Case No's: 2600557/2019
2600626/2019
2600631/2019

EMPLOYMENT TRIBUNALS

Claimants: **Ms. T Fitzsimmons**
Miss. K Patel
Mr. T Steers

Respondents: **Chartwell Care Services Limited (R1)**
Chartwell Trust Care (R2)

Heard at: **Nottingham**

On: **10th September 2019 (In Chambers)**

Before: **Employment Judge Heap**

Representation:
Claimant: **Written representations**
Respondent: **Written Representations**

JUDGMENT ON RECONSIDERATION

1. The Respondent's application for Reconsideration made on 22nd July 2019 of the Judgments sent to the parties on 12th July 2019 is refused on the basis that there are no reasonable prospects of those Judgments being varied or revoked.

2. The claims remain listed for a Remedy hearing on 1st October 2019. Case Management Orders will follow under separate cover.

REASONS

BACKGROUND AND THE ISSUES

1. The Respondent's application of 22nd July 2019 has been taken as an application for Reconsideration of the Default Judgments sent to the parties on 12th July 2019 and for an extension of time to enter ET3 Responses. I apologise to the parties for the delay in determining the

application but as they will be aware from correspondence from Regional Employment Judge Swann, it was received during a period of leave and I have dealt with it immediately upon return to the office on 3rd September 2019. Thereafter, there was a delay until 10th September 2019 to allow the Respondents to submit a copy of a letter referred to in their Reconsideration application. That has not been provided and so I have proceeded without it as per the indication in the Tribunal's letter of 5th September 2019.

2. The Respondents have not asked for this application to be dealt with at a hearing and so I have dealt with it on the papers in accordance with Rule 72 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

3. In order to deal with the application, it is necessary to set out the background to this matter.

4. On 25th April 2019 the Tribunal sent to both the First and Second Respondents a copy of the ET1 Claim Form for each of the Claimants. That was served at the address provided by the Claimants in their Claim Forms in accordance with Rule 86(2) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Those letters each separately set out the following:

   "If a respondent wishes to defend the claim their response must be received at the Tribunal office by ***23/05/19****. If a response is not received by that date and no extension of time has been applied for and given, or if a respondent indicates that it does not contest any part of the claim, a judgment may be issued and that respondent will only be entitled to participate in any hearing to the extent permitted by the Employment Judge who hears the case."*

5. On the same date, 25th April 2019, the Tribunal wrote to the parties proposing to consolidate the three Claim Forms that had been received. That correspondence would have been sent with the Claim Forms and the letters referred to at paragraph 2 above. They were clearly received by the Respondents who wrote on 9th May 2019 by way of their in-house representative, Christopher Johnson. Mr. Johnson describes himself as an Employment Law Specialist who provides in house services to the Respondent. I am aware and take notice of the fact that prior to Mr. Johnson taking up that role for the Respondent that he has acted in the field of employment law including conducting claims before the Employment Tribunals, albeit I believe almost exclusively if not exclusively on behalf of Claimants.

6. Mr. Johnson indicated in his letter that he had been unwell but that he was due to resume his duties the following day and that he required an extension of time of 24 hours to respond to the question of consolidation. There was some reference to an application under Rule 20 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("The Regulations") (which would relate to an extension of time to present the

ET3 Responses) but the surrounding content of the letter appeared to relate only to a request for further time to comment on the proposal to consolidate the claims. Nothing was received within the 24 hour window which had featured in the Respondents application nor, indeed, for almost a month later.

7. On 24th May 2019, the day after the deadline to submit the ET3 Responses had passed, the Respondents, via Mr. Johnstone, made their objections to consolidation of the claims. The letter focused almost entirely on the objections of the Respondents to the question of consolidation. Indeed, it was headed *"Comments pertaining to proposal of amalgamation"* and referred again to the 9th May letter which was said to have been an application made under Rule 20 of the Regulations. There was some reference to the ET3 Responses which said this:

   "I am mindful of the Judicial Time-Line elapsing, with regard to the ET3(S). We shall require the Judgment pertaining to the Amalgamation factor, so as to construct the appropriate robust response".

8. On 12th July 2019 the Tribunal wrote to the parties issuing Default Judgments for each of the three Claimants and confirming consolidation of the claims. The Tribunal file does not show any further communication had been received in the interim from the Respondents other than a telephone call and letter of 24th June 2019 from Mr. Johnstone pertaining to placing his newly appointed paralegal on record and a telephone call the previous day requesting further copies of the Claim Form to be sent to him electronically.

9. The letter from the Tribunal of 12th July also addressed the applications for an extension of time to enter the ET3 Responses and the relevant part of the letter said this:

   "The Respondent's purported application for an extension of time to enter the ET3 is refused by Employment Judge Heap. Insofar as the Respondent's letter of 9th May was an application for an extension of time to enter the ET3 Response as is suggested by the later letter of 24th May, that cannot be the case on the basis that the time for presentation of the Response had not elapsed and the Respondent was only seeking in that letter an extension of 24 hours (although it is noted that that extension was in reality about responding to proposed consolidation not the ET3 Response).

