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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4100228/2019

10 **Held in Glasgow on 19 August 2019**
(Reconsideration Hearing)

Employment Judge Ian McPherson

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Miss Alicia Carpenter	**Claimant** **In Person**
Switch2day Utilities Ltd	**Respondent** **Not Present and** **Not Represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that: -

(1) In the absence of the respondent, who was not in attendance nor
30 represented, and the claimant being in attendance and ready and willing to proceed, the Tribunal proceeded with this Reconsideration Hearing in the absence of the respondent, in terms of **Rule 47 of the Employment Tribunal Rules of Procedure 2013**, taking into account the information available to the Tribunal from the casefile, and the
35 claimant's oral and written submissions at this Hearing.

(2) Having considered (a) the respondent's opposed application, in terms of **Rule 70 of the Employment Tribunals Rules of Procedure 2013,** for reconsideration of the Default Judgment issued by the Tribunal in terms of **Rule 21** on 14 March 2019, and (b) the respondent's opposed application for an extension of time (in terms of **Rule 20**) to lodge a late ET3 response defending the claim, as per the ET3 submitted on 2 April 2019, the Tribunal **refused** both applications, being satisfied it was in the interests of justice to do so, and the Tribunal **confirmed** the Default Judgment, without variation.

(3) Arising from the Judge's preliminary consideration of the application submitted at this Reconsideration Hearing on behalf of the claimant for expenses and Preparation Time Order against the respondent, and to allow the respondent a reasonable opportunity to respond to that application, and in terms of his general case management powers under **Rule 29 of the Employment Tribunals Rules of Procedure 2013**, the Judge has **ordered** that :-

(a) The clerk to the Tribunal shall send to the respondent's representative, along with this Judgment, a copy of the claimant's handwritten application dated 19 August 2019, together with the supporting vouchers produced by the claimant, to allow the respondent, **within no more than 7 days from date of intimation of this Judgment**, to make any written comments or objections as the respondent considers appropriate, including, in terms of **Rule 84**, to provide any information (with appropriate supporting vouching) as regards the respondent's ability to pay if any order for expenses and / or preparation time were to be granted by the Tribunal.

(b) Such comments / objections shall be sent to the Tribunal, by e-mail, with copy sent at the same time by email to the claimant, as per **Rule 92.** The respondent's representative shall, in replying to this order, state whether or not they wish

an oral Hearing for the Judge to consider any opposed application, and, if so, indicate dates for their availability, in **September / October 2019**, or if they consent to the matter being addressed by the Judge only , in chambers, on the papers, having regard to parties' written representations, then they shall state that preference.

(c) **Within no more than 7 days of intimation of any comments / objections by the respondent**, the claimant shall send her reply to the Tribunal by email, copying it by email at the same time to the respondent's representative, for his information, and the Judge will thereafter direct any further appropriate procedure.

REASONS

Introduction

1 This case called before me on the morning of Monday, 19 August 2019, at 10.00a.m, with a time allocation of 2 hours, as a Reconsideration Hearing of an earlier decision of the Tribunal to reject a late response submitted by the respondent.

2 This Reconsideration Hearing was a relisted Hearing, as the originally assigned Reconsideration Hearing, allocated by Notice of Hearing issued by the Tribunal on 22 May 2019, and assigning 20 June 2019, for the Reconsideration Hearing, was postponed on the respondent's application, on the grounds that the respondent was not in the country on the date of the Reconsideration Hearing arranged for 20 June 2019.

Claim and Default Judgment

3 Following ACAS early conciliation between 13 December 2018 and 13 January 2019, the claimant presented her ET1 claim form to the Employment Tribunal on 17 January 2019, complaining that, arising from the termination

of her employment with the respondent on 26 November 2018, as an Admin Clerk, she was owed notice pay, holiday pay, arrears of pay, and other payments, as more fully detailed in her ET1 claim form at Sections 8.1, 8.2 , 9.1 and 9.2.

4 Her claim form was accepted by the Tribunal on 24 January 2019, and a copy sent to the respondent, for them to lodge an ET3 response by 21 February 2019. No ET3 response was presented by that date and, following referral to me, by Default Judgment issued on 14 March 2019, in terms of **Rule 21 of the Employment Tribunal Rules of Procedure 2013**, I decided to issue Judgment for the claimant on the available material under **Rule 21** and, as there was no defence to the action, the Final Hearing that had been listed for 5 April 2019 was cancelled.

5 A copy of that Default Judgment was sent to the respondent, by the Tribunal, under cover of a letter dated 14 March 2019, advising that the respondent had the right to apply for a reconsideration of the Judgment, within 14 days of that date, and further advising that if the respondent now wished to defend the claim, they would also have to apply for an extension of time to submit their response.

6 The respondent was also advised that any such application for an extension of time must be accompanied by a draft of the response which they wished to present, or explain why that was not possible, and if they requested a Hearing to determine the application to extend time, then they should state that when making the application.

Correspondence received from the Respondent

7 Having received the Tribunal's letter of 14 March 2019, enclosing copy Default Judgment, a Mr Leo Flores from the respondent e-mailed the Tribunal, on 20 March 2019, stating that they were not aware that there was a claim against them until they received the Judgment, and that they had not received any previous correspondence and that they would be contesting the claimant's claim against them at the Tribunal.

8 Following referral to me, by letter from the Tribunal dated 22 March 2019, the respondent was sent a copy of the ET1 claim form, a blank ET3 response form, and copy of the previously issued Notice of Claim, and referred to the letter of 14 March 2019 which had advised that they had 14 days from that date to seek reconsideration of the Default Judgment, and they should apply for an extension of time to lodge an ET3 and give reasons to why it was late. A copy of that letter to the respondent was sent to the claimant for her information.

9 In response to the copy letter sent to her on 22 March 2019, the claimant e-mailed the Tribunal, on 23 March 2019, noting that Mr Flores had sought to overturn her recent award for withheld wages, and disputing his assertion that she was on a zero hours contract, and attaching copy of her contract, and further stating that she strongly suspected that his correspondence was simply a "**delaying tactic**", as Mr Flores did not respond to any part of the process despite being aware through correspondence that it was happening, and he had been unreachable by her despite continuing to do business from the respondent's address in Glasgow.

