013**, and, it being in the interests of justice to do so, on reconsideration, the Tribunal **revokes t**hat Default Judgment.

(4) The Tribunal **instructs** the clerk to the Tribunal to serve a copy of the now accepted ET3 response on the claimant's solicitor, and on ACAS, when issuing this Judgment to all parties, and **allows** the claimant's solicitor a period, **not exceeding 14 days from date of issue of this Judgment**, to prepare and lodge with the Tribunal, by e-mail, with copy sent at the same time to the respondents' representative, any further and better particulars for the claimant, answering the narrative for the respondents provided in the 20 paragraphs of the three-page paper apart to the ET3 response intimated on 21 December 2018.

(5) Further, having **revoked** the Default Judgment, the Tribunal **orders** the claim and response to be listed for a Final Hearing before a full Tribunal, to be chaired by Employment Judge Ian McPherson, if available, whom

failing any other Employment Judge, at the Glasgow Employment Tribunal, on dates to be hereinafter fixed, in the listing period **June, July and August 2019**, following receipt of completed date listing stencils to be issued to both parties by the clerk, along with standard case management orders, together with this Judgment, listing the case for full disposal, including remedy if appropriate.

REASONS

Introduction

1. This case called before me on the morning of Tuesday, 2 April 2019, at 10.00am, for a Reconsideration Hearing previously intimated to parties' representatives by the Tribunal by Notice of Hearing (Reconsideration / Extension of Time) dated 12 February 2019.

2. Three hours was allocated for this Reconsideration Hearing, which the claimant attended, represented by her solicitor, Mr Angus McIntosh, from Castlemilk Law and Money Advice Centre. She was accompanied by her partner, Mr Andrew Hannah, who, it emerged, had himself sued the charity in separate Tribunal proceedings. He was an observer and took no active part in the public Hearing.

3. The respondents were represented by their acting chairperson, Mr Colin Simpson, accompanied by Mrs Elizabeth Painter, vice-chairperson. I was advised that the other office bearer, Mrs Karen Park, the treasurer, was aware of the proceedings, but unable to attend on account of her work as a nurse at the childrens' hospital.

4. Having reserved judgment on the two opposed applications before the Tribunal, I advised parties that my written Judgment with Reasons would follow in due course. Having now had private deliberation in chambers, and having carefully considered the competing submissions made to me, I have come to my reserved judgment, which is given as above.

5. As certain case management issues were usefully discussed, at the Reconsideration Hearing, I decided to issue a separate written Note and

Orders dated 3 April 2019, dealing with a detailed Schedule of Loss and mitigation documents from the claimant, and additional information about the 1st respondents' status as a charity, etc, all of which would be required, at any future Hearing, regardless of my decision on these opposed applications, and that Note and Orders was sent to both parties' representatives under cover of a letter from the Tribunal dated 5 April 2019.

Claim and Response

6. Following ACAS Early Conciliation between 22 June and 20 July 2018, the claimant's ET1 claim form was presented to the Employment Tribunal on 17 August 2018, by Ms Lucy Neil, Castlemilk Law & Money Advice Centre, Glasgow.

7. The claimant complained of unfair dismissal from her employment with the respondents, Govanhill Youth Project, as a Youth Development Officer, on 18 April 2018, and also complained that she was owed notice pay, and holiday pay. In the event of success with her claim, she sought an award of compensation only from the respondents, then only Govanhill Youth Project, but no information was given at section 9.2 of the ET1 claim form as regards the amount of financial compensation being sought from those respondents.

8. That claim was accepted by the Tribunal on 22 August 2018, and a copy served on the respondents, then only Govanhill Youth Project, at the address provided by the claimant in the ET1 claim form, namely 172 Butterbiggins Road, Glasgow, G42 7AL. Those respondents were advised that if they wished to defend the claim, they should return the ET3 response form by 19 September 2018, and they were further advised that the case had been listed for a one-hour Final Hearing on Wednesday, 31 October 2018, at 11.30am, before an Employment Judge sitting alone, to hear the evidence and decide the claim, including any preliminary issues.

9. No ET3 response form was lodged by, or on behalf of, those respondents, then only Govanhill Youth Project, by 19 September 2018, or at all.

Default Judgment: Liability Only

10. On 27 September 2018, no response having been received or accepted in this case, I granted a **Rule 21** Default Judgment, liability only, which was issued without a Hearing, and that was entered in the register and copied to parties under cover of a letter from the Tribunal dated 28 September 2018 advising that, as the Default Judgment dealt with liability only, the Final Hearing listed for 31 October 2018 would be extended to two hours duration to deal with remedy only.

11. In the Tribunal's letter entitled: '**NO RESPONSE – JUDGMENT ISSUED'**, issued on 28 September 2018, and sent to Govanhill Youth Project, at the address stated in the ET1 claim form, and the address to which the Notice of Claim had previously been issued, the respondents, then only Govanhill Youth Project, were advised that they had the right to apply for a reconsideration of the judgment, within 14 days of the date of that letter, and they were further advised that if they wished now to defend the claim, they would also have to apply for an extension of time to submit their ET3 response and that any such application would be considered by an Employment Judge.

12. Further, on 29 September 2018, under cover of a Notice of Remedy Hearing issued by the Tribunal to the claimant's solicitor, with copy to the respondents, then only Govanhill Youth Project, at their stated address on file, but for information only, parties were advised that a two-hour Remedy Hearing had been set aside for Wednesday, 31 October 2018 at 10.00am.

13. In the event, that Remedy Hearing did not proceed because, on 26 October 2018, having considered correspondence received from the claimant's solicitor, and a Mr Colin Simpson, acting on behalf of the respondents, Employment Judge Robert Gall postponed that Remedy Hearing.

Parties' Correspondence with the Tribunal: Chronology of Events

14. As the chronology of events is important to the disputed applications before me at this Reconsideration Hearing, I detail them below, not only in relation to this case, but also in relation to the separate case (case no **4105568/2017**) against the same respondents, by the claimant's partner, **Mr Andrew Hannah**, where both Mr McIntosh and Mr Simpson were again involved.

