EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms N Chacaturian	**v**	**Whitbread Group plc**

Heard at: Watford **On**: 10 October 2019

Before: Employment Judge Jack

Appearances

For the Claimant: In person with Mr B Moore, supporter
For the Respondent: Miss C Hollins, solicitor

PRELIMINARY HEARING

1. This is an application by the respondent for reconsideration of the judgment signed on 15 April 2019 and sent to the parties on 23 April 2019, with a consequential application for an extension of time for submitting an ET3. I heard from the claimant in person assisted by Mr Brian Moore, a friend. The respondent was represented by Miss Hollins, a solicitor, with her was Mrs Bates, the People Director of the respondent.

The facts

2. The claimant was born on 1 September 1985. She is Lithuanian by origin. On 13 June 2014 she started working at a Costa Caffe branch in Greenford Westway in London as a barrista. That was on a fixed term contract which ended on 12 September 2014. The contract at page 55 in the bundle, at the top it says:

> "This statement of terms and conditions of employment is issued by Costa Limited ('the company') whose head office is Whitbread Court, Broughton Hall Business Park, Porz Avenue, Dunstable"

It was a fixed term contract terminating on 12 September 2014. There was never any subsequent contract issued either by Costa Limited or by Whitbread Group plc.

3. The claimant was subsequently promoted to a barrista maestro position and finally she was promoted again to an assistant manager at the Uxbridge

branch of Costa Caffe. She was dismissed on 22 August 2018 in circumstances to which I will come. The usual conciliation process was followed with Whitbread Group plc being the respondent of that and on 4 January 2019, the ET1 in the current matter was issued against Whitbread Group plc.

4. On 31 January 2019, the tribunal set the ET1 to Whitbread Group plc at Whitbread Court at the address which I have already read. That ET1 has not been returned in the post. The covering letter fixed a return date for the hearing of the unfair dismissal claim brought by the claimant with a return date of today, 10 October 2019.

5. On 13 April 2019, the tribunal wrote to the respondent to say that they had received no response to the ET1 and on 15 April 2019, Employment Judge Robin Lewis signed a Judgment against the respondent finding that the claimant had been unfairly dismissed and keeping the date of 10 October 2019 for the remedy hearing.

6. On 17 April 2019, Weightmans, instructed by Whitbread Group plc, wrote to the tribunal and said that the ET1 had not been received and that in any event, Costa Limited was the right respondent. That letter post-dated the Judgment which was formally sent to the parties on 23 April 2019. On 26 April 2019, Weightmans repeated the issues which they had raised in their letter of 17 April 2019 and requested a reconsideration of the Judgment and an extension of time for filing the ET3. Those are the applications which are now before me.

7. The claimant sent an e-mail on 3 May disputing the assertions made by Weightmans and on 4 May 2019, Employment Judge Robin Lewis gave directions. On 15 May 2019, both Whitbread Group plc and Costa Limited served a draft ET3.

8. On 4 August 2019, Employment Judge Manley directed that 10 October hearing should determine the correct respondent and whether the ET3 might be presented out of time.

The law

9. So far as the law is concerned, rule 70 of the Tribunal's Procedure Rules says:

> "a tribunal may either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary and in the interest of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again."

10. The interest of justice test request requires an application of the overriding objective in rule 2. I shall not read it out, but I have it well in mind.

Evidence on service

11. So far as the evidence on service is concerned, Ms Hollins accepted that the address which was used for service of the ET1 was the registered office of Whitbread Group Limited. She accepted that Whitbread had a very substantial operation there and that there were procedures in place for dealing with the substantial amount of mail which must come in. In my judgment, there must be procedures in place in the post room to deal with incoming post and procedures for dealing with incoming ET1's. Given the size of Whitbread in the hospitality and hotel business, the receipt of ET1's must be a regular part of its business. Miss Hollins argued that it is impossible to prove a negative; that the ET1 was not received; and that the respondent was right to adduce no evidence as to their procedures because of the impossibility of proving a negative. I disagree, applications to set aside default judgments are extremely common in all areas of civil law, both before the tribunals and before the Courts. It is absolutely standard for someone seeking said side of default judgment to explain the procedures for dealing with incoming post. In the current case, for example, there is no evidence as to whether not Whitbread keep a post book. Many firms no longer do. But for an important document like an ET1 one would expect some record covering receipt to exist. Someone with knowledge of the post room procedures would ordinarily be able to give evidence showing that the ET1 was never received because the procedures are such that the ET1 would simply not have been overlooked. The absence of any such evidence in my judgment means that the proper conclusion to draw is that the ET1 was properly served. There is no evidence to rebut the presumption that it was received by Whitbread.

