EMPLOYMENT TRIBUNALS

Claimants: **Mr. P Perkins**

Respondent: **Everyman Motor Racing Activities Limited**

Heard at: **Leicester**

On: **13th January 2020**

Before: **Employment Judge Heap**

Representation:
Claimant: **No attendance - written representations**
Respondent: **No attendance - written Representations**

JUDGMENT ON RECONSIDERATION

1. The Respondent's application for Reconsideration made on 10th September and 4th November 2019 of the Judgment sent to the parties on 4th September 2019 is refused.

REASONS

BACKGROUND AND THE ISSUES

1. This hearing was listed today to consider an application made by the Respondent to revoke the Default Judgment issued in favour of the Claimant and sent to the parties on 4th September 2019. The essence of that application appeared to be that some postal issues had seen the Respondent not receive the ET1 Claim Form in respect of this Claimant and another unconnected individual.

2. This hearing was listed to deal with that application and a Notice of hearing sent to both parties by the Tribunal on 23rd November 2019. By that time, the Claimant had registered his objections to the application.

3. Orders were made for preparation for the hearing so that there would be documentary and witness evidence available to deal with the application.

4. However, no one has attended today for or on behalf of either the Claimant or Respondent. A clerk of the Tribunal sought to make contact with both parties but no contact was able to be made on the mobile telephone numbers on the Tribunal file. I delayed the commencement of the hearing until 10.30 a.m. in the event that the parties were running late but by that time there was still no attendance on either side.

5. I have not adjourned the hearing as I am satisfied that Notice of hearing has been sent to both parties and that they would therefore have been aware of the hearing today. I can only assume that it was therefore a conscious decision not to attend and I can have no confidence that will not occur again if the hearing is adjourned and re-listed. I have therefore proceeded with the hearing in the absence of the parties and taken the Respondent's applications of 10th September and 4th November 2019 and the Claimant's email of 12th November 2019 as written representations.

6. I should observe that there is the possibility that this matter has been resolved between the parties with the payment of the monies due under the Default Judgment. If that is the case then the parties should have notified the Tribunal to avoid the time and cost of the hearing today being wasted. Judicial and administrative resource that could have been usefully deployed to other claims has been wasted today if it is the case that the parties have resolved matters and the Respondent's application has therefore fallen away.

7. Nevertheless, in the event that it has not I have gone on to deal with the application on the basis of written representations as set out above.

8. In order to deal with the application, it is necessary to set out the background to this matter.

9. On 5th August 2019 the Tribunal sent to the Respondent a copy of the ET1 Claim Form which had been presented by the Claimant. That was served at the address provided by the Claimant in his Claim Form in accordance with Rule 86(2) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. As it happens, that is also the address of the Registered Office of the Respondent as can be seen from Companies House records, despite the suggestion to the contrary in the Respondent's email of 10th September 2019. The letters set out the following:

   *"If a respondent wishes to defend the claim their response must be received at the Tribunal office by **02/09/2019**. If a response is not received by that date and no extension of time has been applied for and given, or if a respondent indicates that it does not contest any part of the claim, a judgment may be issued and that respondent will only be entitled to participate in any hearing to the extent permitted by the Employment Judge who hears the case."*

10. No Response was entered on time or at all and on 4th September 2019 the Tribunal wrote to the parties issuing a Default Judgment.

11. On 10th September 2019 the Respondent sent an email headed "Reconsideration Request" on the basis that it was said that no documentation had been received about this or another unconnected claim. The email made a request for documents to be sent to what it was said was its registered office. That was a different address to that provided on the Claim Form and also, as I have already observed, the address of the registered office with Companies House.

12. I directed on 17th September 2019 that if the Respondent wished to further an application for Reconsideration then they would need to set out the full grounds of why it was in the interests of justice to do so and comply with Rule 20(1) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

13. At some point, the Respondent engaged the services of Peninsula Business Services Ltd ("Peninsula") who dealt with that application and a draft ET3 Response on 4th November 2019. Peninsula subsequently came off record as acting for the Respondent.