   The later letter of 24th May 2019, although referencing Rule 20, again only appears to address the question of consolidation. The reference to a Judgment of Regional Employment Judge Swann dated 22nd May 2019 is not understood as no Judgments of that date or any other have been issued in respect of this claim before today.

   Insofar as the Respondent was seeking an extension of time in the letter of 24th May on the basis that they were awaiting a decision as to whether the claims had been consolidated, that was not a basis upon which to fail

to enter an ET3 Response on time. All claims could have been responded to on their own facts and the question of consolidation has no bearing whatsoever on that. The application for an extension of time is therefore refused and these claims will now proceed undefended. Default Judgments on liability have today been issued. The Respondent will be entitled to participate to the degree permitted by an Employment Judge in a Remedy hearing given the decision in ***Office Equipment Systems Ltd v Hughes [2018] EWCA Civ 1842.****"*

10. Insofar as the application of 24th May 2019 was an application for an extension of time to enter the ET3 Response, it was also deficient on the basis that it did not comply with Rule 20(1) of the Regulations given that it was not accompanied by a draft of the Responses which the Respondent wished to present or an explanation of why that was not possible.

11. On 22nd July 2019 the Respondents made this application which has been taken as one of Reconsideration of the decision to refuse the extension of time and to set aside the Default Judgments. The grounds upon which the application is advanced appear to be as follows and I have addressed each of them below[1]:

    a. The Respondents application had been made on 24th May 2019 and it had taken over 7 weeks for the Tribunal to deal with it during which time there had been numerous calls made to obtain a response;
    b. That incorrect documentation had been sent on 22nd May 2019 and further numerous telephone calls had been made to obtain the correct documentation but that had not been provided;
    c. That as a result the Respondent was at a disadvantage;
    d. That the complexity and issues in the cases meant that it was fair and just to afford an extension of time;
    e. A decision needed to be made on consolidation prior to the Responses being entered as *"a tri defence shall be constructed as a completely different beast as to a single defence"* but that had not been taken into account;
    f. That it was hypocritical of the Tribunal not to afford an extension of time when it had taken so long to respond to the applications made and had sent the wrong documentation.

12. Those are summaries of the position set out by the Respondents but are what appear to be the points upon which the application is advanced.

13. No draft ET3 Responses have ever been presented to date by the Respondents.

[1] There are also further references to seeking reconsideration of the decision made by Employment Judge Hutchinson to consolidate the claims but those are not relevant to the matters before me and are to be addressed separately by Employment Judge Hutchinson.

CONCLUSIONS

14. In reaching my conclusions I have paid regard to the decision of the Employment Appeal Tribunal in **Kwik Save Stores Ltd v Swain 1997 ICR 48**, albeit that that decision related to an earlier incarnation of the Regulations relating to the then "just and equitable" test. In addition to dealing with the specific grounds raised by the Respondents, I have therefore taken the following into account:

    a. The explanation as to why an extension of time is required and the fact that the lengthier the delay, the greater importance of providing a satisfactory and honest explanation;
    b. The balance of prejudice; and
    c. The merits of the defence – if the defence is shown to have some merit in it then justice will often favour the granting of an extension of time.

15. I have balanced all of those issues along with the arguments raised by the Respondent when considering the application of 22nd July 2019. I address each of them below along with the test in **Kwik Save Stores** although some of the issues overlap to some degree.

The Kwik Save Stores test

16. To date I am not satisfied that there has been any explanation, let alone a satisfactory one, as to why an extension of time is required. The Respondents failed to make any such application (for the reasons that I have already set out above) until the day after the time had passed for the ET3's to be presented. There has been no suggestion that they did not receive the ET1 Claim Forms shortly after 25th April 2019 when they were served on the Respondents. Whilst Mr. Johnstone wrote to say that he had been ill, by 10th May 2019 he was fit to resume his duties and had returned to work. There is no satisfactory reason advanced why he could not have prepared the ET3 Responses to be submitted on or before 23rd May 2019 or, if that was not possible, to request a modest extension of time to do so before the deadline had passed.

17. The only explanation which appears to be given is the suggestion that the Claim Forms could not be responded to until a decision had been made on consolidation. That is nothing approaching a satisfactory explanation. The Respondent's knew what each Claimant was claiming and whether the claims were consolidated or heard separately, that in no way prevented the Respondents from responding to the Claim Forms.

18. I also take into account the length of the delay. The ET3 Responses are now well over three months late. No attempt has been made to comply with Rule 20(1) of the Regulations as no drafts of the Responses have ever been filed. Mr. Johnstone as an Employment Law Specialist with experience of conducting litigation in the Employment Tribunals cannot be unaware of the Regulations or the requirement to file a Response in time.

