Case No: 2603403/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Williams**

Respondent: **E.ON UK Plc**

Heard at: **Nottingham** **On:** **24 February 2020**

Before: **Employment Judge M Butler (sitting alone)**

Representation
Claimant: **Ms M Stanley of Counsel**
Respondent: Mr M Bidnell-Edwards of Counsel

UPON APPLICATION made by letter dated 29 January 2020 to reconsider the judgment under rule 71 Employment Tribunals Rules of Procedure 2013 dated 20 January 2020.

JUDGMENT

1. The judgment is revoked as follows and the Respondent granted an extension of time in which to file its response submitted on 29 January 2020.

2. The response has been accepted.

REASONS

Background

1. By a claim form submitted on 22 November 2019 the Claimant brought claims of unfair dismissal and disability discrimination against the Respondent. There had been a period of early conciliation from 27 September 2019 to 23 October 2019. The Claimant worked for the Respondent as a Customer Service Adviser from 4 April 2008 until 10 September 2019 when he was dismissed on capability grounds with effect from 10 September 2019.

2. In the normal course of dealing with new claims, the Tribunal sent a copy of the claim form to the Respondent with the usual instructions as to the date on which any response should be submitted. By letter of 12 December 2019, the Tribunal pointed out that the response should be received by 9 January 2020.

3. No response was received by that date and a default judgment was given on 20 January 2020.

4. Upon receiving the default judgment, the Respondent immediately contacted its solicitors, Pinsent Masons LLP, to ascertain why the response had not been filed.

The solicitor with conduct of the matter at Pinsent Masons LLP was Mr Shabudin, an Associate Solicitor with the firm. Mr Shabudin submitted a witness statement at the reconsideration hearing outlining that the claim form had been sent to him by the Respondent on 19 December 2019, he sent a first draft of the response to the Respondent on 2 January 2020, received a few comments on the draft from the Respondent and then on 6 January 2020 sent the Respondent a final draft of the grounds of resistance. The Respondent confirmed its acceptance of that document on 7 January when Mr Shabudin prepared an e-mail to be sent to the Tribunal attaching the response. Unfortunately, he then forgot all about it until hearing from the Respondent on 29 January with a copy of the default judgment. An application to revoke the default judgment was immediately submitted to the Tribunal by email with a copy of the response attached thereto and a request that time be extended to submit that response.

5. The Claimant, through his solicitors, objected to the application and hence the matter came before me.

The law

6. Rule 71 of the Rules of Procedure provides:

> "Except where it is made in the course of the hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons that were sent (if later) and shall set out why reconsideration of the original decision is necessary."

7. During the course of the hearing I was referred to the following authorities:

> **Kwik Save Stores Limited v Swain and Others** [1997] EAT
> **Andrew Mitchell MP v News Group Newspapers Limited** [2013] EWCA Civ 1537
> **Office Equipment Systems Limited v Ms J Hughes** UK EAT/0183/16/JOJ

The Evidence

8. Although the Claimant and Mr Shabudin both produced witness statements, the parties agreed that the matter should proceed on the basis of submissions only.

9. There was a bundle of documents which was prepared for a remedy hearing and which was not relevant to the reconsideration hearing.

Submissions

10. It was not argued before me that the Respondent's solicitors had failed to comply with the requirements of rule 71.

11. The submissions of the parties largely concentrated on the judgments in **Office Equipment** and **Kwik Save**.

12. For the Respondents, Mr Bidnell-Edwards pointed out that the response and application for a reconsideration were submitted to the Tribunal as soon as the default judgment was received by the Respondent.

That response was only 20 days late. Relying on the **Kwik Save** judgment he said this was a clear example of the kind of mistake for which I should exercise discretion. The Respondent has a complete defence to both claims. Further, the mistake was genuine and Mr Shabudin had been honest as to why the deadline was missed.

