Case Numbers: 2600557/2019
2600626/2019
2600631/2019

EMPLOYMENT TRIBUNALS

Claimants:	Ms T Fitzsimmons Mr. T Steers Miss. K Patel
Respondents:	Chartwell Care Services Limited (R1) Chartwell Trust Care (R2)
Heard at:	Leicester
On:	1st October 2019
Before:	Employment Judge Heap (Sitting Alone)
Representation	
Claimants:	Mr. D Gray-Jones - Counsel
Respondents:	Mr. R Cumming - Counsel

JUDGMENT ON RECONSIDERATION

JUDGMENT having been sent to the parties on 3rd October 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, the following reasons are provided:

REASONS

BACKGROUND & THE ISSUES

1. The background to what might at best be described as a rather unfortunate matter with a difficult procedural history is set out in an earlier Judgment of mine which was sent to the parties on 13 September 2019. Accordingly, it is not rehearsed again here but the history of that matter can be seen at pages 55 – 62 of the hearing bundle.

2. Today was due to proceed as a Remedy hearing but late on Friday 27th September 2019, the Respondents made an application for reconsideration. That followed the making of unsuccessful postponement application. The application now advanced is one for reconsideration of the refusal to extend time to enter ET3 Responses and to set aside judgments made by me under Rule 21 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("The Regulations") in favour of all three Claimants on 12th July 2019.

3. This is not the first application for reconsideration in that regard although this present incarnation was made on an entirely different footing to that which was previously advanced by Mr. Christopher Johnstone who was, at that time, representing the Respondents. That earlier application is one which Mr. Cumming on behalf of the Respondents accepts was properly refused, largely on the grounds that it did not make sense.

4. In short terms, the present application focuses on neglect, inaction or negligence on the part of Mr. Christopher Johnstone, the Respondents' employed and self-titled Employment Law Specialist, to take steps either to enter ET3 Responses at all or otherwise in time.

5. All three Claimants oppose the application and I deal with the respective arguments in that regard later.

6. Before that point, however, the Respondents accepted within the application for reconsideration itself, and particularly at paragraph two, that it needed to apply for an extension of time for the substantive application itself to be heard.

7. The provisions of Rule 5 of the Regulations deal with extensions of time and say this:

"Extending or shortening time

5. *The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired."*

8. Having heard from both Mr Cumming on behalf of the Respondents and Mr Gray-Jones on behalf of the Claimants, I granted that application under Rule 5 of the Regulations on that the basis of the following:

    a. Firstly, the Respondents did not have a full knowledge of Mr Johnstone's activities until relatively recently after an investigation and when he was relieved of conduct of these particular claims. Before that, Mr. Johnstone had retained conduct of the matters and was taking steps, it seems, to try to mitigate his earlier failures, albeit those too ultimately failed;

b. Secondly, the Respondent is prejudiced if their application cannot be fully ventilated as the matter is of considerable importance and much is potentially at stake;

c. Thirdly and finally, there is little, if any, prejudice to the Claimants in allowing the extension of time to have the application ventilated on the basis they have had prior knowledge of the substance of the application before now and Mr Gray-Jones is here to ably argue the position on their behalf.

9. Turning then to the substance of the application, as set out at paragraph 14 of the last judgment issued following Mr. Johnstone's unsuccessful attempts to have the tribunal reconsider its decision, I accept the submissions of Mr Cumming that the **Kwik Save Stores v Swain [1997] ICR 48** test is the test that I am bound to consider in dealing with this particular application.

10. That decision, as set out at paragraph 14 of my last judgement, requires me to take 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 the importance of providing a satisfactory and honest explanation;

b. The balance of prejudice; and

c. The merit of the defence. If the defence is shown to have some merit, then justice will often favour the granting of an extension of time.

11. I start therefore with the reason and length of the delay. Mr. Cumming does not shy away from the fact that this is a not insubstantial delay of some four months before this present application is before me. It is also at a time when most unfortunately all Claimants have attended for what should have been a Remedy hearing and had prepared for the same.

12. However, in terms of the reason, the reason now advanced by the Respondents is the failings, neglect or negligence of Mr. Christopher Johnstone, the Respondents' in-house Employment Adviser - or self-titled Employment Law Specialist – who was acting on their behalf.

13. The Respondents' case is that they discovered the inactivity of Mr. Johnstone on this case following what might appear to be negligent dealings on other matters in or around August 2019. Thereafter, it is said that they investigated and discovered the sad state of affairs in these proceedings and made the extant application which is now before me.

14. The Claimants' case, argued ably by Mr Gray-Jones, is that that is not a good reason or a reason at all. He advances in particular the following.

    a. Firstly that there is no evidence that Mr. Johnstone's ill health was at play in his decisions as the Respondents suggest.

    b. Secondly, that there is evidence of a deliberate decision on Mr. Johnstone's part not to respond to the claims in time.

    c. Thirdly, that the Respondents' are the authors of their own misfortunate; and

    d. Fourthly that any inaction of a representative cannot be a good reason for granting reconsideration. The Claimants rely in particular in relation to this aspect on the decision of the Employment Appeal Tribunal in **Lindsay v Ironsides Ray & Vials [1994] ICR 384.**

15. I have considered all of those matters carefully and am obliged to both Counsel for their helpful submissions in dealing with the application today. However, having considered those matters, I am persuaded that there is good reason for what is unfortunately an otherwise lengthy delay. I cannot assume that whatever caused Mr. Johnstone to rather spectacularly fail to deal with these claims was his ill-health. It may have been just plain negligence or a complete lack of understanding about it was that he was supposed to be doing. As Mr. Cumming submits, that might be inferred from some of his rather unique correspondence to the Tribunal early in the history of this matter.