19. I have considered the balance of prejudice. Clearly, the Respondents will be prejudiced if they are unable to defend the proceedings but that is tempered significantly by the fact that this is a situation entirely of their own making. They were aware of the deadline to file the Responses, they had an Employment Law Specialist dealing with the matter for them and they would have been aware that no extension of time had been granted (or indeed in reality applied for until after the deadline had passed) and so Responses remained due by 23rd May 2019. They still failed to act and so in respect of that prejudice, they are entirely authors of their own misfortune.

20. I am also satisfied that there would be real prejudice to the Claimants. All have had Default Judgments now for some time and a Remedy hearing is scheduled for 1st October 2019. If the Respondent is now permitted to enter Responses so very late, there would be a considerable delay to the claims being heard. It would be a delay of many months into next year before that could be achieved and that delay is a prejudice to the Claimants.

21. I finally deal with the merits of the defence. Other than repeated assertions by the Respondents that the Claimants have in some way colluded and conspired (to use the words of Mr. Johnstone) to bring the claims, I have no basis of any defence whatsoever that the Respondents would intend to seek to advance. That is purely on the basis that, as above and notwithstanding the provisions of Rule 20(1) of the Regulations, no draft Responses have ever been provided to the Tribunal.

22. Taking into account the factors in **Kwik Save Stores**, that does not favour the granting of the application for Reconsideration as it is not in the interests of justice to do so.

The factors in the Reconsideration application

23. I turn then to each of the factors relied upon by the Respondents in their application and deal with those in turn below:

24. The first of those factors is that the Respondents application had been made on 24th May 2019 and it had taken over 7 weeks for the Tribunal to deal with it during which time there had been numerous calls made to obtain a response. It is unfortunate that the application could not have been dealt with sooner but that is no basis on which to grant the Reconsideration application. The deadline for a Response to be entered had already passed when the application for an extension of time was made. The application did not comply with Rule 20(1) Employment Tribunals (Constitution & Rules of Procedure) Regulations and equally importantly there was nothing which warranted an extension of time to be granted. Again, the Respondents are represented by an Employment Law Specialist with prior experience and knowledge of the Employment Tribunal system and would have been fully aware from the Tribunals letter of 25th April 2019 of the deadline for presenting the Responses. An extension of time cannot reasonably have been presumed and, as already

observed, there was no satisfactory explanation as to why one was required.

25. The second ground relied upon is that it is said that incorrect documentation had been sent on 22nd May 2019 and further numerous telephone calls had been made to obtain the correct documentation but that had not been provided. There is no documentation dated 22nd May 2019 on the Tribunal file. The Respondents were asked for a copy by return on 15th September 2019 if they wished to rely on it. Nothing has been forthcoming and so I can say no more about this ground save as to observe that as at 22nd May almost a month would have passed since the deadline to file the ET3 Responses and so it is difficult to see what impact any documentation of that date could have had on the failure to do so in time or, indeed, at all.

26. The third ground is that as a result the Respondents are said to be at a disadvantage. Whilst the Respondent may well be disadvantaged (or, as I have termed it above, prejudiced) in now being unable to defend the claims, as I have already observed under the **Kwik Save Stores** test, that is entirely a matter of their own making.

27. The fourth ground is that the complexity and issues in the cases meant that it was fair and just to afford an extension of time. That might be a persuasive argument if the Respondents had any satisfactory reason for not having entered their Responses on time. Otherwise, it would simply ride a coach and horses through the time limit contained within Rule 16 of the Regulations and allow an otherwise remiss Respondent to enter a Response at whatever stage of the proceedings it chose to do so simply because there was a complexity to a claim or claims.

28. The fifth ground is that it is said that a decision needed to be made on consolidation prior to the Responses being entered as *"a tri defence shall be constructed as a completely different beast as to a single defence"* but that had not been taken into account. This ground has already been dealt with above. There was nothing at all that required the Responses to be delayed by the question of consolidation or for the Respondents to await a decision on that. The Respondents knew what each Claimant was claiming and had it in their gift to present timely Responses for each of them. The failure to do so cannot reasonably have been affected by any need to await a decision on consolidation.

29. The final ground is that it was hypocritical of the Tribunal not to afford an extension of time when it had taken so long to respond to the applications made and had sent the wrong documentation. It is unfortunate that there has been a lengthy period before the Respondent's application of 24th May 2019 was addressed. However, whilst there are target times for the Tribunal to respond to correspondence, that is not the same as the prescribed time limit contained in Rule 16 of the Regulations and simply because there is a delay in applications being addressed does not correlate to it being in the interests of justice to override or disapply the provisions of Rule 16.

30. Taking all of those matters into account both singularly and cumulatively it is not in the interests of justice to grant the Respondent's application and the application for Reconsideration is refused. The Judgments sent to the parties on 12th July 2019 are therefore confirmed and not set aside and there is no extension of time afforded to the Respondents to enter ET3 Responses.

31. The matter will now proceed to the Remedy hearing on 1st October 2019.

Employment Judge Heap

Date 10th September 2019
JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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