EMPLOYMENT TRIBUNALS

Claimant: Mr A Bladen

Respondent: Croftwick Limited

Heard at: Cardiff **On:** 21 August 2019

Before: Employment Judge Moore

Representation
Claimant: Mr Barry, Counsel
Respondent: Mrs Nevans, Solicitor

UPON APPLICATION made by letter dated 24 April 2019 to reconsider the Judgment under rule 71 Employment Tribunals Rules of Procedure 2013 dated 29 March 2019 and for permission to enter a late response.

JUDGMENT

1. The judgment is confirmed.
2. The application to enter a late response is refused.

REASONS

Background

1. The claim was presented on 6 December 2018. The claimant brought claims for unfair dismissal, unpaid wages and notice pay. It was served on the respondent at their address in Chapel Street, Pontnewydd, Cwmbran on 17 December 2018. The date for presenting a response was 14 January 2019.

2. No response was entered. Employment Judge Beard directed the claim be re-served on the respondent's registered office address c/o Leigh Saxton Green LLP, 70 Conduit Street, London on 1 February 2019. The response was due 1 March 2019. No response was received. Following receipt of a schedule of loss from the claimant a Rule 21 Judgment was issued by Employment Judge Cadney on 29 March 2019 and sent to the parties on

10 April 2019. The address used for the respondent was the c/o address Leigh Saxton Green LLP.

3. On 24 April 2019 the respondent made an application to revoke the Rule 21 Judgment and sought permission for an extension of time to present a response. No draft response was submitted. A preliminary hearing was listed to determine both issues.

4. On 16 August 2019 Peninsula came on the record for the respondent and submitted an amended reconsideration application and a proposed response and ET3 covering form.

The Preliminary Hearing

5. The parties were informed that the reconsideration hearing could not be determined by Employment Judge Cadney as he had transferred out of the region. Rule 72 (3) of the Employment Tribunal Rules of Procedure 2013 ("the Rules") provides where practicable the consideration shall be by the Judge who made the original decision. Where that was not practicable the Regional Employment Judge shall appoint another Judge to deal with the application.

6. On 21 August 2019 I was Acting Regional Employment Judge and determined it was not practicable for Employment Judge Cadney to hear the reconsideration and that I could determine the applications. Further, both parties consented to my hearing the applications.

7. I heard submissions from both parties. I did not hear witness evidence but I had sight of a text message exchange between the respondent and claimant on 15 September 2018. This was according to the ET1 the date the claimant was dismissed. The claimant sent a text to Mr Fillimore at 10.20am as follows:

"I won't be in work for a bit mate got to sort my self out LM under a lot of stress and it's getting me down wife and family on me all the time I'm 60 next year and should not be doing what I'm doing sorry mate"

Mr Fillimore replied:

"Ok mate your health is more important;

and then later at 17.38pm:

"I need to lay you off from today mate as I got to take another driver on Monday! It won't be fair on the new driver not knowing how long he's got! Have some time off and if I get the Newport order you are welcome to come and work in the workshop to keep you from driving and sensible hrs let me know".

The Law

8. The rules concerning presentation of a response are contained in paragraphs 18 and 20 of the Rules. The effect of non-presentation of a response is that a Judge can issue a judgment under Rule 21. The procedure for reconsideration of Judgments is set out in paragraphs 70 – 72 of the said Rules.

9. I was referred to the case of **Kwik Save Stores Ltd v Swain & Others ICR 1996.**

Respondent submissions

10. The respondent submitted that there had been an oversight in submitting the ET3 due to a difficult period of trading causing stress for the sole director and shareholder Mr Paul Fillimore. Mr Fillimore accepted he had been contacted by ACAS. He had attended the hearing on 1 April 2019 only to be informed the hearing had been cancelled. Upon receipt of the Rule 21 Judgment Mr Fillimore instructed a direct access barrister and lodged the application on 24 April 2019.

11. Mr Fillimore suffered a stroke in 2011. I had sight of a GP letter confirming he suffered a delay in memory since then as well as sleep apnea and fatigue which are said to exacerbate his memory loss.