16. However, whatever the reason, it is clear that the Respondents did not know the state of affairs until reasonably recently and following investigation being undertaken. Until the Respondents' Board became aware of what happened they were not in a position to try and remedy it.

17. While Mr Gray-Jones not unreasonably points to a lack of supervision of Mr. Johnstone, which is perhaps regrettable in itself, he had of course the self-styled title of Employment Law Specialist. The Respondents had used him as a Consultant previously when he was operating from another business and without any apparent difficulty.

18. I do not find it unusual in those circumstances that they relied on him to deal with these matters appropriately. The fact that he did not is not something that came to their attention until reasonably recently.

19. Whilst it is clear that Mr. Johnstone was the author of his own and, to some extent, the Respondents' misfortunes as referred to in my earlier judgment, the Respondents were, they accept, the unwitting victims of Mr. Johnstone's very significant shortcomings. If I had known then what I know now, I would have granted the earlier reconsideration application. That was not open to me on the basis that Mr. Johnstone made that

application himself and raised nothing, perhaps not surprisingly, of the real reason behind the failure to enter ET3 Responses on time or at all.

20. I do not accept that the decision in the **Lindsay** case as relied on by Mr Gray-Jones precludes a successful reconsideration (or review as it then was in that case) where the representative is at fault. The decisions relied on in that regard refer to points not properly taken or advanced at full or preliminary hearings. One can see why it is not desirable to reopen matters in those circumstances or where an alternative remedy is open to the aggrieved litigant. That is not an option available to the Respondents in these circumstances, however, given that Mr. Johnson was an in house representative, and this is also not an attempt to reargue a case, that being the point made in **Lindsay**, but rather to argue it for the first time.

21. I am also not with the Claimants that the Respondents' delay in making the application should count against them so as to read across to the Civil Procedure Rules so that the application should be refused. The relevant starting point here is the Regulations which allow me to reconsider decisions if it is in the interests of justice to do so and the test set out above.

22. Moreover, I agree with Mr. Cumming that the Claimants' reliance on **British Gas Trading Ltd v Oak Cash & Carry Ltd [2016] EWCA Civ 153** is not relevant to this case, focussing as it does on late applications for relief from sanction. The relevant test, as I have already referred to, is that in **Kwik Save Stores** and with reference to the interests of justice.

23. Turning then to consider in that regard the balance of prejudice. There is going to be clear prejudice to the Respondents and that is undeniable. My observations at paragraph 19 of my last judgment no longer stands given that I accept that this was in fact not a situation entirely of the Respondents' own making but rather one that was made by Mr. Johnstone and that they were, until reasonably recently, blissfully unaware of.

24. That prejudice is significant. Aside from the fact that the allegations made by all three Claimants are serious ones which the Respondents will have no way to challenge or defend and would stand as made out, overall the Claimants are claiming together somewhere in excess of £150,000 in compensation. That is not a modest sum and could be potentially catastrophic.

25. That is not to say that if the Respondents are permitted to enter Responses, that that outcome will not be the same later down the line but the interests of justice are not favoured by the Respondents being refused the opportunity to test and challenge the claims.

26. I acknowledge that there is real prejudice to the Claimants and repeat what I said in that regard at paragraph 20 of my last judgment. That is not least given that all three are here today at a Remedy hearing with the expectation of being awarded compensation. The proceedings will inevitably be delayed and if the Claimants are successful, as Mr Gray-Jones point out, any compensation payments will be similarly delayed.

27. That is an unfortunate situation and no doubt very disappointing for all the Claimants but it does pale somewhat when contrasted with the prejudice to the Respondents of being unable to defend such serious and significant claims, both financially and reputationally.

28. I take into account the arguments of Mr. Gray-Jones that there could be further prejudice to the Claimants caused if Mr. Johnstone has destroyed or otherwise not maintained documents that the Claimants would be entitled by way of disclosure and which they would need in preparation of their cases. It cannot be known if that is right or not. I cannot suppose at this stage that it is. If it transpires to be the case, however, then that is a matter it seems to me not for this particular application but for an application to strike out the Responses on the basis that a fair hearing is no longer possible. However, we have no way of knowing whether that is going to be an issue so it cannot form part of my consideration for the purposes of this application.

29. I also observe that the prejudice to the Claimants is mitigated somewhat by Mr. Cumming's frank and very sensible concession that he would find any application that the costs of today be Ordered to be paid by the Respondents somewhat difficult to resist.

30. Finally, I take into account the merits of the defence. This is the first time today that I have seen the proposed Responses. They clearly have potential merit and, if they are made out, are a complete answer to the claims which are advanced by the Claimants. Again, that is a reason for granting the application so as to allow the claims, the evidence and defence to be tested. Again, the interest of justice favour that.

CONCLUSIONS

31. For all of those reasons, the interests of justice favour the granting of the application and accordingly it is granted so that the Respondents are permitted an extension of time to enter the ET3 Responses and the consequence of that is that the previous default judgments are all set aside.

32. The Respondents are to pay to the Claimants solicitors the sum of £1,500.00 inclusive of VAT in respect of the costs thrown away today.

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Employment Judge Heap

Date: 23rd October 2019
JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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