10 Following referral to Employment Judge Mary Kearns, on 28 March 2019, the claimant's e-mail was placed on the case file, and a copy of her correspondence sent to the respondent.

Extension of Time sought by the Respondent

11 In response to the copy sent to the respondent, Mr Flores e-mailed the Tribunal, later on 28 March 2019, stating that they had never received any of the ET1 or ET3 forms from the Tribunal office, because they don't get a lot of mail because of the secured entry system at their business address, and seeking an extension of time to apply for reconsideration of the Default Judgment issued on 14 March 2019.

12 Further, in response to the copy contract submitted by the claimant, Mr Flores submitted documents on behalf of the respondent, including what he alleged was the claimant's employment contract, and her monthly wage slips. He also

supplied copy e-mails sent to Argyle Accountants, advising that they did the respondent's payroll.

Application for Reconsideration of Default Judgment

13 Following referral of Mr Flores' e-mail of 28 March 2019 to Employment Judge Claire McManus, a letter was sent by the Tribunal to the respondent, with copy to the claimant, on 2 April 2019 stating that Judge McManus had treated the e-mails from Mr Flores as a request for reconsideration of the Default Judgment issued on 14 March 2019, no ET3 having been received, and she had further directed that the respondent had until 15 April 2019 to set out the reasons for the Judgment being reconsidered in terms of **Rule 72 of the Employment Tribunal Rules of Procedure Regulations 2013.**

14 Judge McManus also asked that the respondent be reminded of **Rule 92** (all correspondence sent to the Tribunal must be copied to the other party) and instructed that a copy of the ET1 claim form, and a blank ET3 response form, be attached, and sent to the respondent, along with the Tribunal's letter of 2 April 2019. This was duly done by the Tribunal's letter on 2 April 2019.

ET3 response submitted by the Respondent

15 By e-mail of 2 April 2019, Mr Flores sent to the Tribunal office, with copy to the claimant, his completed ET3 response for the respondent, and supporting documentation. In the ET3 response, it was stated that the respondent did not know that there was a Tribunal case against them, and accordingly they could not agree with the details given by the claimant about early conciliation with ACAS.

16 While disputing the dates of employment given by the claimant, they accepted that she had been employed by them as an Admin Assistant from 2 August to 26 November 2018. It was further stated that the claimant was given one week's notice as her final wage slip, and her last 3 months wage slips were attached. It was stated that they defended the claim.

Reply from the Claimant

17 Following the claimant's receipt of Mr Flores' e-mail of 2 April 2019, the ET3 response for the respondent, and supporting documents, the claimant e-mailed the Tribunal, on 3 April 2010, with copy to Mr Flores, stating that she had received his correspondence, including "***falsified contracts and wage slips"***, and that she was writing to provide a full account from her perspective "***in the hope of speedy justice***".

18 She stated that she had never seen or signed the document entitled ***"Alicia Contract"*** attached by the respondent, and, in response to the wage slips attached by the respondent, the claimant provided her bank statements showing that she did not receive any wages from the respondent after 31 October 2018.

19 Further, while the wage slips provided for earlier dates appeared accurate, and payments received were corroborated in her bank statements, the payslip dated 5 December 2018 detailed a payment that the claimant stated had not been received by her, as could be seen in all subsequent bank statements, and that alleged payment also fell short of what was awarded to her in the Tribunal's original ruling. She referred to an attached copy of a letter from herself to the respondent's Mr Flores, dated 29 November 2018, for details of the wages claimed by her.

20 Further, the claimant stated that the P45 enclosed with Mr Flores' e-mail of 2 April 2019, although dated 28 March 2019, had not been received by herself, but she did not know why it had been received in this manner, nor why it had taken so long after the end of her employment for it to be drafted, and she further stated that its total pay shown was inaccurate, as it included calculation of the 5 December 2018 payslip, which she stated was never sent to her.

21 Further, the claimant's e-mail of 3 April 2019, stated as follows: -

> ***"Given these falsehoods, correlating inaccuracies are present in the ET3 form returned. Attached letters from myself to the respondent show that they were in fact aware of the proceedings against them, which I am sure ACAS can corroborate. I would***

also like to remind the respondent that I am not disputing my termination – their responses read as though I have received my wages and am disputing the grounds for my dismissal. The issue at hand is about unreceived wages, as the respondent was made aware in previous correspondence."

"… I am appalled that my perfectly reasonable request for what is legally owed is being met with avoidance and gaslighting. The conduct of the respondent from day one has been at best disorganised and unprofessional, and at worst deliberately fraudulent and exploitative."

Rejection of ET3 response

22 Following referral to me by the Tribunal administration, the respondent's correspondence of 2 April 2019 was considered, and I directed that the ET3 response form be rejected as it was late, but the respondent's e-mail of 2 April 2019 be treated as a **Rule 20** application for an extension of time, and I directed that a Hearing be fixed. My decision in that regard was intimated to both parties under cover of a letter from the Tribunal dated 9 April 2019.

23 Given the terms of parties' correspondence to the Tribunal between 20 March and 3 April 2019, I directed that the Tribunal administrative should fix a 2 hour Reconsideration / Extension of Time Hearing to be held before me, as I had issued the **Rule 21** Default Judgment on 14 March 2019, and I further directed that both respondent and claimant should attend in person.

24 Thereafter, by Notice of Hearing dated 22 May 2019, the Tribunal assigned 20 June 2019, as that Reconsideration Hearing. As detailed earlier in these Reasons, that date was subsequently postponed, on the application of the respondent, and the case relisted for this Reconsideration Hearing before me.

Respondent's application for postponement refused by the Tribunal

25 In his e-mail to the Tribunal, on 22 May 2019, following an e-mail from the Listing Section, enclosing Notice of Hearing for 20 June 2019, Mr Flores

advised the Tribunal that 20 June 2019 was not good for him as he was in Antigua, until 18 July, but he would be available until 23 August 2019. Following enquiry of the claimant, as regards her availability, Monday, 19 August 2019, was assigned, as per Notice of Hearing sent to both parties by e-mail on 12 August 2019.