15. In the present case, by Miss Johnston, the chronology is as follows:

- **22 June/20 July 2018** – ACAS Early Conciliation.
- **17 August 2018** – ET1 claim form presented to Employment Tribunal.
- **22 August 2018** – Notice of Claim served on respondents, then only Govanhill Youth Project, for an ET3 response by 19 September 2018.
- **28 September 2018** – Default Judgment under **Rule 21** granted by Employment Judge Ian McPherson, dated 27 September 2018, against the respondents, then only Govanhill Youth Project,
- **10 October 2018** – email to Glasgow ET from Mr McIntosh, claimant's solicitor, at Castlemilk Law Centre, noting that the respondents had not entered appearance, and that he is acting for another client against the same respondents, and giving email contact address for Mr Simpson, with whom he is corresponding on behalf of the respondents.
- **15 October 2018** – email to Glasgow ET from Colin Simpson stating: ***"I have become aware that a Tribunal has been raised in respect of Margaret Johnston, but as a representative of Govanhill Youth Project I have received no correspondence in respect of this matter. The address that may have been given for Govanhill Youth Project is no longer in use as the youth project has been dissolved. Can you take note of the fact that I have received no correspondence in respect of Margaret Johnston and could you direct any correspondence to my home address?"***
- **19 October 2018** – email from Mr McIntosh, claimant's solicitor, at Castlemilk Law Centre, to Glasgow ET advising that he is acting for the claimant, in Andrew Hannah v Govanhill Youth Project, which is settling, and the respondents appear to have ceased trading and it does not appear that there is any activity at the address entered for them on the ET1.

- Mr McIntosh's email stated that: "I ***have been in contact with them at the email addresses I sent you. I have also indicated to them, when I have been in touch regarding settlement of Mr Hannah's case, that they should contact the Employment Tribunal regarding Ms Johnston's case. I do not know whether they have done so. Since I have now advised you of the respondent's current contact details and informed them as above, I am not proposing to contact them again before Ms Johnston's hearing. I am not asking you to take any specific action."***

- **26 October 2018** – following referral to Employment Judge Robert Gall, letter sent from Glasgow ET to Mr McIntosh for the claimant, and emailed to Mr Simpson for the respondents. As it appeared the respondents, then only Govanhill Youth Project, had not thus far received any correspondence for this case, Judge Gall postponed the Remedy Hearing scheduled for 31 October 2018.

- **31 October 2018** – following referral to Employment Judge Ian McPherson, email sent to Mr Simpson, for the respondents, with copy to Mr McIntosh for the claimant, stating that the claim had been served on the respondents, then only Govanhill Youth Project, at the address on OSCR and not returned as undelivered, and if the respondents wished to defend the case, they needed to seek reconsideration of the Default Judgment that was issued on 28 September 2018, and an extension of time to lodge an ET3 response. Mr Simpson was asked to clarify, by 7 November 2018, on what basis he was acting for the respondents, as that was not clear from the correspondence to date received by the Tribunal from him by email.

- **31 October 2018** – by email from Mr Simpson, to the Glasgow ET, with copy to Castlemilk Law Centre, Mr Simpson advised as follows:

  "Thank you for your communication attached to your email. I did not receive any correspondence at the address detailed in OSCR records as Govanhill Youth Project vacated the premises detailed

in June 2018 and has received no forwarded mail from this address since then. We do not have access to the premises and we have not been informed of any mail to be collected by the landlord, Govanhill Housing Association.

In terms of why I am the representative for the respondent, this is because I was the chair of the management committee and I have been dealing with correspondence and attendant issues. We also don't have the resources to engage ongoing legal representation and we are trying to deal with this process from a lay person's perspective. I would appreciate the opportunity to participate in the process fairly now that we have acknowledged that we have been unable to participate due to specific extenuating circumstances."

- **13 November 2018** – following an instruction from Employment Judge Shona MacLean, on 6 November 2018, for Mr McIntosh, the claimant's solicitor, to provide comments on Mr Simpson's correspondence of 31 October 2018, Mr McIntosh replied as follows to the Glasgow ET, with copy by email to Mr Simpson: -

  "***I have no objection to Mr Simpson representing the respondents. A copy of the claim form was sent to the respondents on 22 August 2018. No response was received from the respondents and a judgment in favour of the claimant dated 27 September 2018 was issued the following day. A Remedy Hearing was fixed for 31 October 2018. Mr Simpson has been aware for some time that a claim has been lodged. There has still been no ET3 submitted or any other attempt made by the respondents to take appropriate steps to rectify defects in procedure. The claimant's position is that the Judgment of 27 September 2018 should stand and that a fresh Remedy Hearing should be fixed."***

- **14 November 2018** – in reply to Mr McIntosh's email, Mr Simpson emailed the Tribunal, with copy to Castlemilk Law Centre, as follows: -

"***I note that they believe the default judgment should stand as they indicate that they are of the view that Govanhill Youth Project was informed of the claimant's claim. The facts are that I was contacted by ACAS to discuss Margaret Johnston's potential claim against the project and I subsequently received a certificate of completion from ACAS indicating that they had completed their involvement in the process. As I have indicated in an earlier email, we have received no correspondence from the Tribunal in respect of the case as the address to which it was sent was vacated in June. It was only in a telephone conversation with Angus McIntosh, relating to another matter, that I was made aware that a claim had been raised with the employment tribunal. I would also like it noted that the ET does have a record of my home address as this was used for correspondence in a previous case. If I had been aware of this in a timeous manner we would have defended the claim vigorously as we believe that the claim has no merit. It would be unfair, given the circumstances, not to allow us to defend this claim as we are clear that, in this instance, Govanhill Youth Project acted in an appropriate way in terms of our response to the claimant's concerns while she was employed by the project and did not behave in a way which could be construed as constructive dismissal. Ms Johnston resigned from the project when she believed she had secured another job and never indicated in her correspondence that she was leaving as a result of the issues I was made aware of during my discussions with ACAS. I think it is also worth pointing out that Govanhill Youth Project is now dissolved as an organisation and has limited resources to support the contesting of this claim and for a judgment to be made without ensuring that the respondent has the appropriate information does not support open participation in these processes. In light of this, I would ask for the opportunity***

to present our case within a reconvened process and I have now given the ET an address for future correspondence."

