EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr LZ Budavari	v	Falck UK Ambulance Service Limited

PRELIMINARY HEARING

Heard at: Watford On: 30 October 2019

Before: Employment Judge Finlay

Appearances:

For the Claimant: Mr P Tomison, Counsel For the
Respondents: Mr B Jones, Counsel

JUDGMENT

The judgment of the tribunal is that the application by the respondent to set aside the judgment entered on 31 January 2019 under Rule 21 in default of the respondent entering an appearance succeeds and the said judgment is hereby set aside.

REASONS

1. This was an application to set aside a judgment entered and sent to the parties on 31 January 2019 under Rule 21 in default of the respondent entering an appearance.

2. The claimant was represented by Mr Tomison and the respondent by Mr Jones. Ms Liz Fancy gave evidence on oath for the respondent as to the processes for receiving and distributing mail at the relevant office of the respondent.

3. The claim was presented on 6 September 2018. Notice of the claim (form ET2) was sent to the parties on 3 October 2018. The tribunal file confirms that it was sent to the correct address for the respondent. No response was received and on 31 January 2019 the tribunal entered judgment and sent out the Notice of Judgment to the respondent, again to the correct address. On 16 February 2019 the tribunal sent out Notice of Remedy Hearing, which was listed for 6 March 2019. This document came to the attention of the respondent's then HR director on 1 March 2019 and later that day the respondent's solicitors made the application to set aside the judgment.

4. The respondent's position is that it did not receive the Notice of Claim or the Rule 21 Judgment. Ms Fancy could give no explanation as to why this might be the case. She explained that the mail is usually delivered by postmen who know the respondent and vice versa. It is delivered to the ground floor of the respondent's building and is then distributed internally to the relevant department in the offices upstairs. She asserted that as the correspondence from the tribunal would be clearly marked as having come from the employment tribunal, it should be passed to the HR department. She could give no explanation as to what might have happened on these occasions.

5. There are also two other pieces of relevant correspondence.

6. Firstly, the claimant attempted to appeal against the decision to dismiss him. His letter of appeal appears to have been signed for by someone at the respondent at 10:36am on 16 April 2018. However, the respondent has no trace of receiving it. Ms Fancy could not identify the signature on the tracking form, but this, combined with the lack of explanation for the non-receipt of two letters from the tribunal, does raise an inference that there are flaws within the respondent's internal processes. I also note that it appears to have taken some two weeks for the Notice of Remedy Hearing to have been distributed to the respondent's HR director.

7. The other piece of correspondence is an email from the claimant's representative to the tribunal of 6 February 2018, which was not copied to the respondent, as required by Rule 92. Mr Jones made the valid point that if the respondent had received a copy of that email, it would have been "tipped off" as to the existence of these proceedings.

8. The claimant was summarily dismissed by the respondent. His claim is for unfair dismissal (and breach of contract). There is a small additional complaint for failure to pay holiday pay. I have read the proposed grounds of resistance and heard Mr Jones' submissions and I consider that the respondent's defence would appear to be far from hopeless. The claimant was dismissed for a second incident of alleged failure to provide the requisite standard of care, having received a final written warning for the first incident only two months earlier. The claimant was not the only person dismissed for the second incident. Mr Tomison pointed out that the dismissal would be likely to be unfair if only because of the

complete failure to deal with the claimant's appeal (which the respondent says it didn't receive). Mr Jones argued that the letter of appeal does not actually raise any grounds of appeal, but I surmise that it is highly likely that a respondent in these circumstances would ask the employee to clarify grounds of appeal. In any event, even if the respondent's failure to deal with the appeal leads to a finding of unfair dismissal, there are clearly significant "Polkey" argument regarding compensation.

9. The respondent's application is brought under Rule 20, which does not set out a test to be applied by the employment tribunal in exercising its discretion. The "old" rules specified a just and equitable test and the case of Kwik Save Stores Ltd v Swain [1997] ICR 49 listed three factors which should be taken into account. They are:

9.1 Explanation for the delay
9.2 Merits of the defence
9.3 Balance of prejudice

10. I consider it appropriate to take these factors into account along with the matters listed in Rule 2 in the context of the overriding objective of the employment tribunals.

11. In relation to these factors, I was troubled by Ms Fancy's lack of explanation for the failure to enter the response and for the failure to deal with the correspondence from the tribunal. It is of course possible that the correspondence was never received, but as stated above, the evidence does at least suggest an inference that there were flaws in the respondent's processes.

12. As for the merits of the claim, I have taken on board Mr Tomison's points regarding the appeal, but it does appear to me that the defence has some merit.

13. Turning to the balance of prejudice, the claim is already one year old and there is clearly prejudice to the claimant caused by the delay. However, all relevant witnesses are still working for the respondent and there is no obvious reason why a fair trial is not possible. The potential prejudice to the respondent in not being able to defend a claim where the defence does appear to have some merit is, in my view, greater.

14. The matter appears to me to be finely balanced, but weighing up all the factors, I consider that it is just and equitable and within the overriding objective to set aside the judgment and allow the case to proceed to a full hearing. The judgment is therefore set aside.

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Employment Judge Finlay

Date: 11 November 2019

Sent to the parties on:

.....26 November 2019.....
For the Tribunal Office