The merits

12. So far as the merits of the defence to the claim are concerned, Miss Hollins' main point was that the claimant had identified the wrong respondent. The claimant's employer, she says, was Costa Limited, not Whitbread Group plc. The only evidence that Costa was the employer is that initial contract to which I have already referred. But that was a fixed term contract. There never appears to have been any other contract issued. Every other document in evidence has Whitbread Group plc as the employer. That includes the payslips, the pension scheme and the P45. Mrs Bates says that it is common for a group company to run the payroll functions and that this is acceptable to the Revenue. That may or may not be right, but it is certainly news to me that payslips and P45's can be issued in the name of a company which is not the employer. If it was news to me, then it is certainly likely to be news to employees like the claimant. All correspondence and e-mails were on Whitbread stationery or using the Whitbread e-mail address. There is also a point made by the claimant that during the early conciliation procedure, Whitbread raised no issue about who the proper employer of the claimant was. Miss Hollins said that Whitbread was under no obligation to do that. I find that an unattractive submission. There is likely to be an estoppel against an employer behaving in that way.

13. In my judgment, the claimant has a strong arguable case that Whitbread Group plc were the employer rather than Costa Limited. Costa Limited, as I

have said, play no rôle in any of the documentation after the expiration of the fixed term contract. She subsequently received two separate promotions, all of which were against a background of the documentation being in Whitbread Group plc's name. In any event, in my judgment, there would be no difficulty adding or substituting Costa Limited as a respondent if it transpired that the wrong respondent had been named.

14. As to the substantive merits, very little was submitted by either side. The claimant was dismissed as I said, after a shortfall in the takings was discovered when the takings were banked. The respondent says the claimant was responsible for the shortfall. The claimant says that there were five other employees who had access to the money and that the respondent carried out no investigation into any of the other employees. There are points on each side but without hearing evidence I could not determine the underlying merits. In particular, I was not shown the notes of the investigatory hearing or the disciplinary meeting. In those circumstances, there is in my judgment a case for each party which could be tried.

Conclusion

15. Putting these points together it is, in my judgment, not in the interest of justice to reconsider the Judgment of 15 April 2019, sent to the parties on 23 April 2019. There is, as I have said, no evidence to rebut the presumption that the ET1 was validly served. The underlying merits are not obviously in Whitbread's favour. Balancing these considerations and having particular regard to paragraphs b, d and e of the overriding objective, I reject the application for reconsideration and for an extension of time for presenting the ET1.

JUDGMENT ON RECONSIDERATION

The tribunal refuses the respondent's application for a reconsideration of the Judgment of 15 April 2019 sent to the parties on 23 April 2019 and refuses the respondent's application for an extension of time for serving its' ET3.

ORDERS

1. The claimant shall serve on the respondent, a statement of loss by **Friday 25 October 2019**.

2. Each party shall serve on the other, the documents on which they rely, serve is to be effective by **29 November 2019**.

3. The respondent, as a condition of being entitled to appear at the final hearing on remedy, shall produce the bundles by **25 January 2020**.

4. The parties shall exchange witness statements by **22 February 2020**.

5. The hearing on remedy including issues of contributory fault shall be heard in the Watford Employment Tribunal at Radius House, 51 Clarendon Road, Watford, Herts WD17 1HP, on **13 July 2020** at **10am** with a **one day** time estimate.

6. The respondent do have permission to make representations at the final hearing and to call evidence on the issue of contributory fault.

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Employment Judge Jack

Date: ……16 October 2019……..

Sent to the parties on: .....

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For the Tribunal Office