12. The person who normally deals with post was on maternity leave when the notice of claim was served. Mr Fillimore accepted he had received the notice of claim and ET1 as it was located in a pile of post when he received the Rule 21 Judgment.

13. There would be no undue prejudice to the claimant if the Judgment was revoked whereas there would be considerable prejudice to the respondent with the claimant receiving a "windfall".

14. There was a prospect of defending the claim. It was accepted the text messages sent by the respondent could lead to a finding of unfair dismissal but submitted that this could be explained as it was the respondent's case that this text did not amount to a dismissal and it was sent in response to a text from the claimant on 14 September 2018 in which he resigned. However the respondent was unable to produce the text message containing the resignation.

15. The reference to "lay off" was explained as the claimant was not an educated man and had not intended the phrase to mean a dismissal.

Claimant's submissions

16. There was no reference on the original application for reconsideration to the claimant's health. The respondent had not until a very late stage (16th August 2019) provided a response as required by Rule 20 (1), less than a week before the hearing. The claimant's solicitor had written to Mr Fillimore on 26 September 2018 and he had personally responded on 1 October 2018. In his response Mr Fillimore was clearly aware proceedings were contemplated and stated he would not pay the claimant anything and will have a day in court to see who the victim is if he pursues the case in court. Mr Fillimore also emailed the claimant's solicitor on 28 March 2019 in which he was clearly aware of the hearing on 1 April 2019. He must have been in receipt of the notice of hearing by virtue of his attendance.

17. There was a period between 10 – 18 April 2019 where the respondent did nothing. The application to set aside the default judgment and extend time

was 3 months after the deadline and was not accompanied by a response and there has been no good reason for the delay in only complying with Rule 20 (1) as late as August 16th 2019.

18. The merits of the response namely that the claimant had resigned could not be the case as per the text messages. If the claimant had resigned why would the respondent say he was laying him off. The text was a dismissal – if there were other texts previously why had they not been produced to the Tribunal.

Conclusions

The explanation for the delay

19. The respondent accepted that they were aware of the pending claim and that they had received the notice of claim and took no action. They also received the notice of hearing and attended the Tribunal on that day. However nothing further was done to question why the hearing had been cancelled. Action was only taken upon receipt of the Rule 21 Judgment. The reasons put forward were a general lack of office organisation in dealing with post. I took into account that the respondent is a small business employing 15 employees however I am not satisfied that a reasonable explanation has been put forward for the failure to act on the Tribunal papers when received. It was only when the respondent received the Rule 21 Judgment setting out the award to the claimant that they took the matter seriously. Even then it took a further 4 months to lodge a response. In relation to Mr Fillimore's health this did not appear to have affected his ability to deal with the claim in a timely manner. He was able to attend the hearing and his health was not put forward as the reason for the delay.

Merits of the defence

20. In my judgment, the merits of the defence to the unfair dismissal claim are that it has little or no prospect of success both in respect of liability and remedy. The text message to the claimant from the respondent is highly likely to amount to a dismissal. The wording is not ambiguous. I did not find the respondent's explanation that it was in response to a resignation at attractive argument given that 7 months after the claim was presented the respondent was not in a position to produce the alleged resignation text for this hearing. Further the text exchange on 15 September 2018 in no way suggests there had been an earlier resignation. There was no procedure followed prior to the dismissal. The claimant appears to have been dismissed for taking time off sick.

21. I have considered whether there are merits in respect of remedy. The claimant was awarded the remedy based on a schedule of loss provided by his solicitors on 18 March 2019. It accurately sets out his basic award. It shows the claimant secured another role after 6 weeks with a shortfall in wages of £18.93 per day. In my view the claimant is likely to show he has mitigated his loss.

22. In relation to the question of the balance of prejudice, if the applications are permitted the respondent will be permitted to enter a response which in my

view has little or no prospects of success in relation to liability and remedy. Such a position serves no one let alone the respondent. The claimant will be put to further expense of pursuing a claim in addition to the costs he has already incurred.

23. For these reasons I refuse the respondent's applications.

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Employment Judge Moore
1 October 2019

JUDGMENT SENT TO THE PARTIES ON 4 October 2019

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FOR THE TRIBUNAL OFFICE