26 By e-mail of 13 August 2019, the claimant advised that she was now living in South Wales, and working two jobs, and one week's notice for this Tribunal was unsuitable to her but advising whether as she would be in Glasgow between 23 and 25 September 2019, would any of those dates be suitable. In response, Mr Flores e-mailed the claimant, with copy to the Tribunal, stating that those dates were not suitable to him as he would be in Antigua for one month.

27 On 14 August 2019, the claimant e-mailed the Tribunal advising that she would attend the booked date of Monday 19 August 2019. In light of parties' correspondence of 13 and 14 August 2019, Employment Judge Shona MacLean originally directed that the Hearing listed for 19 August 2019 be postponed, but by e-mail of 16 August 2019, to the Tribunal, and copied to Mr Flores, the claimant stated that given Mr Flores' unavailability for September, she had booked tickets to attend the Tribunal on Monday, 19 August 2019, in order to see the case progress as quickly as possible.

28 As such, the claimant asked for the postponement to be reconsidered and the Hearing reinstated. Mr Flores e-mailed the Tribunal advising that he had availability in October 2019, and stating that he expected to call one witness, identified as a **Solomon Ashun**, to give evidence about accounting, with an estimated duration of 30 minutes. He did not copy that e-mail to the claimant.

29 In another e-mail, of 16 August 2019, Mr Flores, in advising the Tribunal, and the claimant, stated that he could not attend the Tribunal on Monday 19 August 2019 "***as I am now attending a meeting in London. Ms Carpenter had e-mailed myself indicating she cannot attend and changed her mind on too short a notice. I travel a lot internationally which Ms Carpenter***

will be aware of as she worked for our organisation. I will submit my dates that I am available."

30 When the respondent's application for postponement was referred to Employment Judge MacLean, she refused it, as she had done earlier that day. In this regard, it is appropriate, at this stage, to note and record that by e-mail sent to both parties at 13:51 on Friday, 16 August 2019, they were advised that Employment Judge Maclean had directed that, as a decision was only taken that morning to postpone and (1) the claimant had re-scheduled her arrangement, (2) the respondent prematurely made alternative plans and (3) the respondent's further availability was limited, the Hearing on Monday, 19 August 2019 would proceed.

31 Following receipt of Mr Flores' e-mail of 16 August 2019, sent at 14:39, advising that he could not attend as he was now attending a meeting in London, that resulted in Judge MacLean's subsequent decision, e-mailed to both parties at 15:36, stating that Employment Judge MacLean had refused the application for postponement, referring to the previous e-mail response dated 16 August 2019 at 13:51, and further stating that Employment Judge MacLean was aware of the respondent's position but, as explained, they had acted prematurely, and "***it is not for the parties to decide that a Hearing is postponed. The previous Hearing has already been postponed due to the respondent's unavailability."***

32 Finally, by e-mail from Mr Flores, to the Tribunal, sent at 15:46 on 16 August 2019, but not apparently copied to the claimant, as it should have been as per **Rule 92,** Mr Flores stated: *"**Please note that I cannot attend the hearing on Monday. I have committed myself to another meeting in London on Monday. I don't think it's fair that the tribunal goes ahead without my attendance. I received an e-mail from Miss Carpenter that she couldn't attend the hearing on the 12th August. The tribunal confirmed this morning by e-mail that the hearing was cancelled. I made my arrangements after I received the tribunal confirmation. I am** (sic) **that the tribunal judge reconsider as I cannot get out of my meeting. If the***

case did go ahead without representation we will appeal as the tribunal meant to be fair to both the Complainant and Respondent. I am available the whole of October as per my earlier email."

33 Mr Flores' e-mail of 16 August 2019 at 15:46 was referred to me on Monday morning, 19 August 2019, prior to the start of the listed Reconsideration Hearing.

Reconsideration Hearing before this Tribunal

34 When the case called before me, on the morning of Monday, 19 August 2019, as listed for this Reconsideration Hearing, the claimant was in attendance, accompanied by her mother, but representing herself, while the respondent was neither present, nor represented.

35 When I commenced the Hearing, shortly after 10.05am, the claimant stated that she had come up to Glasgow the previous day, Sunday, 18 August 2019, but that she was now living at her parental home in Wales, and that her mother, Mrs Carpenter, was here at the Tribunal with her, for moral support, but not acting as her representative.

36 Given the respondent's Managing director, Mr Flores, had indicated that he would be at a meeting in London, and not attending, and that his application for a postponement of this listed Hearing had been refused by Employment Judge MacLean on Friday afternoon, it was clear to me that the respondent was aware of this Hearing and, in those circumstances, I did not instruct the clerk to the Tribunal to make a telephone enquiry, as I might otherwise have done, had a respondent not appeared, or been represented and there had not been any recent correspondence from them to and with the Tribunal.

37 It was clear to me, from perusal of the correspondence on the Tribunal's casefile, from the preceding Friday, 16 August 2019, that the respondent was not going to be in attendance, nor represented.

38 While Mr Flores had indicated that he had made arrangements to attend a meeting in London, there was no information provided to the Tribunal as to

what this meeting was, and why it was more important than him attending the Tribunal in these legal proceedings against the respondent company. Equally, no explanation was provided as to why nobody else from the company could have attended.

5 39 It seemed to me, from perusal of the case papers available to me, that as the ET3 response form had, at Section 2.2, given the name of the respondent's contact as Solomon Ashun, albeit Mr Flores had submitted it to the Tribunal with his e-mail of 2 April 2019, that Mr Ashun, might have been in a position to attend, and represent the company, given that, from the date listing stencil, 10 returned by Mr Flores on 16 August 2019 Mr Ashun was identified as a witness for the respondent, to speak to accounting matters.