13. For the Claimant, Ms Stanley submitted that I should consider the reason for the extension of time application, the length of the delay, the balance of prejudice to the parties and the merits of the case. Following the **Office Equipment** and **Mitchell** case she submitted it would be appropriate for me to take a stricter line in considering the application solely on the Respondent's default. She sought to distinguish between fault lying between the Respondent and its solicitors and there was no good reason for the delay. This could be distinguished from the **Kwik Save** judgment where fault was entirely the Respondent's. Further, the prejudice to the Claimant would be greater than that to the Respondent because if the default judgment is revoked the Claimant will suffer further delay and stress and have to wait for his compensation. She also made the point that any award would presumably be covered by the Respondent's solicitor's insurance policy so the Respondent would suffer no prejudice.

Conclusions

14. There is no dispute before me as to whether the Respondent complied with rule 20 in relation to an application for an extension of time for presenting its response.

15. This case really turns on an interpretation of the decisions in **Office Equipment** and **Kwik Save**. The headnote in **Kwik Save** provides that I must take account of all relevant factors, including the explanation or lack of explanation for the delay and the merits of the defence, weighing and balancing them one against the other, and to reach a conclusion which is objectively justified on the grounds of reason and justice. It is important when doing so to balance the possible prejudice to each party. I may take into account the nature of the explanation for the failure to file a response in time. This may entail forming the view that it is a case of procedural abuse, questionable tactics or even intentional default. I may also form the view that the delay is the result of a genuine misunderstanding or an accidental or understandable oversight. It is for me to decide what weight to give to these factors. I must ask what prejudice will the Respondent suffer if the extension is refused and what prejudice will the Claimant suffer if the extension is granted.

16. **Kwik Save** also provides that 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. I bear in mind that if this application is refused the Claimant may obtain remedies to which he would not be entitled if the Respondent is not heard. Further, the Respondent may be held liable for a wrong which it has not committed.

17. It was argued before me that the **Office Equipment** judgment proposes a stricter line than previously taken in **Kwik Save.** Relying on the CPR as

applicable in **Mitchell**, the Claimant's submission was, if I understand it correctly, that the application for an extension of time should be based solely on the Respondent's default. That is not what actually happened in that case. The EAT found there to be an error in the Employment Tribunal's reasoning since it had failed to consider one of the alternative defences put forward by the Respondent in its out of time response.

18. In my view, when considered closely, the judgment in **Office Equipment** does not contradict that in **Kwik Save**. It clearly notes that the principles in **Kwik Save** are still to be considered and it does not propose that the CPR should always be applicable and taken into account in such cases. In any event, the facts in **Office Equipment** are clearly distinguishable from those before me now.

19. I have considered all relevant factors in reaching my decision. The explanation given for the failure to submit the response on time, whilst unpalatable from a practitioner's point of view, is none the less a valid one. Whilst it does not say much for the Respondent's solicitor's diary management in apparently failing to note the date the response was due by means of a diary alert and confirming it had been sent, Mr Shabudin's statement clearly shows there was a genuine oversight on his part and this was not challenged by the Claimant.

20. The Respondent's application attached to it the response on which it seeks to rely. In considering the merits of that response, I note that it is full and comprehensive and answers each and every aspect of the Claimant's claims. At the very least, therefore, it shows an arguable case. I also bear in mind that the application and the response were submitted on the same day that the Respondent became aware of the default judgment. There was no further delay.

21. I must also consider the potential prejudice to the parties in granting or refusing the application. Who would suffer the greater prejudice? In my view the answer must be that it would be more prejudicial to the Respondent to refuse the applications. It has an arguable defence which clearly has merit. From the Claimant's point of view, he will not suffer a considerable delay in having his claims heard as the original allocated date for the substantive hearing is preserved. In the correspondence before me, there was some argument as to whether or not the Claimant would have the benefit of a financial windfall if the applications were refused. I consider that in refusing the applications, he would indeed potentially get the benefit of a windfall. The argument before me was that the prejudice would be in the delay in receiving his compensation; but it cannot be right that he should receive such compensation at a much earlier date when if the response had been filed within the time limit he would, if successful, have had to wait several months for a substantive hearing.

22. Accordingly, having considered all of the circumstances in this case, I conclude that the interests of justice are best served in allowing the application for a reconsideration of the default judgment and for an extension of time to file the response which is now accepted.

____

Employment Judge M Butler

Date: 28 February 2020

JUDGMENT SENT TO THE PARTIES ON

....

....
FOR THE TRIBUNAL OFFICE