- **23 November 2018** – following referral of parties' correspondence of 13 and 14 November 2018 to Employment Judge Ian McPherson, the relevant papers (being copy of ET1 claim form, Default Judgment, and a blank ET3 response form to complete and return, detailing the respondents' grounds of resistance) were copied to Mr Simpson, as the respondents' representative, and parties were advised that when Mr Simpson returned a completed ET3, the Judge would then instruct that a Reconsideration Hearing be fixed for two hours, in person, to hear from Mr Simpson on the application for an extension of time to lodge the ET3, and for Mr McIntosh to reply.

- Meantime, the Judge stated that it was premature to fix a fresh Remedy Hearing since, if the extension of time were granted, and a late ET3 allowed, the Tribunal would then need to fix a Final Hearing to hear the case on its merits. The respondents were directed to complete and return the ET3 "***as soon as possible***".

- **30 November 2018** – The Tribunal acknowledged Mr McIntosh's email of 21 November 2018, copied by email to Mr Simpson, acknowledging receipt of Mr Simpson's email of 14 November 2018, and reiterating the claimant's position that the Judgment of 27 September 2018 should stand and that a fresh Remedy Hearing should be fixed.

- **18 December 2018** – Employment Judge Ian McPherson, noting that, despite previous correspondence, no ET3 had been lodged by the respondents, then only Govanhill Youth Project, directed that, in those circumstances, the respondents were not actively pursuing their defence to the proceedings and, accordingly, he instructed that the case be listed for a two-hour Remedy Hearing, with a Notice of Hearing to follow in due course.

- **19 December 2018** – Email from Mr Simpson, to Glasgow Employment Tribunal, copied to Mr McIntosh for the claimant, stating

that: "***Can I ask you indicate to the tribunal judge that I am not in agreement with his decision. I am currently preparing our ET3 response and expect to lodge it in the next few days. The letter inviting us to respond did not set a time limit but simply said we should lodge our response "as soon as possible". It has been a busy period and also, I have had to engage with other members of the committee as well as gather evidence in relation to an organisation which is now dissolved. I would ask for a few more days to lodge a response so that we can participate properly in the process. As a lay person without recourse to legal advice, I feel we should be given an opportunity to fully participate."***

- **19 December 2018** – Email from Mr McIntosh, Castlemilk Law Centre, to Glasgow ET, copied to Mr Simpson for the respondents, stating: ***"The respondents have had since October 2018 to comply with the rules and I am not agreeable to any further time being allowed."***

- **24 December 2018** – Following referral to Employment Judge Ian McPherson, letter sent from the Tribunal to both parties informing them that the respondents' representative was to lodge the ET3 by 4pm on 31 December 2018. If the ET3 was not received by the Tribunal by that date, the Remedy Hearing would be listed but, if the ET3 was received by that date, a Reconsideration Hearing would be fixed.

- **8 January 2019** – Correspondence received at Glasgow ET from the respondents' representative, Mr Simpson, by email, on 21 December 2018, enclosing completed ET3 response form, and supporting documents, was referred to Employment Judge Ian McPherson.

- On his instructions, by letter from the Tribunal dated 9 January 2019, emailed to both Mr McIntosh, and Mr Simpson, parties were advised that Mr Simpson's correspondence had been acknowledged and placed on the case file, and the claimant's representative, Mr McIntosh,

was directed to provide comments on the correspondence, with a reply due by 19 January 2019.

- Parties were further advised that the Employment Judge had treated the correspondence as an application for an extension of time under **Rule 20**, and the case was to be listed for a Reconsideration / Extension of Time Hearing, and that date listing stencils would be issued in due course in order for both parties to provide their availability.

- **9 January 2019** – Mr Simpson provided availability for the respondents.

- **17 January 2019** – Mr McIntosh provided availability for the claimant, with updated availability provided on 11 February 2019.

- Despite the Employment Judge's direction, in the Tribunal's letter of 9 January 2019, that the claimant's representative, Mr McIntosh, should provide comments on the respondents' correspondence of 21 December 2018, namely the ET3, no comments were provided by Mr McIntosh, by the due date, or at all, in advance of this Reconsideration Hearing.

- **12 February 2019** – Notice of Hearing (Reconsideration / Extension of Time) issued by the Tribunal to both parties, assigning 3 hours on Tuesday, 2 April 2019, at 10.00am.

16. In Mr Hannah's case, the relevant dates, extracted from the Tribunal's case file, available to me at this Reconsideration Hearing, were as follows:

- **9 November 2017** – ET1 claim form presented by claimant's solicitor.

- **12 December 2017** – No ET3 response lodged by respondents.

- **13 February 2018** – **Rule 21** Default Judgment issued by Employment Judge Mary Kearns, for liability and remedy.

- **22 February 2018** – Colin Simpsons seeks to ***"appeal"*** against the Default Judgment.

- **19 March 2018** – Employment Judge Mary Kearns advises respondents that no ET3 response has been presented and so respondents are not a party to proceedings, and if they wish to apply for a reconsideration, they need to present an ET3 along with an application for an extension of time.

- **4 April 2018** – On direction from Employment Judge Jane Garvie, blank ET3 form sent to Mr Simpson to return to Tribunal as soon as possible.

- **25 April 2018** – ET3 response form presented by Mr Simpson, on 23 April 2018, rejected by Employment Judge Kearns, under **Rule 18**, because submitted out of time, and no application made for an extension of time.

- **3 May 2018** – Employment Judge Shona MacLean decides original decision to reject ET3 was correct, but as respondents appear to be seeking an extension of time, under **Rule 20**, that application copied to claimant's representative for comments within 7 days.

