



**THE EMPLOYMENT TRIBUNAL**

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE TRUSCOTT QC

**BETWEEN:**

**Ms J Czabrycka**

**Claimant**

AND

**(1) Delikatesy Polonez Ltd,  
(2) Ms Aneta Wiatrowska  
(3) Mr Jacub Szymanski**

**Respondent**

**ON:** 22 October 2019

**Appearances:**

**For the Claimant:** Mrs M Inkin, lay representative

**For the Second Respondent:** Ms D Gilbert of Counsel

**JUDGMENT upon RECONSIDERATION**

1. The Tribunal grants the application for reconsideration of the Tribunal's judgment dated 6 February 2019.
2. The Tribunal revokes the decision to allow the claim to be amended to proceed against second and third respondents.

3. As against the first respondent, the Judgment of the Tribunal is corrected so that the claimant is entitled to:

1	1 weeks' pay in lieu of notice of	£282.69
2.	1.24 weeks of paid holidays	£163.54
4.	Compensation for injury to feelings	£8600.00
5.	Future loss of income	£10757.69
	Total	£19803.92

6. The judgment and awards made against the second and third respondents in the judgment issued on 6 February 2019 are revoked.

### REASONS

1. This is an application for reconsideration of the Tribunal's judgment dated 6 February 2019, pursuant to rule 70 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules").

2. The claimant presented her claim against the three respondents on 17 September 2018. The ET1 identified the second respondent but gave her address as "c/o Delikatesy Polonez Ltd 337 Athlon Road, Wembley, Middlesex, HA0 1EF". This address was provided in the Companies House Register for the second respondent as a director for service. She has advised that the address is the address of accountants of the first respondent. It was not the correct address for the second respondent. The claim against the second and third respondents sent to that address was returned to the Tribunal by Royal Mail as undelivered. No response having been received by the relevant deadline, the matter proceeded to hearing on 6 February 2019, at which time amendment was allowed and judgment was issued for the claimant. Not only did the second respondent not receive the ET1, she did not receive the notice of hearing or judgment. Again, these were returned to the Tribunal by Royal Mail undelivered. She did not become aware of the judgment until visited by bailiffs seeking to enforce the judgment.

3. Pursuant to rule 15 of the ET Rules, where a claim is accepted, the Tribunal must send a copy of the claim form, together with a prescribed response form, to each respondent with a notice which includes information on (a) whether any part of the claim has been rejected, and (b) how to submit a response to the claim, the time limit for doing so and what will happen if a response is not received by the tribunal within that time limit.

4. A claim will not be treated as having been 'sent to the respondent' if the name and address on the document purportedly sent to him contains significant inaccuracies (**Chowles t/a Granary Pine v. West** UKEAT/0473/08 (unreported)). Such errors may not always be fatal, but each case depends on its own facts (**Campbell v. James Stevens (Kensington) Ltd** UKEAT/0097/19 (8 July 2019, unreported)).

5. The address the Tribunal used to send the ET1 to was no longer the address for the second respondent on the failure of the business. The wrong address, in these circumstances, constitutes a material inaccuracy and therefore the ET1 has not been sent in accordance with rule 15.

6. As set out in the ET3 and response, and witness statement of the second respondent, there are good grounds for defending the claim. In addition, as the claim involves allegations of discrimination against the second respondent personally, it is in the interests of justice that she be allowed to defend herself.

7. In the circumstances, the judgment was issued erroneously and is set aside.

8. The claimant applied for early conciliation against the first respondent on 20 July 2018 and lodged an ET1 against all three respondents on 17 September 2018. The claim against the first respondent is valid and in time. The claimant sought early conciliation against the second and third respondent on 4 September 2018.

9. As narrated in the judgment issued on 6 February 2019, the claim against the second respondent did not appear to be valid due to a failure to comply with the Early Conciliation requirements. The Tribunal took the course of amending the claim, so as to be able to invoke the ratio of **Mist v. Derby Community NHS Trust** [2016] ICR 543 EAT, such that a separate EC certificate in respect of the second respondent would not be required and would not be a bar to the claimant's claim. The Tribunal considers that this course of action was impermissible. The ratio of **Mist v. Derby** applies only where a respondent is brought in to existing proceedings by way of amendment. The rationale is that rule 1 of the Early Conciliation Rules of Procedure ("the EC Rules") requires the relevant steps to be completed by a "prospective" claimant. By the time a claimant seeks to add a respondent to an existing claim, they are no longer a prospective claimant and thus do not come within the statutory framework. The ratio did not apply to the second respondent, since she was named as a respondent at the time the ET1 was first presented. At the time during which the claimant ought to have complied with the EC requirements in respect of the second respondent, she was a prospective claimant. Pursuant to rule 4 of the EC Rules she was required to present separate EC forms against each respondent, and did not do so. There was no amendment to be made, and indeed post "amendment" the parties remained as they were before it. The only means by which the claim could be 'amended' in this way would be if there were no claim against the second respondent in the first place.

10. There was no appearance by the third respondent. The claimant's representative advised that he was in Poland but if she found an address for him, she would seek to enforce the award. The Tribunal considered that the case of the third respondent was on all fours with that of the second respondent on the substantive points and accordingly it was in the interests of justice that the judgment against him be revoked also.

### Conclusion

11. The judgment against the second and third respondents is revoked because:
  - a. The claim was not sent to the second and third respondents in accordance with rule 15 of the ET Rules, and thus the time limit for responding to the claim did not expire. There was therefore no basis for proceeding without the second and third respondent's participation or presence.
  - b. The claim against the second and third respondents was not valid because the claimant had failed to comply with the Early Conciliation requirements. The decision to amend the claim to include the second and third respondents was incorrect in law. There is therefore no valid claim against the second and third respondents in respect of which judgment could be entered.
12. It follows that the sums held by the claimant's representative paid by the second respondent should be returned to the second respondent.
13. In terms of future procedure, parties were agreed that there should be a preliminary hearing. It will be for the claimant to determine her course of action from now on. She must determine the basis upon which she wishes to proceed against the second and third respondents, if she seeks to do so. She should decide her course of action by 31 December 2019 and should notify the Tribunal which will, subject to any comments made on behalf of the second respondent, proceed as appropriate.

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**I D Truscott QC Employment Judge**

**Date: 28 October 2019**