40 I inferred, from that, that Mr Ashun presumably has some connection with the respondent's accountants, identified in the e-mail of 2 April 2019 previously provided to the Tribunal as being Argyle Accounting. The Tribunal, however, 15 had no contact details for Mr Ashun, so I could not instruct the Tribunal clerk to make enquiry of him.

41 In those circumstances, the respondent not being in attendance, nor represented, the listed Reconsideration Hearing proceeded in their absence, as per **Rule 47 of the Employment Tribunal Rules of Procedure 2013** and 20 I took into account the information available to the Tribunal from the case file, as well as oral submissions from the claimant in person, and that included perusal of the full correspondence, and late ET3 response, submitted by Mr Flores on behalf of the respondent.

Claimant's Oral Submissions

25 42 I then heard from the claimant, and allowed her an opportunity for adjournment, in terms of the overriding objective under **Rule 2 of the Employment Tribunal Rules of Procedure 2013,** to deal with the case fairly and justly, so that she could consider her position, and write written representations for the Tribunal.

43 The claimant stated that she had incurred costs in arranging return travel, and overnight accommodation, and that appropriate vouchers evidencing this expenditure could be provided, if required. and that she had further had to take two days off work to come to this Reconsideration Hearing.

5 44 She further advised that she had received no correspondence from the respondent since the first Notice of Reconsideration Hearing was issued on 22 May 2019, until her recent applications for postponement by the respondent, post 12 August 2019 relisting, which had been refused by the Tribunal.

10 45 As the claimant was an unrepresented, party litigant, with no previous knowledge of the Tribunal, its practices or procedures, or the law relevant to her claim against the respondent, I advised her that, consistent with my **Rule 2** duty to deal with the case fairly and justly, I could inform her, in general paraphrased terms, of the applicable legal test, and then invite her comments,
15 by way of taking them into account, as regards her stated opposition to the respondent's applications for reconsideration of the Default Judgment granted to her, and for any extension of time to allow a late ET3 response, and for them to be able to defend the claim on its merits, and have the Default Judgment revoked.

20 46 I briefly summarised the relevant law for her information, as part of my duty under **Rule 2 of the Employment Tribunal Rules of Procedure 2013** to ensure a fair and just Hearing.

47 **Rule 2** provides that the Tribunal in dealing with a case fairly and justly includes, so far as practicable, (a) ensuring that the parties are on an equal
25 footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of issues; (c) avoiding unnecessary formality and seeking flexibility of the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.

48 Further, **Rule 2** also provides that the Tribunal shall seek to give effect to the
30 overriding objective when exercising any power given to it by the Rules, and

parties shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and the Tribunal.

49 I explained to the claimant that, in terms of **Rule 70**, an application for reconsideration requires the Tribunal, either on its own initiative or, as here, on the application of a party, to reconsider any Judgment where it is necessary in the interests of justice to do so and, on reconsideration, the original decision may be confirmed, varied or revoked and, if it is revoked, it may be taken again.

50 In terms of **Rule 71**, an application for reconsideration shall be presented in writing, and copied to the other party, within 14 days of the date on which the written record or other written communication of the original decision was sent to the parties, in this case being 14 March 2019, and the application shall set out why reconsideration of the original Decision is necessary.

51 **Rule 18** states that an ET3 response form shall be rejected by the Tribunal if it is received outside the time limit in **Rule 16** (or any extension of that limit granted within the original limit) unless an application for extension of time has already been made under **Rule 20** or the response includes or is accompanied by such an application in which case the response shall not be rejected pending the outcome of the application.

52 Further**, Rule 20(1)** provides that an application for extension of time for presenting an ET3 response shall be presented in writing and copied to the claimant, and it shall set out the reason why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and if the respondent wishes to request a Hearing this shall be requested in the application.

53 **Rule 20(2)** provides that the claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed, while **Rule 20(3)** provides that an Employment Judge may determine such an application without a Hearing. Finally, **Rule 20(4)** provides that if the decision

is to refuse an extension, any prior rejection of the response shall stand, and if the decision is to allow an extension, any Judgment issued under **Rule 21** shall be set aside.

54 Having regard to my knowledge of the relevant case law on reconsideration, and extensions of time, I explained briefly to the claimant that an extension of time application would, ordinarily, if both parties were present, involve me considering the explanation or lack of explanation for the delay in presenting the response to the claim, the merits of the respondent's defence, the balance of prejudice each party would suffer should an extension be granted or refused, and so to enquire of both parties why they were inviting the Tribunal to grant or, as the case may be, refuse the respondent's application for an extension of time.

55 In explaining her purpose in attending this Hearing, as ordered by me previously for both parties to be in attendance, the claimant explained that she would like to receive from the respondent the sum that is owed to her, and which the Tribunal has previously awarded in its Default Judgment. She stated that she wished the Tribunal to confirm that Default Judgment for the sums set forth in it, and to refuse the respondent's application for reconsideration of that Default Judgment.

56 As regards the late ET3 response by the respondent, the claimant explained that she did not believe it is accurate, and she stated that it contains accompanying fraudulent documents. She added that the respondent had not engaged with ACAS early conciliation, and while advised that the proceedings were ongoing, she had seen this as no more than a "***delaying tactic"*** by the respondent.

57 Stating that the sum ordered to be paid to her, by the Default Judgment of 14 March 2019, had not, to date of this Hearing, been paid to her by the respondent, the claimant advised that she would take the appropriate steps to seek to enforce that Judgment in her favour, and, in that regard, I informed her that she would need to make written application to the Tribunal

administration for an Extract to be issued to allow her to instruct Sheriff Officers to enforce that Default Judgment against the respondent.

58 In further explaining her position, the claimant submitted that it is far too late for the respondent now to seek to defend the case, when they did not engage with the process before, and so she opposed their application to allow the late ET3 response, and their application to grant an extension of time.

59 In reply to my summary of the relevant law, the claimant added that she did not consider a reconsideration of the Judgment was in the interests of justice, and as regards the request for an extension of time, there had been delay by the respondent, and it should not be forgotten that she holds a Default Judgment in her favour.

