THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Ms Elizabeth Joanne Russell **Francis W Construction Ltd**

JUDGMENT AT A RECONSIDERATION HEARING

HELD AT MIDDLESBROUGH ON 15 October 2019
EMPLOYMENT JUDGE GARNON
Appearances :
Claimant in person
For the respondent Mr T Goldup of Avensure Employment Consultants

JUDGMENT

I confirm my Judgment of 12 August 2019 because it is not necessary in the interests of justice to revoke or vary it. Remedy will be decided at a 1day hearing on a date to be fixed. Case management orders are in a separate document.

REASONS

1. The respondent has applied for a reconsideration of a judgment on liability only made by me on 12 August 2019 under Rule 21 of the Employment Tribunal Rules of Procedure 2013 (the Rules) in circumstances where no response had been presented that claims of wrongful dismissal (breach of contract), failure to pay compensation for untaken annual leave and unfair dismissal were well founded.

2. The claimant, born 8 May 1970, was employed as Office Manager from 22 August 2016 until her summary dismissal for alleged gross misconduct on 19 February 2019.

3. She appealed by email against her dismissal, giving full grounds, on 4 March, requested a copy of the disciplinary procedure and made a Subject Access Request. Her email was not acknowledged until 25 March by "Rob Chambers, Office Manager, Francis W Group" . I see reference to a company Francis W Groundworks Ltd . A Company called Francis W Group Ltd was incorporated in September 2018. On 1 April the claimant chased for a reply. An email from Mr Chambers to her insisted on posting information rather than sending by email. On 8 April the claimant chased again for a reply. On 9 April an email from Mr Chambers to her says he will " *speak to Francis …. and get back to you ASAP*". No appeal meeting was ever arranged.

4. The claimant commenced Early Conciliation (EC) on 8 May and ACAS issued the EC certificate on 20 June. ACAS had contacted the respondent who engaged in conciliation for longer than the usual four week period .

5. The claim was presented on 3 July and served on 10 July . A response was due by 7 August, but none was received. The claim form gave sufficient information to enable me to find three claims proved on a balance of probability but not a claim for which the claimant has "ticked the box" in part 8 of the form for a redundancy payment. I signed judgment on 12 August and it was sent to the parties on 14 August. It would have been received by the respondent in the normal course of post no later than 16 August.

6.The claimant sent a list of documents on 20 August and a very detailed schedule of loss on 16 September which she copied to the respondent. The latter contains certain requests, such as a judgment against the directors personally and/or other companies in the "group",which cannot be awarded. The remedy hearing was listed for 24 September, notice of which had been sent to both parties on 14 August.

7.The first the Tribunal heard from the respondent was a letter dated 18 September sent by email on 19 September by Mr Malcolm Cameron of Avensure Employment Law Consultants . It attached a draft response denying the claimant's allegations and applied for it to be accepted out of time and the Rule 21 judgment to be reconsidered. The ground of the application was that of the respondent's two directors, Mr Francis Ward is severely dyslexic and did not understand what the documents he received required of him and Mr Christopher Howard who normally deals with paperwork was ill. Mr Ward gave evidence today by reference to a written statement. He accepts the Notice of Claim which was handed to him by an administrator Mr Andrew Hodgson. It gave a hearing date of 30 October 2019 which Mr Ward read but he did not understand most of the document. He did not ask anyone to read it to him as he did not think it appropriate an administrator should see the claim. He accepted in cross examination he could have asked a Mr Fraser, who provided accountancy services to the respondent and had been at the disciplinary hearing to read it but he did not. In any event it was the covering letter from the Tribunal which needed to be read, not the claim itself . Mr Ward said he thought he could just turn up on 30 October to have his say. He says he rang his solicitors, a well respected local firm, who said he could do that. Following receipt of the liability judgment, Avensure contacted him to offer their services.

