EMPLOYMENT TRIBUNALS

Claimant: Miss K Skrok

Respondent: Populus Resources Ltd

UPON APPLICATION made by letter dated **22nd October 2019** to reconsider the judgment under rule 71 Employment Tribunals Rules of Procedure 2013 dated **26th September 2019** and without a hearing,

JUDGMENT

1. The judgment dated 26th September 2019 is confirmed.

REASONS

1. The claimant presented her claim to the Tribunal on 1st August 2019. The notice of claim and ET1 was sent to the respondent by first class post on 9th August 2019. The matter was listed for a case management preliminary hearing on 26th September 2019. The notice of hearing was dated 9th August 2019. It was also sent by first class post. The deadline for presentation of a completed ET3 by the respondent was 6th September 2019. No response was presented.

2. The hearing took place on 26th September 2019. The respondent did not attend, was not represented and did not correspond with the Tribunal regarding the proceedings. Following the hearing the rule 21 judgment was sent to the parties on 8th October 2019.

3. The respondent requested a reconsideration of the judgment by correspondence dated 22nd October. The respondent's position was that it was not present at the hearing because it was not aware that it was taking place. The relevant correspondence from the Tribunal had not been delivered by recorded delivery and did not required a recipient's signature. It had been delivered to an office which is shared with other companies and had been left on a pile. The correspondence was not discovered until after the hearing had taken place. The respondent indicated that it had taken legal advice on the

matter. A request was made for an extension of time to present the ET3 but no draft completed ET3 was attached. The respondent indicated that the claimant's pregnancy only came to light once she was already working at the respondent's client's warehouse. The client requested that the claimant be taken off the assignment. The respondent feels that the claim should be against its client rather than against itself. The respondent asserts that the claimant was a temporary worker and it was not contractually required to provide any other work for the operative if she was no longer required by the client.

4. On 27th November 2019 the Tribunal requested the claimant's comments on the respondent's application and asked her whether she wanted a hearing or for the application to be dealt with on the papers.

5. Via email dated 9th December 2019 the claimant responded to the application for a reconsideration She indicated that she disputed the facts asserted by the respondent and maintained that she had notified the respondent of her pregnancy from the outset.

6. Via email dated 10th December 2019 the respondent confirmed that its preference was for the reconsideration application to be dealt with without a hearing. It indicated that it intended to send a draft completed ET3 to the Tribunal.

7. The Tribunal sent a letter to the respondent dated 20th December 2019 requiring the respondent to send any draft grounds of resistance to the claim to the Tribunal by 10th January 2020 with an application to extend time explaining why those grounds could not have been provided by 6th September 2019 when they were originally due.

8. The respondent sent an "official" application to extend time for presentation of the ET3 dated 9th January 2020 and emailed to the Tribunal on 10th January 2020. On 14th January it appeared on the Tribunal file that no draft ET3 response form had been sent by the respondent and so Judge Lancaster refused the application. On 14th January 2020 the respondent clarified that it had submitted its ET3 online on 10th January. A copy was subsequently retrieved by the Tribunal administration. It largely reiterated the contents of the reconsideration application in that it maintained the claimant was a temporary worker, that there was no obligation to provide further work if the client no longer required her services, that the claimant did not disclose her pregnancy before she started the assignment and the client asked the respondent to terminate the claimant's assignment.

9. The claimant responded to the Tribunal's correspondence on 20th January 2020 saying she was happy to have a new hearing and would require a polish interpreter. The respondent did not respond to say whether it wanted a hearing or to provide any further written representations.

10. The reconsideration hearing was due to take place on 15th April 2020. It was cancelled in light of the impact of Covid 19 on Tribunal hearings. The Tribunal wrote to the parties indicating that I was minded to determine the application on the papers given the likely difficulty in organizing a hearing within a reasonable timescale and asking the parties for their views. The claimant

confirmed that she was happy for the hearing to be dealt with on the papers. The respondent did not respond to the request for its views on the matter.

11. In light of the above chronology both parties have had adequate opportunity to convey their views and representations in writing prior to me determining the application.

12. In determining the reconsideration application, I must consider whether it is necessary in the interests of justice for the judgment to be reconsidered (rule 70 of the Tribunal Rules of Procedure.

13. In this case both the ET1 and the notice of hearing were properly served on the respondent. Rule 90 of the Tribunal Rules of Procedure indicates that the documents were delivered and the onus is on the respondent to prove that they were not received. The respondent effectively confirms that they were delivered but just says that it did not open them because they were sent to a shared office address and were mixed up with mail for other companies. Indeed, they were not opened because they looked like “circulars”. There is no indication that someone from another company picked up or removed the correspondence by mistake thereby depriving the respondent of the opportunity to deal with the claim. Rather, the respondent failed to implement appropriate systems to ensure that it opened and read all mail addressed to it.

14. The respondent’s office arrangements are its own affair but it could and should have had appropriate measures in place to ensure that properly delivered mail was opened and read within a reasonable timescale. It has given no good reason why this did not happen in this case. It could and should have read the correspondence in time to file its completed ET3 or, at the very least, attend the hearing on 26th September. The respondent has had the opportunity to provide further information or details to justify its failure to act but has not done so.

15. The respondent indicated in its application that it had taken legal advice and yet it did not include a draft completed ET3 with that application. The respondent had to be asked twice by the tribunal before it provided that ET3 on 10th January 2020. It gave no explanation why the ET3 was not completed and filed sooner, particularly why it did not accompany the reconsideration application or the application for an extension of time.

16. In determining this application I have considered the overriding objective to deal justly and fairly with the case including matters of proportionality and the interests of both parties.

17. The need for reconsideration arises entirely as a result of the respondent’s own actions. It had a proper opportunity to respond to the claim and attend the initial hearing. It has not provided its draft response in a timely manner. There is a public interest in finality in litigation. There is also a need to deal with matters proportionately to the value of the case and the issues in dispute.

18. Whilst the respondent has completed its ET3 form the response is lacking in detail. It does not deal at all with the issue of unauthorised deductions from wages or holiday pay. It does not apparently dispute that the respondent was the claimant’s employer, albeit on a temporary, agency basis. Nothing is said about why the claimant could not be redeployed elsewhere if there was a

health and safety issue arising from the pregnancy. Whilst it is asserted that there should be a claim against the respondent's client, the Response does not indicate why there cannot be claims against both the end user/client and the respondent. The fact that there may be a potential second respondent does not automatically mean that this respondent is not an appropriate party to proceedings. The respondent's defence to the claims does not, on the papers, appear particularly meritorious.

19. I have also considered the overriding objective of dealing with cases justly and the balance of prejudice between the parties. Whilst the respondent is now subject to a judgment which it could have avoided there is substantial inequality of arms between the parties. Whilst the respondent says that it has been able to take legal advice the claimant has not been in a position to do so. She is without funds, is a new mother and English is not her first language. She would also need considerable assistance from an interpreter if the proceedings were to be reopened.

20. On balance and taking into consideration all the available information it is not necessary in the interests of justice to revoke or vary the original judgment in this case and it is also not appropriate for me to grant an extension of time for presentation of the respondent's ET3 response. The original judgment is maintained in force.

Employment Judge Eeley
18th May 2020