60 Accordingly in assessing the balance of prejudice and hardship to parties, the claimant stated that it would be important for the Tribunal to recall that she now stays in Wales, and so it is difficult for her to travel up to Glasgow for any further Hearing, if the Tribunal were to revoke the existing Default Judgment, and that she has been very open with the respondent from the start of the Tribunal process, and the respondent has only offered documents in "***dribs and drabs***", through Mr Flores, rather than him putting all his "***cards on the table***".

61 As, in effect, the respondent had received five weeks' work from the claimant for free, as the respondent did not pay the claimant the wages due, the claimant submitted that that was a prejudice to her, and that that prejudice would be greater for her if the Default Judgment was to be revoked, which would be the end result of a successful application by the respondent for reconsideration of the Default Judgment , and / or an extension of time for a late ET3 response.

62 Continuing her oral submissions to the Tribunal, the claimant explained the impact of the non-payment of her wages, etc., and the respondent's failure to issue her with even a basic reference for her employment with them, and she further added that, having two jobs now in Wales, if this case was allowed to

proceed as defended, as sought by the respondent, she would need to come back, and pay further expenses, and as the respondent is based here in Glasgow, then the respondent should at least have sent a representative from the business to the Tribunal if Mr Flores was at a meeting in London.

63 The claimant explained that Mr Flores is one of the Directors of the respondent's business, and she invited me to refuse both applications by the respondents, and to confirm the Default Judgment in her favour. Making comment that she believed Mr Flores is a sexist employer, and he had made comments to her based on her religion, she stated that as per her previous correspondence to the Tribunal, on 3 April 2019, that the issue at hand was her unreceived wages.

64 Further, the claimant re-stated that she was not disputing her termination of employment. When she sought to detail the concerns she had about the work environment being uncomfortable, with sexist remarks, and comments from Mr Flores, I stated that that was not part of her ET1 claim form to the Tribunal, which had not included any complaint of alleged unlawful discrimination, on grounds of either of the protected characteristics of sex, or religion and belief, and as such the Tribunal would not be considering any such complaint.

Oral Judgment for the Claimant: Respondent's applications refused by the Tribunal

65 Having heard the claimant's oral submissions, and by oral Judgment delivered *ex tempore* there and then in public Hearing, without the need to adjourn, I stated to the claimant that, in the absence of the respondents, and as provided for under **Rule 47**, I had taken into account the correspondence from the respondent on the Tribunal's case file, and her oral submissions as claimant, and having done so, I refused the respondent's application for reconsideration of the Default Judgment, and for an extension of time to lodge a late ET3, and confirmed the Default Judgment pf 14 March 2019.

66 I stated full written Judgment and Reasons for my oral ruling would follow as soon as possible, to both parties. I further stated that I would instruct the clerk

to the Tribunal to issue an Extract of the Default Judgment, as soon as possible after receipt of the claimant's written application, explaining to the claimant that that was an administrative function for the Tribunal administration, and not a judicial function for me.

5 **Claimant's Application for Preparation Time / Expenses against the Respondent**

67 Next, having regard to the Tribunal's overriding objective, and taking into account the claimant's status as an unrepresented, party litigant, I enquired of her further about the expenses which she had incurred in attending this
10 listed Reconsideration Hearing, and whether, given the terms of her e-mail of 3 April 2019 to the Tribunal, complaining about the conduct of the respondent being "***at best disorganised and unprofessional, and at worst deliberately fraudulent and exploitative***", whether or not she had any application to make to the Tribunal for an application for either preparation
15 time, or expenses, to be payable to her, by the respondent.

68 In reply, the claimant stated that she estimated she had spent two hours preparation time preparing for this Reconsideration Hearing, and in addition to the costs of her flight and hotel, she had also lost two days wages, as she had had to take time off as unpaid leave from her new employment.

20 69 After I had briefly explained the procedure that would be followed by the Tribunal, in the event that an application for preparation time and/or expenses were to be made by her, the claimant stated that she would be content for her application to be dealt with by the Tribunal, on the papers only, and she would not be seeking an oral Hearing, which would require her further personal
25 attendance at the Tribunal, and the associated on costs.

70 To assist the claimant in her understanding of the relevant Tribunal rules, I provided to her my bench copy of **Butterworths Employment Law Handbook,** and drew her specific attention to **Rules 74 to 84 of the Employment Tribunal Rules of Procedure 2013**.

71 Specifically, I referred her to **Rules 74, 75, 76,** as well as **78 and 79,** and also **Rule 84** concerning the respondent's ability to pay as the potential paying party, if any application were made, and granted by the Tribunal. While the claimant stated that she knew Mr Flores is personally very wealthy, and that 5 his daughter is privately educated, and they go on expensive holidays, she stated that she did not have any knowledge about the finances of the respondent's business, and therefore its ability to pay any expenses, if awarded to her by the Tribunal.

72 The claimant then asked me as the presiding Employment Judge what she 10 should do about her allegations of fraud by the respondent. In reply, I stated that that was a matter for her to consider and, if she was so minded, then she should refer the matter to Police Scotland, for investigation, and, if so, she should advise the Employment Tribunal office of the police incident number, and the date of the referral, lest any police investigation might have an impact 15 on any future Tribunal proceedings.

73 The claimant indicated that she understood that the respondent company might have been dissolved, and, in reply, I stated that, before adjourning proceedings, to allow her to consider her position further, and to draft any application for preparation time/expenses, I would instruct the clerk to the 20 Tribunal to clarify the respondent's status via the online Companies House search facility.

74 Proceedings adjourned at 10.54am, for half an hour, for the claimant to consider her position, and draft any further application for the Tribunal's consideration. In the event, proceedings did not resume until 11.44am, when 25 the public Hearing resumed, and I confirmed that, as a result of a search of the Companies House website, by the Tribunal clerk, it had been established that the respondent is still an active company, and that there is no active proposal to strike off the company from the register, although on 5 June 2019, it was recorded on the Companies House website that a compulsory strike off 30 action had been discontinued.