- **20 July 2018** – Employment Judge Mark Whitcombe directs case to be listed for a Reconsideration Hearing on decision to reject ET3 response.

- **17 August 2018** – Notice of Hearing for Reconsideration of Decision to Reject Response issued, fixing 18 September 2018 for that Reconsideration Hearing.

- **18 September 2018** – Reconsideration Hearing before Employment Judge Kearns, continued to 2 October 2018. Ms M Smith, solicitor for the claimant, and Mr Colin Simpson and Mrs Painter for the respondents.

- **27 September 2018** – On application by claimant's representative, Mr McIntosh, Reconsideration Hearing arranged for 2 October 2018 cancelled, on grounds that the case was to be sisted for 14 days to allow settlement.

- **27 November 2018** – The sist having been continued, from time to time, the claimant's representative confirms to the Glasgow Employment Tribunal that the case has been settled, and sums due to Mr Hannah have been paid, and that the claim can be withdrawn.

- **28 November 2018** – **Rule 52** dismissal Judgment, granted by Employment Judge Jane Garvie, and issued to parties on 29 November 2018, confirming the claim against Govanhill Youth Project having been withdrawn by the claimant, it is dismissed by the Tribunal.

Procedure at this Reconsideration Hearing

17. While the claimant was legally represented, I was aware that the respondents were not, and that 2 out of 3 office-bearers from the respondents were there on their behalf, with Mr Simpson acting as their representative.

18. In those circumstances, and so as to ensure parties were put on an equal footing, I advised Mr Simpson of the terms of the Tribunal's overriding objective, under **Rule 2 of the Employment Tribunal Rules of Procedure 2013**, which provides that the Tribunal is to deal with cases fairly and justly, and that dealing with a case fairly and justly includes, so far as practicable (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of issues; (c) avoiding unnecessary formality and seeking flexibility of the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.

19. Further, **Rule 2** also provides that the Tribunal shall seek to give effect to the overriding objective when exercising any power given to it by the Rules, and parties shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and the Tribunal. I further

explained that, for the avoidance of any doubt, my role was not to act as advocate or representative for either party, for they must each take their own independent advice.

Relevant Law

20. At the start of the Reconsideration Hearing, neither party's representative presented any Bundle of Documents to me for use at the Reconsideration Hearing, nor was I advised that either party had any case law authorities to rely upon in submitting their arguments for and against the two applications before the Tribunal.

21. Mr McIntosh, solicitor for the claimant, did hand up to me, with copy for Mr Simpson, an excerpt copy of some of the Tribunal Rules, namely **Rules 13 to 20**, dealing with the response to a claim, and whilst his copy handed up was with a handwritten note by him stating : "***I don't think we ever received the ET3"***, he acknowledged, in reply to my query about that handwritten note that he had received Mr Simpson's email of 21 December 2018, the day it was sent to the Tribunal, and that his note had been written before that date, and so it was irrelevant for present purposes.

22. As the respondents' representative, Mr Simpson, was essentially a lay, party litigant, who advised me that, apart from dealing with Mr Hannah's case at this Tribunal, he had no other knowledge of Tribunal practice or procedure, or the relevant law, and likewise for Mrs Painter, I advised both Mr McIntosh and Mr Simpson that, consistent with my **Rule 2** duty to deal with the case fairly and justly, I could inform them, in general paraphrased terms, of the applicable legal test for a **Rule 20** application, and then invite their comments, by way of addressing the factors identified in the Employment Appeal Tribunal case law.

23. I explained to them both that this would include me seeking the explanation or lack of explanation for the delay in presenting a response to the claim, the merits of the respondent's defence, the balance of prejudice each party would suffer should an extension be granted or refused, and so why they invited me to grant or, as the case may be, refuse the respondent's application.

24. Specifically, I referred them both to paragraphs 16, 17, and 18 of the judgment of Mrs Justice Simler DBE, then President of the Employment Appeal Tribunal, in **Grant v Asda [2017] UKEAT/0231/16/ BA,** and now reported at **[2017] ICR D17**, the full terms of which extracts I reproduce here for ease of reference:

> "16. ***Rule 20*** *of the* ***ET Rules*** *provides as follows:*
>
> ***"(1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reason why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and if the respondent wishes to request a hearing this shall be requested in the application.***
>
> ***(2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.***
>
> ***(3) An Employment Judge may determine the application without a hearing.***
>
> ***(4) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside."***
>
> *17. Again, unlike its predecessor,* ***Rule 20*** *permits an application for an extension of time after the time limit has expired. Rule 20 is otherwise silent as to how the discretion to extend time for presenting an ET3 is to be exercised. Guidance on the approach to be adopted by tribunals in exercising their discretion was given in* ***Kwik Save***

Stores Ltd v Swain *[1997] ICR 49 EAT, a case concerning a respondent's application for an extension of time under the* ***Employment Tribunal Rules 1993****. Mummery J gave guidance at pages 54 to 55:*

> ***"The discretionary factors***
>
> ***The explanation for the delay which has necessitated the application for an extension is always an important factor in the exercise of the discretion. An applicant for an extension of time should explain why he has not complied with the time limits. The tribunal is entitled to take into account the nature of the explanation and to form a view about it. The tribunal may form the view that it is a case of procedural abuse, questionable tactics, even, in some cases, intentional default. In other cases it may form the view that the delay is the result of a genuine misunderstanding or an accidental or understandable oversight. In each case it is for the tribunal to decide what weight to give to this factor in the exercise of the discretion. In general, the more serious the delay, the more important it is for an applicant for an extension of time to provide a satisfactory explanation which is full, as well as honest.***
>
> ***In some cases, the explanation, or lack of it, may be a decisive factor in the exercise of the discretion, but it is important to note that it is not the only factor to be considered. The process of exercising a discretion involves taking into account all relevant factors, weighing and balancing them one against the other and reaching a conclusion which is objectively***

justified on the grounds of reason and justice. An important part of exercising this discretion is to ask these questions: what prejudice will the applicant for an extension of time suffer if the extension is refused? What prejudice will the other party suffer is the extension is granted? If the likely prejudice to the applicant for an extension outweighs the likely prejudice to the other party, then that is a factor in favour in granting the extension of time, but it is not always decisive. There may be countervailing factors. It is this process of judgment that often renders the exercise of a discretion more difficult than the process of finding facts in dispute and applying them to a rule of law not tempered by discretion.