CONCLUSIONS

14. In reaching my conclusions I have paid regard to the decision of the Employment Appeal Tribunal in **Kwik Save Stores Ltd v Swain 1997 ICR 48**, albeit that that decision related to an earlier incarnation of the Regulations relating to the then "just and equitable" test. I have therefore taken 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 importance of providing a satisfactory and honest explanation;
    b. The balance of prejudice; and
    c. The merits of the defence – if the defence is shown to have some merit in it then justice will often favour the granting of an extension of time.

15. I take each of those matters in turn.

16. Firstly, I am not satisfied that there has been any explanation, let alone a satisfactory one, as to why an extension of time is required. Whilst there appears to be a reliance on postal difficulties, the Claim Form was sent to the Respondent's Registered Office. If post is "regularly not received" as is suggested in the application of 4th November 2019 then it is curious why that remains the Registered Office given the possibility of important documentation going astray. Despite the opportunity for the Respondent to present evidence today about the suggested difficulties with delivery/receipt of post, and Orders having been made to do so, the Respondent has not taken that opportunity and I therefore have no evidence to support the claimed postal issues.

17. I also take into account the length of the delay. Although the original application was made promptly, there was then an unexplained almost 7 week delay until the Respondent complied with Rule 20(1) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and submitted a draft ET3 Response. The Respondent had obtained specialist advice from Peninsula and it is concerning to say the least that no attempt was made by the Respondent to deal with this matter for a significant number of weeks. The Respondent should have been alive to the fact that, already having entered no Response on time, time was now of the essence. Without attendance today by or on behalf of the Respondent I have not been able to ascertain the reason(s) for that further significant delay. It cannot be the complexity of the issue as the claim is entirely straightforward and the Particulars of Response occupied only two pages. As such, this weighs against the granting of the application.

18. I have considered the balance of prejudice. Clearly, the Respondent will be prejudiced if they are unable to defend the proceedings but that is tempered significantly by the fact that, as I shall come to, there is little or no merit in the defence as set out in the Response.

19. I am also satisfied that there would be real prejudice to the Claimant. He has had the Default Judgment now for some time. If the Respondent is now permitted to enter a Response very late, a hearing would have to be listed and it may be a further many number of weeks before that could be achieved and that delay is a prejudice to the Claimant. Moreover, as I shall come to below with regard to the merits of the defence, the outcome would be likely to be just the same but with much more delay than the Claimant has presently experienced.

20. I finally therefore deal with the merits of the defence. The Respondent appears to rely entirely on a clause in a "deductions from pay" agreement in withholding the monies due to the Claimant (see paragraph 9 of the draft Response). That clause is set out and it is said to say this:

    "any loss to us that is the result of your failure to observe rules, procedures or instruction, or is as a result of your negligent behaviour or your unsatisfactory standards of work will render you liable to reimburse to us the full or part of the cost of the loss".

21. Section 13 Employment Rights Act 1996 requires the Claimant to have signified his consent in writing to **the deduction** (my emphasis) or for a relevant part of the Claimant's contract to authorise **the deduction** (my emphasis). The clause relied upon as set out above does not authorise any deduction at all. What it allows the Respondent to do is to look to the Claimant to reimburse them for any alleged losses. That is a step removed from an entitlement to deduct the money from wages owed. It therefore appears to me that on that basis and given the decision in **Potter v Hunt Contracts Ltd [1991] UKEAT 428_89_2011** (which would bind a Tribunal) the Respondent in fact does not have any form of meritorious defence to this claim.

22. Taking into account the factors in **Kwik Save Stores**, that does not favour the granting of the application for Reconsideration as it is not in the interests of justice to do so. The application is therefore refused and the Default Judgment stands.

Employment Judge Heap

Date 13th January 2020
JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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