75 The claimant provided to the clerk, for my consideration, a handwritten letter from her as the claimant, seeking an Extract of the Default Judgment, and an application from her, also handwritten, seeking a Preparation Time Order / Expenses Order, against the respondent.

5 **Expenses Application reserved for Further Consideration**

76 The claimant's application for an Expenses and Preparation Time Order reads as follows: -

"***Relating to attendance of the hearing of 19th August 2019, set up for the benefit of the respondent and not attended by them, I***
10 ***incurred the following costs: -***

- ***£150 return flight – Cardiff to Glasgow***
- ***£94 accommodation costs – nights 18th and 19th August 2019.***
- ***2 days leave from work; 14 hours at £10.34 per hour***
- ***2 hours preparation time for the hearing***

15 ***The respondent behaved in a disruptive and unreasonable manner by applying for a rejection of the original response and providing a period in which they would be available for hearings only to provide less than a weeks' notice of their inability to attend todays hearing.***

20 ***The respondent is based locally while I am based in South Wales; they could have attended or sent a representative to a hearing for their benefit. The respondent's unavailability for the significant future made it necessary for me to attend at short notice, despite higher transport costs."***

25 77 The e-mail from the claimant to the Tribunal office, copied to Mr Flores, at 11:32 on Monday, 19 August 2019, attached receipts for her travel and accommodation claimed as part of her expenses, being electronic ticket

receipt from FlyBe dated 14 August 2019 in the sum of **£150.18** and booking confirmation for the Lorne Hotel, Glasgow, for two nights, 18/19 August 2019, in the sum of **£94.00**. In terms of **Rule 79**, the hourly rate is currently **£39 per hour** for preparation time, for preparation time after 6 April 2019.

5 78 Concluding proceedings at 11.50am, I advised the claimant that, as per my oral Judgment, written confirmation would follow in due course, in a written Judgment, with Reasons, and as regards her application for Preparation Time Order / Expenses Order, so as to comply with **Rule 77**, the respondent, as the potential paying party, would have to be provided with a reasonable 10 opportunity to make representations (in writing or at a Hearing) as the Tribunal might order, in response to the application from the claimant.

79 In that regard, I advised the claimant that I would fix a period of 7 days for the respondent to do so, from intimation of this Judgment and Reasons, and for the claimant to have a further period, of 7 days, to respond to any 15 comments/objection by the respondent.

80 Thereafter having regard to the respondent's position, I would decide on any further procedure including, if appropriate, fixing an Oral Hearing, although I noted the claimant's preference for the matter of any opposed Preparation Time/Expenses application to be dealt with on the papers, and without an Oral 20 Hearing.

81 I have made appropriate Case Management Orders in that regard, which are included in my Judgment as detailed above, at paragraphs 3 (a) to (c).

Further Procedure

82 Given my Oral Judgment refusing the respondent's applications, and 25 confirming the Default Judgment, there is no further procedure to be determined by the Tribunal at this stage, other than the matter of the claimant's application for Preparation Time / Expenses Order against the respondents, and I have dealt with that earlier in these Reasons, and in my Judgment above, so I need say nothing further here.

83 The case file will be returned to me after two weeks from date of issue of this Judgment, and Reasons, in order that I can consider any further procedure on that application for Preparation Time/Expenses Order.

Reasons for Oral Judgment: Discussion and Deliberation

5 84 At this Reconsideration Hearing, notwithstanding the lack of attendance by, or representation for, the respondent, I carefully considered both parties' respective positions, and also my own obligations under **Rule 2** to deal with the case fairly and justly. While I gave oral Judgment at the Hearing, refusing the respondent's applications, I reserved my Reasons to be given later, in
10 terms of **Rule 62**. These are now provided below.

Relevant Law

85 At the Hearing, I gave myself a self-direction on the relevant law. Specifically, in paraphrasing it, in brief and layman's terms for the assistance of the claimant as an unrepresented, party litigant, I had in mind certain well-known
15 and familiar case law authorities from the higher Courts regularly cited in such applications before the Tribunal, as well as the express wording of the relevant Tribunal Rules of Procedure.

86 On reconsideration, the reconsideration application requires to be dealt with as per **Rules 70 to 73 of the Employment Tribunals Rules of Procedure**
20 **2013.** As this was an application by the respondent, **Rule 73**, relating to reconsiderations by the Tribunal on its own initiative, does not fall to be considered further.

87 Further, as always, there is the Tribunal's overriding objective, under **Rule 2**, to deal with the case fairly and justly. As there were no properly stated
25 grounds advanced for reconsideration, in any of Mr Flores' earlier communications with the Tribunal, I could not give the reconsideration application any preliminary consideration under **Rule 72**, which is why I previously directed it be listed for Hearing, with both parties ordered to attend.

88 The previous **Employment Tribunal Rules of Procedure 2004** provided a number of grounds on which a judgment could be reviewed (now called a reconsideration). The only ground in the current **2013 Rules** is that the judgment can be reconsidered where it is necessary "***in the interests of justice***" to do so. That means justice to both sides.

89 However, it was confirmed by HHJ Eady QC in **Outasight VB Limited v Brown [2014] UKEAT/0253/14/LA**, now reported at **[2015] ICR D11**, that the guidance given by the Employment Appeal Tribunal in respect the previous Rules is still relevant guidance in respect of the **2013 Rules** and, therefore, I considered the case law arising out of the **2004 Rules.**

90 Judge Eady stated that: "***In my judgment, the 2013 Rules removed the unnecessary (arguably redundant) specific grounds that had been expressly listed in the earlier Rules. Any consideration of an application under one of the specified grounds would have taken the interests of justice into account. The specified grounds can be seen as having provided examples of circumstances in which the interests of justice might allow a review. The previous listing of such examples in the old Rules - and their absence from new - does not provide any reason for treating the application in this case differently simply because it fell to be considered under the "interests of justice" provision of the 2013 Rules. Even if it did not meet the requirements laid down in Rule 34(3)(d) of the 2004 Rules, the ET could have considered whether it should be allowed as in the interests of justice under Rule 34(3)(e). There is no reason why it should then have adopted a more restrictive approach than it was bound to apply under the 2013 Rules".***