It is well established that another factor to be taken into account in deciding whether to grant an extension of time is what may be called the merits factor identified by Sir Thomas Bingham MR in Costellow v Somerset County Council [1993] 1 WLR 256, 263:

> ***"a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate."***

Thus, if a defence is shown to have some merit in it, justice will often favour the granting of an extension of time, since otherwise there will never be a full hearing of the claim on the merits. If no extension of time is granted for entering a notice of appearance, the industrial tribunal will only hear

> ***one side of the case. It will decide it without hearing the other side. The result may be that an applicant wins a case and obtains remedies to which he would not be entitled if the other side had been heard. The respondent may be held liable for a wrong which he has not committed. This does not mean that a party has a right to an extension of time on the basis that, if he is not granted one, he will be unjustly denied a hearing. The applicant for an extension has only a reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner. That will involve some consideration of the merits of his case."***

*18. The approach set out by Mummery J was subsequently adopted in relation to the **2004 Rules** in **Pendragon plc (t/a CD Bramall Bradford) v Copus** [2005] ICR 1671 EAT. In our judgment, it applies with equal force to the **2013 Rules**. So, in exercising this discretion, tribunals must take account of all relevant factors, including the explanation or lack of explanation for the delay in presenting a response to the claim, the merits of the respondent's defence, the balance of prejudice each party would suffer should an extension be granted or refused, and must then reach a conclusion that is objectively justified on the grounds of reason and justice and, we add, that is consistent with the overriding objective set out in **Rule 2** of the **ET Rules**.*

25. Through the clerk, I had the Judgment in **Grant** copied, and provided to each party's representative, to read, and digest, and while I did not do likewise, by providing them with a copy, I did advise them that this EAT Judgment mirrored an earlier Judgment of an earlier President of the Employment Appeal Tribunal, Mr Justice Underhill, in **Thornton v Jones [2011] UKEAT/0061/11**, which is in similar terms to the case law I cited to parties' representatives.

26. I then invited their specific comments upon the caselaw at this Hearing, providing them with an adjournment to consider their respective positions, before inviting oral submissions, first from Mr Simpson for the respondents, and then from Mr McIntosh for the claimant, before giving Mr Simpson a right of reply.

27. I pause here to note and record that the ET3 response presented to the Tribunal by Mr Simpson on 21 December 2018 was not rejected under Rule 18, and so a reconsideration of a rejected response under Rule 19 was not appropriate in the present case, because I decided, on that ET3 response being referred me, that the late ET3 should be treated as an application for an extension of time under **Rule 20**.

28. While Mr McIntosh's oral submissions for the claimant, and his extract from the Rules, only referred to a **Rule 20** extension application, he did not refer to the applicable provisions at **Rules 70 to 73** about "***Reconsideration of Judgments."*** The end result of a successful reconsideration could be revocation of the original decision so, in practical terms, it can achieve the same result as securing an extension of time, and so setting aside a Default Judgment under **Rule 20(4).**

29. Nonetheless, I have borne in mind those Reconsideration Rules, as Mr Simpson had sought revocation of the Default Judgment, and, as per **Rule 70**, a party may apply for reconsideration of any Judgment where it is necessary in the interests of justice and where, on reconsideration, the Tribunal may confirm, vary or revoke its original decision and, if revoked, that decision may be taken again.

30. Of course, I recognise that, in terms of **Rule 71**, a reconsideration application should be submitted within 14 days of the date on which the original decision was "***sent to parties***" (being 28 September 2018 in the present case), the respondents' position is that they did not receive their copy of the Default Judgment though the post, although it was sent to them and the claimant's solicitor on the same date by ordinary post.

31. **Rule 5**, of course, allows the Tribunal, on its own initiative, or on application of a party, to extend any time limit specified in these Rules whether or not, in the case of an extension of time, it has expired. Had it been required, I would have granted an extension of time, as a party cannot practically speaking seek reconsideration of a Judgment until it has knowledge of it.

Submissions for the Respondents

32. Having adjourned at 10.30am, for a 15-minute break, to allow both parties representatives to read the EAT judgment in **Grant**, when proceedings resumed, at 10.56am, I invited Mr Simpson, representing the respondents, to address the Tribunal first. He did so by looking at the factors specified by Mr Justice Mummery in **Kwik Save Stores Limited v Swain [1997] ICR 49**, as highlighted by Mrs Justice Simler at paragraph 17 of her Judgment in **Grant**.

33. Mr Simpson explained that he was simply not aware of correspondence to respond to from the Tribunal, and when he became aware, he did respond in a way that he described as commensurate with the guidance and correspondence between himself and the Employment Tribunal, although he did acknowledge that it took a while for him to submit his application for an extension of time, and lodge the ET3 response for the respondents. He added that it was not his intention to hold up the process, but he needed to gather information, and put it in a narrative appropriate to the needs of the Tribunal.

34. He further stated that it was an "***oversight***" to not be aware of the claim, but explained that it was a genuine misunderstanding, and the respondents did not have access to the correspondence, namely the original ET1 claim form at the time it was served. Mr Simpson further stated that it was only through Mr McIntosh, the claimant's solicitor, that he became aware that a Default Judgment had been issued against the respondents, and he stated that the respondents were "***oblivious to the process up to this point***", as they did not get the copy Default Judgment sent to them at their former address, and that explanation is the full and honest explanation of why no ET3 had been lodged earlier.