8. On 19 September the claimant objected to the application giving detail of why some of the respondent's arguments simply defied documentary evidence she produced. On 20 September I considered the application on a preliminary basis under rule 72. I could not say it had no reasonable prospect of success without hearing argument to excuse failure to respond to the claim. In reconsideration applications arguments are regularly put that crucial documents have not been received. I always in such cases direct myself to be wary of cynicism. I have heard many fanciful "lost in the post" arguments but some genuine ones. However, in those cases and this one the more letters from the Tribunal and from one party to another are sent, the less chance there is of genuine oversight.

9. Rule 2 of the Rules provides:
The overriding objective of these Rules is to enable Employment Tribunals to deal with ***cases*** *fairly and justly. Dealing with a case fairly and justly includes, in so far as practicable –*
(a) ensuring the parties are on an equal footing
(b) dealing with a case in ways which are in proportionate to the complexity or importance of the issues
(c) avoiding unnecessary formality and seeking flexibility in the proceedings
(d) avoiding delay , so far as compatible with proper consideration of the issues
(e) saving expense
A Tribunal or Employment Judge shall seek to give the effect to the overriding objective in interpreting, or exercising any power given to it by the Rules The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal

10. My reason for emboldening the word " **cases**" is that it is not only this case which Employment Judges have to manage and Tribunal staff have to deal with The overriding objective is a concept created when the Civil Procedure Rules were reformed under the direction of Lord Woolf in the early 1990s. His Lordship emphasised in a number of cases, notably , Beachley Properties v Edgar, that the concept of ensuring just handling of cases was not confined to the case in question. The proper administration of justice was not to be disrupted by parties' failure to comply with orders or other forms of unreasonable behaviour. Similar points were made by the Court of Appeal in Arbuthnot Latham Bank v Trafalgar Holdings and Adoco Limited v Jemal.

11. Article 6 of the European Convention on Human Rights provides everyone is entitled to a fair hearing within a reasonable time. That right must be afforded without discrimination on any ground including disability. In Riley v The Crown Prosecution Service 2013 IRLR 966 the Court of Appeal emphasised that is an entitlement of both parties. It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time.

12 Kwik Save-v-Swain and Pendragon plc-v-Copus are commonly cited authorities which concern delay in responding, as Mummery P said in Kwik Save, " *as the result of a genuine misunderstanding or an accidental oversight* ". A Tribunal should be " *more willing to allow the late lodging of a response* " if there had been a genuine mistake. These cases were under earlier and different versions of Employment Tribunal Rules.

13. The 2013 Rules were intended to be a modernised system, designed to do justice between the parties but requiring the respondent to the claim to put forward its defence in a prescribed way at a prescribed time. The system also made far greater provision for determinations without a hearing. Everyone is still entitled to a fair hearing if they follow the Rules to avail themselves of that right. Employment Tribunals send to every respondent very detailed explanations of what they must do , when they must do it and the consequences of not complying.

14 In my view the history of the claimant's attempts to appeal and engage in EC combined with the number of communication sent by her and the Tribunal to the respondent which were ignored tend to suggest this respondent ignored the claim hoping it would fade away. I fully accept Mr Ward is dyslexic and Mr Howard was ill , though he attended the workplace for short times. I cannot accept any solicitors would have told Mr Ward he need do nothing before the hearing date. Mr Ward must have been expecting a claim after EC and took no reasonable steps to have documents read to him. A procedure followed which resulted in a judgment and only then did the respondent act . It would cause the claimant the Tribunal and other litigants delay and expense to revoke the judgment and start afresh. To allow a respondent in these circumstances , who has been given but not taken advantage of the opportunity to defend, to do so after a Rule 21 judgment would make a mockery of the system. I therefore confirm the original judgment in its entirety.

15. Following a Rule 21 judgment on liability only, a respondent who has not put in a response is entitled to be heard on remedy. Mr Goldup said he appreciated this was not an opportunity to run a liability defence in disguise

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TM Garnon Employment Judge
Date signed 15 October 2019.