91 The approach to be taken to applications for reconsideration was also set out more recently in the case of **Liddington v 2Gether NHS Foundation Trust** [**2016] UKEAT/0002/16/DA** in the judgment of Mrs Justice Simler, then President of the EAT, where she stated that the Employment Tribunal is required to:

> ***"1. identify the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage;***
>
> ***2. address each ground in turn and consider whether is anything in each of the particular grounds relied on that might lead ET to vary or revoke the decision; and***
>
> ***3. give reasons for concluding that there is nothing in the grounds advanced by the (applicant) that could lead him to vary or revoke his decision."***

92 In paragraph 34 and 35 of the Judgment, the learned EAT President, Mrs Justice Simler, stated as follows:

> **34**. ***In his Reconsideration Judgment the Judge identified the Rules relating to reconsideration and in particular to the provision in the Rules enabling a Judge who considers that there is no reasonable prospect of the original decision being varied or revoked refusing the application without a hearing at a preliminary stage. In this case, the Judge addressed each ground in turn. He considered whether was anything in each of the particular grounds relied on that might lead him to vary or revoke his decision. For the reasons he gave, he concluded that there was nothing in the grounds advanced by the Claimant that could lead him to vary or revoke his decision, and accordingly he refused the application at the preliminary stage. As he made clear, a request for reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to reargue matters in a different way or adopting points previously omitted. There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications***

are a limited exception to that rule. They are not a means by which to have a second bite at the cherry, nor are they intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered. Tribunals have a wide discretion whether or not to order reconsideration, and the opportunity for appellate intervention in relation to a refusal to order reconsideration is accordingly limited.

35 ***Where, as here, a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application. It seems to me that the Judge was entitled to conclude that reconsideration would not result in a variation or revocation of the decision in this case and that the Judge did not make any error of law in refusing reconsideration accordingly.***

93 In considering this reconsideration application, I also took into account the helpful judicial guidance provided by Her Honour Judge Eady QC, EAT Judge, in her judgment delivered on 19 February 2018, in **Scranage v Rochdale Metropolitan Borough Council [2018] UKEAT/0032/17**, at paragraph 22, when considering the relevant legal principles, where she stated as follows (underlining is my emphasis): -

"***The test for reconsideration under the ET Rules is thus straightforwardly whether such reconsideration is in the interests of justice (see Outasight VB Ltd v Brown UKEAT/0253/14 (21 November 2014, unreported). The "interests of justice" allow for a broad discretion, albeit one that must be exercised judicially, which means having regard not only to the interests of the party seeking the***

review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation."

94 Further, I also took into account the Court of Appeal's judgment, in **Ministry of Justice v Burton & Another** **[2016] EWCA Civ.714**, also reported at **[2016] ICR 1128**, where Lord Justice Elias, at paragraph 25, refers, without demur, to the principles ***"recently affirmed by HH Judge Eady in the EAT in Outasight VB Ltd v Brown UKEAT/0253/14."***

95 Also, at paragraph 21 in **Burton**, Lord Justice Elias had stated that:

"***An employment tribunal has a power to review a decision "where it is necessary in the interests of justice": see Rule 70 of the Tribunal Rules. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, as Underhill J, as he was, pointed out in Newcastle on Tyne City Council v Marsden [2010] ICR 743, para. 17 the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. In particular, the courts have emphasised the importance of finality (Flint v Eastern Electricity Board [1975] ICR 395) which militates against the discretion being exercised too readily…"***

96 On extensions of time, I took account of the helpful judicial guidance from the judgment of Mrs Justice Simler DBE, then President of the Employment Appeal Tribunal, in **Grant v Asda** **[2017] UKEAT/0231/16/ BA**, and reported at **[2017] ICR D17**, in particular at paragraphs 17 and 18, as follows, which I reproduce here for ease of reference:

"17. *Again, unlike its predecessor, Rule 20 permits an application for an extension of time after the time limit has expired. Rule 20 is otherwise silent as to how the discretion to extend time for presenting an ET3 is to be exercised. Guidance on the approach to be adopted by tribunals in exercising their discretion was given in* ***Kwik Save Stores Ltd v Swain***

[1997] ICR 49 EAT*, a case concerning a respondent's application for an extension of time under* ***the Employment Tribunal Rules 1993****. Mummery J gave guidance at pages 54 to 55:*

"The discretionary factors

5 ***The explanation for the delay which has necessitated the application for an extension is always an important factor in the exercise of the discretion. An applicant for an extension of time should explain why he has not complied with the time limits. The tribunal is entitled to take into account the nature of the explanation and to form a view 10 about it. The tribunal may form the view that it is a case of procedural abuse, questionable tactics, even, in some cases, intentional default. In other cases it may form the view that the delay is the result of a genuine misunderstanding or an accidental or understandable oversight. In each case it is for the tribunal to decide 15 what weight to give to this factor in the exercise of the discretion. In general, the more serious the delay, the more important it is for an applicant for an extension of time to provide a satisfactory explanation which is full, as well as honest.***

In some cases, the explanation, or lack of it, may be a decisive factor 20 in the exercise of the discretion, but it is important to note that it is not the only factor to be considered. The process of exercising a discretion involves taking into account all relevant factors, weighing and balancing them one against the other and reaching a conclusion which is objectively justified on the grounds of reason and justice. 25 An important part of exercising this discretion is to ask these questions: what prejudice will the applicant for an extension of time suffer if the extension is refused? What prejudice will the other party suffer is the extension is granted? If the likely prejudice to the applicant for an extension outweighs the likely prejudice to the other 30 party, then that is a factor in favour in granting the extension of time, but it is not always decisive. There may be countervailing factors. It

is this process of judgment that often renders the exercise of a discretion more difficult than the process of finding facts in dispute and applying them to a rule of law not tempered by discretion.