35. Continuing his submissions, Mr Simpson stated that there will be prejudice to the respondents if the extension of time was refused, as they would not have the chance to offer their side of things, and he described that as "***unfair and unjust".*** To revoke the Default Judgment, and let the respondents in, he argued, would allow the case to be judged on its merits, as per this EAT guidance in **Grant** and **Kwik Save**. He further stated that the response submitted by him on 21 December 2018, and the material attached, shows what the respondents have to offer in defending the claim brought against them, and that the respondents should not be denied a Hearing due to any procedural default by not lodging an ET3 in time, when they did not know of the case against them.

36. Mr Simpson further explained that he felt there was a danger the respondents might be held liable for a wrong they had not committed, and if they were unaware of the case until after the Default Judgment, and since then he had tried to participate as best he could, and that was shown by his correspondence with the Tribunal, and Mr McIntosh, solicitor for the claimant. Ending his oral submissions, Mr Simpson stated that the respondents were contesting the claimant's narrative of her claim in their three-page narrative, attached to the ET3 response submitted by him, and that the respondents should be allowed to defend the claim, and the Tribunal should revoke the Default Judgment.

Submissions for the Claimant

37. Having heard Mr Simpson's submissions, I invited Mr McIntosh, solicitor for the claimant, to reply, which he did, commencing at 11:06am. He explained that he had not replied to the Tribunal's letter of 9 January 2019, because if the respondents were allowed in, he would be seeking a period of 14 days to amend the details of claim in the ET1, in light of their response, but his principal submission to this Hearing was to invite the Tribunal to refuse the respondents' application for an extension of time, and / or revocation of the Default Judgment.

38. In making his argument, Mr McIntosh submitted that there were three factors, arising from the EAT Judgment in **Grant**, on which he relied, being (1) there was essential non-compliance by the respondents, and the Default Judgment should not be revoked, and the case should proceed to the Remedy Hearing; (2) there is not much merit in the defence stated by the respondents and (3) on the balance of prejudice, the claimant will suffer more if the Default Judgment is revoked, than the respondents will if the extension of time is not granted.

39. Next, Mr McIntosh set out a timeline of relevant dates from 22 August 2018, when Notice of Claim was served on the respondents for an ET3 response to be lodged by 19 September 2018, up to and including the date of this Hearing. I do not repeat his timeline here, as I have already given, earlier in these Reasons, a full chronology of relevant events, in both this case, and Mr Hannah's case.

40. Mr McIntosh described 10 October 2018 as being a "***significant date***". He explained that was so because that is the date he told the Employment Tribunal of a contact address for the respondents, yet it had taken the respondents some two and a half months after that before an ET3 response was lodged on 21 December 2018.

41. Further, Mr McIntosh suggested that, if the respondents had put in place a Royal Mail redirect, then all correspondence would have been redirected to them, and he stated that would have been prudent, and responsible thing for the respondents to have done, when they had vacated the project premises. He described their failure to do so as evidencing a lack of responsibility by the respondents. As regards Mr Hannah's case, he highlighted that it had been settled, between himself and Mr Simpson, in November 2018, and by his involvement in that other case, Mr Simpson, acting for the respondents, should have known how to deal with this case, given his involvement in that other case.

42. Thereafter, Mr McIntosh referred me to **Rules 16 and 20**, and stated that notwithstanding the draft ET3 submitted by Mr Simpson on 21 December

2018, there was no indication why an extension of time was being sought, when Mr Simpson was aware of this case from 10 October 2018. That said, Mr McIntosh readily accepted that the respondents did not know about it before 10 October 2018, given the correspondence sent to them, at the address given on the ET1 claim form, had been vacated by them.

43. He further added that Mr Simpson had been "***late, time and time again***", in lodging his ET3, and that the ET3 was an "***implicit application for an extension of time",*** but his main point, on behalf of the claimant, is that there were procedural irregularities in the sense that the ET3 should have been in earlier, and at latest within 28 days of 10 October 2018.

44. As regards the merits of the case, a factor mentioned in the **Grant** judgment, Mr McIntosh stated that the claimant's position is that she was being abused by a new manager, she became unwell, and took sick leave. When her manager left, she submitted a grievance, and she would say that it was not dealt with properly by the respondents as her employer. He noted how the ET3 response had accepted that there were problems with the manager's conduct, and that he left, but he further stated that he saw no great merit in the respondent's stated defence.

45. On the matter of prejudice to the claimant, Mr McIntosh stated that matters continued to go on, and the claimant could be out of pocket for a further period as she has been to date, as the Tribunal has not yet made a Remedy Judgment in her favour, despite the earlier Liability Judgment. He further stated that the claimant had a reasonable expectation that there would be a Remedy Hearing held on 31 October 2018, but due to inaction by the respondents, that had not been dealt with since that date.

46. Next, on the matter of prejudice to the respondents, Mr McIntosh did accept that there would be prejudice to the respondents if the Default Judgment was not revoked, but they could still go to the Remedy Hearing, a point which I acknowledged, stating that there had been recent case law authority about a respondent being a participant, at a Remedy Hearing, even if no ET3 had

been received or allowed. I pause here to note and record that I deal with the recent Court of Appeal authority on this point later in these Reasons.

47. Mr McIntosh further stated that the respondents could participate at the Remedy Hearing, even if the Default Judgment was not recalled, as they can participate in a Remedy Hearing to any extent allowed by an Employment Judge.

Reply for the Respondents

48. In reply, starting at 11.28am, Mr Simpson, having heard Mr McIntosh's oral submissions, stated that, with hindsight, of course, the respondents recognise now that it would have been appropriate to arrange for a Royal Mail redirect, but that was very much not in their mind when they were closing the organisation, dealing with administrators and others, and handing the keys back to the landlord, and that the whole thing fell into somewhat of what he described as a "***shambles***", for himself, Betty Painter, and Karen Park, the treasurer, further adding that while he is in employment, Mrs Painter is a pensioner, and Mrs Park is in full time employment as a nurse.

