



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr Ben Jarvis

AND

Respondent
DX Network Services Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth
(Public Hearing by Telephone)

ON

6 April 2020

EMPLOYMENT JUDGE N J Roper

Representation:

Claimant: In person

Respondent: Ms S Bowen of Counsel

JUDGMENT ON APPLICATION TO RECONSIDER RULE 21 JUDGMENT

The judgment of the tribunal is that:

1. The respondent's application for reconsideration is allowed; and
2. The Judgment dated 3 January 2020 is revoked; and
3. The respondent's notice of appearance is accepted out of time.

REASONS

1. The respondent has sought a reconsideration of the judgment entered under Rule 21 dated 3 January 2020 which was sent to the parties on 7 January 2020 ("the Judgment"), and has made an application for an extension of time to serve its response. The grounds are set out in its e-mail letter dated 14 January 2020. That letter was received at the tribunal office on 14 January 2020. The respondent has also subsequently served its proposed notice of appearance in defence to the claim, and a statement from Marie Maguire who is the respondent's Senior Employment Legal Counsel.
2. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2015 ("the Rules"). Under Rule 21(2) judgment can be issued

- where no response has been presented within the time limit in Rule 16, or a response has been rejected and no application for reconsideration is outstanding, or the respondent has stated that no part of the claim is contested.
3. Under Rule 71 an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received within the relevant time limit.
 4. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.
 5. The grounds relied upon by the respondent are that these proceedings were never received by the respondent, and the first occasion upon which the respondent received correspondence from the Tribunal was the Judgment itself. The respondent then immediately made an application for reconsideration on the basis that the proceedings had never been received, and that the respondent had a defence to the claims.
 6. The background in more detail is this. The claimant issued these proceedings on 18 November 2019 claiming unfair constructive dismissal, age discrimination, unlawful deduction from his wages, and for accrued but unpaid holiday pay. The proceedings were served by the Tribunal office to the respondent's correct address. In default of any response, the Judgment was entered under Rule 21 in favour of the claimant in respect of his claim for unfair dismissal, age discrimination, unlawful deduction from wages, and for accrued but unpaid holiday pay.
 7. The respondent denies ever having received the original proceedings, and the statement from Marie Maguire explains the system which the respondent has in place for processing received mail, and how any proceedings, if received, would have been referred immediately to either the legal department for the HR Department. Following detailed enquiry neither department ever received them.
 8. The respondent's defence to the claim is not speculative and appears to have potential merit, and arguably has good prospects of a successful outcome. In particular it asserts that there was no repudiatory breach of contract, and the majority of the complaints raised by the claimant postdate his decision to resign. In addition, the claimant has not identified any acts or omissions which he asserts were related either directly or indirectly to his age. The respondent also asserts that it made the appropriate payments to the claimant with regard to his wages and holiday pay.
 9. Under the previous Rules of Procedure (relating to the review of what were called Default Judgments) the EAT gave guidance on the factors which tribunals should take into account when deciding whether to review a default judgment in Moroak t/a Blake Envelopes v Cromie [2005] IRLR 535. The EAT held that the test that a tribunal should apply when considering the exercise of its discretion on a review of a default judgment is what is just and equitable. In doing so, the EAT referred to the principles outlined in Kwik Save Stores Ltd v Swain and others [1997] ICR 49.

10. In the Kwik Save decision, the EAT held that "... 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". The case established that an Employment Judge should always consider the following three factors. First, the explanation supporting an application for an extension of time. The more serious the delay, the more important it is that the Employment Judge is satisfied that the explanation is honest and satisfactory. Secondly, the merits of the defence. Justice will often favour an extension being granted where the defence is shown to have some merit. Thirdly, the balance of prejudice. If the employer's request for an extension of time was refused, would it suffer greater prejudice than the employee would if the request was granted?
11. This guidance in Kwik Save was approved by reference to the subsequent 2013 Rules in Office Equipment Systems Ltd v Hughes UKEAT 0183/16/JOJ.
12. I have also considered the case of Pendragon Plc (trading as C D Bramall Bradford) v Copus [2005] ICR 1671 EAT which confirms that in conducting a reconsideration of a Rule 21 Judgment (formerly a review of a default judgment under the previous Rule 33) an Employment Judge has to 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 the possible prejudice to each party, and to reach a conclusion that was objectively justified on the grounds of reason and justice.
13. Applying these principles in this case, I am satisfied that the respondent did not receive these proceedings through the post and that it has an arguable defence to the claimant's claims. The greater prejudice would lie in refusing the application for reconsideration. Whereas the claimant would lose the windfall of being able to rely on the Judgment, the respondent would be precluded from pursuing its defence to the claim in circumstances where it is still capable of a fair hearing. The claimant remains able to pursue his claims in full to that fair hearing.
14. Accordingly, I allow the application for reconsideration pursuant to Rule 70 and the Judgment is hereby revoked. I also allow the application for an extension of time and the respondent's response is accepted. Case management orders will follow so that the matter progresses.

Employment Judge N J Roper

Dated 6 April 2020

Judgment sent to Parties