It is well established that another factor to be taken into account in deciding whether to grant an extension of time is what may be called the merits factor identified by Sir Thomas Bingham MR in Costellow v Somerset County Council [1993] 1 WLR 256, 263:

> ***"a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate."***

Thus, if a defence is shown to have some merit in it, justice will often favour the granting of an extension of time, since otherwise there will never be a full hearing of the claim on the merits. If no extension of time is granted for entering a notice of appearance, the industrial tribunal will only hear one side of the case. It will decide it without hearing the other side. The result may be that an applicant wins a case and obtains remedies to which he would not be entitled if the other side had been heard. The respondent may be held liable for a wrong which he has not committed. This does not mean that a party has a right to an extension of time on the basis that, if he is not granted one, he will be unjustly denied a hearing. The applicant for an extension has only a reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner. That will involve some consideration of the merits of his case."

97 The approach set out by Mummery J was subsequently adopted in relation to the **2004 Rules** in **Pendragon plc (t/a CD Bramall Bradford) v Copus [2005] ICR 1671 EAT**. In our judgment, it applies with equal force to the **2013 Rules**. So, in exercising this discretion, tribunals must take account of all relevant factors, including the explanation or lack of explanation for the delay

in presenting a response to the claim, the merits of the respondent's defence, the balance of prejudice each party would suffer should an extension be granted or refused, and must then reach a conclusion that is objectively justified on the grounds of reason and justice and, we add, that is consistent
5 with the overriding objective set out in **Rule 2** of the **ET Rules.**

98 I also took into account the Judgment of another former President of the Employment Appeal Tribunal, Mr Justice Underhill, in **Thornton v Jones [2011] UKEAT/0061/11**, which is in similar terms to the recent **Grant v Asda** case law.

10 99 Having taken that relevant law into account, and having regard to the claimant's oral submissions, and the respondent's position as articulated in their correspondence held on the Tribunal file, I decided it was appropriate, having heard from the claimant, and in the absence of any competing arguments from the respondent to assist the Tribunal in better understanding
15 the respondent's position, and in particular its position as regards reconsideration of the Default Judgment, and / or allowing an extension of time for a late ET3 response, that the interests of justice should weigh in favour of the claimant's position, holding the Default Judgment, prevailing.

100 In coming to that decision, rather than postponing the Hearing, for a third time,
20 and so further prolonging proceedings, with no guarantee that the respondent would appear at any reconvened Hearing, I also decided that it was appropriate to confirm the Default Judgment, so that the claimant can seek to enforce that Judgment, and so recover the sums found owing and due to her as per that Default Judgment, the respondent not having paid her the amounts
25 ordered on 14 March 2019, and not, so far as this Tribunal is aware, having appealed against that Judgment to the Employment Appeal Tribunal.

101 Even if the respondent had appeared or been represented at this Hearing , and persuaded this Tribunal that it was appropriate to revoke that original Default Judgment, and relist the case for a Final Hearing, that would not be a
30 Final Hearing before sometime in October 2019, when, had the respondent timeously lodged an ET3 response to defend the claim, by 21 February 2019

as per the Notice of Claim sent to them on 24 January 2019, then the claim could have proceeded to the listed Final Hearing on 5 April 2019. However, they failed to do so.

102 The reason proffered in correspondence from Mr Flores is that they never received that Notice of the Claim. The letter sent to them was not returned to the Tribunal by the Post Office as undelivered. In terms of **Rule 90 of the Employment Tribunal Rules of Procedure 2013**, a document served by the Tribunal is taken to have been received, **unless the contrary is shown**.

103 The respondent here has not shown the contrary. Mr Flores' email of 20 March 2019, replying to the Tribunal's letter of 14 March 2019, posted to that same address for the respondent, shows that that letter was received.

104 If any business operates a mail system whereby, as Mr Flores' email of 20 March 2019 states, "***We occupy a business centre that has a secured entry system which is not manned and a lot of times we don't receive mails, there is no means for the postman to deliver our mails if there is no one in our office, which is most of the time",*** then they must face the consequences arising from deemed proper service on them, as far as the Tribunal is concerned, at the time when, there being no ET3 response lodged, Default Judgment was issued against the respondent.

105 Given the Tribunal's, and parties' obligations, to ensure that cases are dealt with fairly and justly, including avoiding delay, so far as reasonably practicable, to have granted the respondent's applications would have been unfair and unjust to the claimant, as that would mean the claimant losing the Default Judgment that she holds, and also having to wait a significantly longer period of time for her case to be heard by the Tribunal, as also the respondent's defence, in circumstances where I was not satisfied, in the absence of any proper explanation from the respondent, or a representative on their behalf, that there was any reasonable likelihood of success on their part in resisting the claim, based on my analysis of the ET1 and ET3, and the supporting documentation, so far provided to the Tribunal, by both parties.

106 The interests of justice require that I have regard to the interests of not just the respondent, but also the claimant, and indeed the wider administration of justice. There was nothing before me, at this Hearing, from the respondent, that allowed me to consider that granting their opposed applications would be in the interests of justice. If anything, the respondent's conduct of these proceedings to date looked just like what the claimant was stating, being no more than "***delaying tactics***".

Postscript

107 In writing up this Judgment**,** the clerk to the Tribunal has referred to me subsequent emails received from Mr Flores, and the claimant, dated 19 August 2019, and forwarded to the Tribunal by the claimant, on 20 August 2019.

108 Mr Flores' email of 19 August 2019, at 13:45, to the claimant, states "***We will not be paying these Expenses",*** as the passenger name given is not Alicia Carpenter. The claimant replied to him, at 16:46 that same day, advising that her passport is indeed in a previous surname, but if required, she can provide a change of name deed.

109 While a change of name deed is not required by the Tribunal, what the Tribunal does require is the respondent's comments or objections to the claimant's application of 19 August 2019 for expenses / preparation time.

110 On receipt of the respondent's reply, **within no more than 7 days of this Judgment and Reasons being served upon them,** I will then determine any necessary further procedure.

Employment Judge: Ian McPherson
Date of Judgment: 26 August 2019
Date sent to parties: 04 September 2019