49. Mr Simpson further stated that Mr McIntosh had acknowledged 10 October 2018 as a significant date, and he added that, since that date, having become aware of the case, and the Default Judgment against the respondents, he had "***participated vigorously, and with some passion***", in correspondence with the Tribunal, and copied to Mr McIntosh, and he sought to be heard in the process. He further stated that an ET3 response form had not been distributed to them to submit, and he probably took more time than the claimant felt was necessary to complete the ET3 response, but the letter from the Employment Tribunal had not specified a date for return, simply stating it should be returned "***as soon as possible***", and he submitted that it had been returned as soon as possible.

50. On the merits of the case, Mr Simpson stated that it was critical that these were taken into account in coming to a decision on his applications before the Tribunal, and he disputed that what Mr McIntosh had said, about the claim, was true, because, on his explanation, the project manager did not leave, and

that the claimant had raised her grievance while the manager was still there. In the response, the respondents had indicated that there were some problems about the conduct of the manager, but he further submitted that had to be balanced by the respondents' concerns over the claimant, and he referred me to the various appendices, being documents, attached to the ET3 lodged with the Tribunal.

51. Mr Simpson then stated that the respondents wanted the right to be heard on the merits, and the Default Judgment to be revoked, describing the narrative in his ET3 as being truthful, and while the respondents know that, they want the opportunity to explain their position clearly to an Employment Tribunal at an evidence giving Final Hearing, with evidence led by both parties, and they want the Final Hearing to be fixed to allow the merits of the case to be looked at, and while he stated that the respondents did not relish being part of what he described as "***an external process",*** he stated that this is in the interests of fairness and justice.

52. On the matter of prejudice to the respondents, if the case were to proceed to a Remedy Hearing only, the Liability Judgment left in placer, as suggested by Mr McIntosh, Mr Simpson stated that the respondents have already been held liable for wrongs they have not committed, and that this has had an "***emotional, as well as reputational, impact on the charity, and indeed its office bearers"***, and that any award of compensation to the claimant would be an extremely challenging matter, as the charity is now dissolved.

53. Thereafter, from 11.38am until this Reconsideration Hearing concluded, at 12.43pm, I had general case management discussion with both parties' representatives about the status of the respondents as a charity, and we also dealt with Mr McIntosh's application to amend the identity of the respondents, and **Rule 34** application to add the office bearers as additional respondents, all of which matters are dealt with more fully in my written Note and Orders dated 3 April 2019, to which I refer, and about which I accordingly need say nothing further here.

Reserved Judgment and Further Procedure

54. Having heard submissions from both parties' representatives, and in closing the Hearing at 12.43pm, I stated that I was reserving my Judgment, on the opposed applications, and, after a period of private deliberation, a full written Judgment and Reasons would be issued to both parties, within a few weeks.

55. I also indicated that, whatever my decision on the opposed **Rule 20** application might be, the case would need to be re-listed for another day, either to hear evidence from the claimant at a Remedy Hearing, as previously ordered in the Default Judgment, with participation by the respondents to such extent as might be allowed by a Judge, or, if I revoked that Default Judgment, then at a Final Hearing for both parties to lead evidence on the merits, and as regards both liability and remedy.

Discussion and Disposal

56. Having carefully considered, in chambers, during private deliberation, after this Reconsideration Hearing, both parties' competing submissions, I have now come to my decision, which is to grant the **Rule 20** application, and allow the case to proceed as defended.

57. Having carefully reflected on parties' completing oral submissions, and the information available to the Tribunal, in the casefile, including the ET1 claim form, correspondence with both parties' representatives, and the ET3 response, I am satisfied, having heard Mr Simpson's explanation of the reason for his delay in lodging the ET3 response, and balancing the relevant factors of the reason for, and length of the delay, prejudice to each party if the extension of time is either granted or not granted, as well as the merits of the respondent's defence, as set out in the ET3 response produced by him, and Mr McIntosh's objections, that it is in the interests of justice to allow the claim to be defended, and accordingly to set aside the previous Default Judgment.

58. In particular, I am satisfied that it is in the interests of justice to allow the respondents' opposed **Rule 20** application, for the phrase "***in the interests of justice"*** means justice to both parties, and so I order that the case now be listed for a Final Hearing for full disposal, including remedy if appropriate, on dates to be assigned by the Tribunal, having ascertained from both parties,

by returning completed date listing stencils, their availability, and their respective lists of proposed witnesses, and estimated duration of evidence for each party.

59. In coming to this decision, I have taken into account both parties' oral submissions to me, as also the relevant law, as I paraphrased to both parties' representatives, at the Hearing, and as I have reproduced it earlier in these Reasons.

60. While, on one view, Mr Simpson has been very lackadaisical in his approach, I am satisfied that he was not acting in wilful defiance of Orders and directions of the Tribunal, but doing his best, as an office-bearer of the charity, to attend to the charity's defence of Tribunal proceedings raised against it by an ex-employee, and, given how charities operate, often through unpaid volunteers, he needed to consult with others, and that all took time.

61. Such a casual attitude to legal proceedings is not easy to understand, particularly when it emerged from submissions at this Hearing that Mr Simpson had become involved with Mr McIntosh in settlement of Mr Hannah's claim over part of the same period as concerned here. However, from the information Mr Simpson provided at this Hearing, I am prepared to accept that the respondents' failure was not wilful, but caused by other things, including the other ongoing proceedings by Mr Hannah, and thus impacting on Mr Simpson's ability, while employed elsewhere in the charity sector, to work for his employer there, as also seek to deal with this charity's legal affairs timeously and properly to defend this claim against the charity at the Employment Tribunal.

62. While, as per Mr McIntosh's submissions, the claimant wanted her case disposed of at a Remedy Hearing, which has been ordered for 31 October 2018, and then postponed, and that the Liability Judgment issued in her favour should be confirmed, not revoked, the Tribunal's overriding objective, under **Rule 2**, to deal with cases fairly and justly, and the interests of justice, require that I do justice by allowing the respondents to be heard at a Final Hearing.

63. In balancing prejudice as between the parties, I take into account that if I refused the late ET3 response, then the respondents would not be able to defend the claims brought against them, where they dispute liability, and, liability having been established through the Default Judgment, they could end up with a further Remedy Judgment against them, and an order for them to pay compensation to the claimant, and that without having had the opportunity to put forward their defence case on liability in evidence.

64. On the other hand, prejudice to the claimant is far, far less, and all that she loses, at this stage, is the loss of a liability Judgment, where, on one view, she received a windfall of being able to get an undefended liability Judgment in her favour without having to give evidence, or to argue against the points now raised by the respondents in their late ET3.

65. She was always going to have to give evidence at a Remedy Hearing for a Judge sitting alone to determine the appropriate remedy for her claim. She has had to wait longer than she might have expected for a Hearing before the Tribunal, but that is just a single factor in the balancing exercise, and not determinative in her favour.

66. Now, she will require to give evidence to a full Tribunal, at a Final Hearing, and that is likely to last a few days, as opposed to a few hours for a Remedy Hearing only, before a Judge sitting alone. She is legally represented by the Castlemilk Law Centre, and as Mr McIntosh made no reference to any prejudice caused to her by having to pay them legal fees, I took it that she is not a fee-paying client, but in receipt of *pro-bono* legal representation through that agency. Compared to the respondents, who are not legally represented, the claimant's position benefits from having legal advice and representation available to her.

67. While, as per the standard correspondence issued to parties, with a Notice of Claim, it states that if a response is not accepted an Employment Judge may issue a Judgment against a respondent without a Hearing, and they will be sent a copy of any Judgments, Orders or Notices of Hearing, they will only be allowed to participate in any Hearing to such extent as permitted by an

Employment Judge. Notices of Hearing, in undefended cases, are thus sent to respondents "***for information only***".

68. Since the Rules were brought into force, as per **Rule 21(3)**, recent case law authority needs to be borne in mind, following the Court of Appeal's judgment of 1 August 2018 in **Office Equipment Systems Ltd v Hughes [2018] EWCA Civ 1842; [2019] ICR 201.** It agreed the earlier approach taken by the EAT in **D & H Travel Ltd v Foster [2006] ICR 1537**, per the then Mr Justice Elias, President.

69. In particular, I refer to paragraphs 18, 19 and 20 of that judgment by the Court of Appeal, per Lord Justice Bean, as agreed by Lord Justice Underhill, as follows:

> "***18. I agree entirely with the approach taken by the EAT in the D&H Travel case, and although the 2013 Rules differ in some respects from the 2004 Rules which were then applicable I do not consider that this should lead to a different result.***
>
> ***19. There is no absolute rule that a respondent who has been debarred from defending an employment tribunal claim on liability is always entitled to participate in the determination of remedy. At the lower end of the scale of cases employment tribunals routinely deal with claims for small liquidated sums, such as under Part 2 of the Employment Rights Act 1996 (still commonly called the "Wages Act" jurisdiction) where liability and remedy are dealt with in a single hearing. In such a case, a respondent who has been debarred from defending under Rule 21 could have no legitimate complaint if the employment tribunal proceeds to hear the case on the scheduled date, determines liability and makes an award. Even in that type of case it would generally be wrong for the tribunal to refuse to read any written representations or submissions as regards remedy sent to it by the defaulting respondent in good time, but proportionality and***

the overriding objective do not entitle the respondent to a further hearing.

20. But in a case which is sufficiently substantial or complex to require the separate assessment of remedy after judgment has been given on liability, only an exceptional case would justify excluding the respondent from participating in any oral hearing; and it should be rarer still for a tribunal to refuse to allow the respondent to make written representations on remedy."

70. In these circumstances, I have decided that the prejudice to the respondents outweighs any prejudice to the claimant, and that it is appropriate to let in the late ET3 response, and the merits of parties' respective positions can be adjudicated upon by the Tribunal at a Merits Hearing, after hearing evidence from both parties.

71. I recognise that the claimant will be disappointed by this ruling, for she had no doubt hoped to attend at this Hearing, and have Mr McIntosh's arguments prevail, and so get an early date for a fresh Remedy Hearing. However, the reality of the matter is that she was not going to get a Remedy Hearing any faster than a Final Hearing.

72. It is in the interests of justice that the merits, or otherwise, of each of the claimant's case, and the respondent's defence, can be assessed by me, or if not available, another Employment Judge chairing a full industrial jury panel of three at a Final Hearing on dates to be hereinafter fixed by the Tribunal. Indeed, even if I had refused to revoke the Default Judgment, the respondents would still have been entitled to participate in the Remedy Hearing anyway, and no reason was advanced by Mr McIntosh as to why their participation in that type of Hearing would have been inappropriate.

Closing Remarks

73. While to date the respondents have been acting, without legal representation, through Mr Simpson, as they are perfectly entitled to do, I encourage the respondents, particularly the office-bearer additional respondents, to seek

out independent and objective advice, whether from an employment law solicitor or other professional adviser, or from a trade union, Citizens Advice Bureau, or *pro bono* voluntary agency (such as the Glasgow Caledonian University or Strathclyde University Law Clinics) providing advice and assistance to individuals involved in Tribunal proceedings.

74. In issuing this Judgment, I also remind parties that, as per **Rule 3 of the Employment Tribunals Rules of Procedure 2013:**

> ***Alternative dispute resolution***
>
> ***3. A Tribunal shall wherever practicable and appropriate encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement.***

75. I encourage both parties to use ACAS as a means of resolving their disputes by agreement. Alternatively, if all parties agree, given that any Final Hearing is likely to be at least 3 days duration, I ask parties to consider whether they might jointly agree to explore Judicial Mediation. In the event of a joint approach, I will then refer the casefile to the Vice-President, Employment Judge Susan Walker, for her consideration.

Employment Judge	**I McPherson**
Date of Judgment	**10 April 2019**
Entered in register and copied to parties	**14 April 2019**