EMPLOYMENT TRIBUNALS (ENGLAND & WALES)
LONDON CENTRAL

BETWEEN

Claimant	Mr D Wilson
Respondent	Vision Security Group Ltd
Employment Judge:	Mr J S Burns
Representation	
Claimant:	In person
Respondent	Ms N Welsh (Solicitor)

Judgment

following a hearing held on the telephone on 11/6/2020

The Respondent's applications to set aside the judgment in this matter on 13 March 2020 by way of reconsideration under rule 70, and for an extension of time for presenting its response, are dismissed.

Reasons

Facts

1. The Claimant resigned from his employment as a security officer with the Respondent on 6/4/2019. On 16/6/2019 he presented an ET1, claiming unfair constructive dismissal – and in particular that he had experienced prolonged and various problems when he had tried to arrange annual leave, starting in 2017, continuing in 2018 and with the final straw being problems in 2019, and that this had caused him to resign.

2. The ET1 was sent by the tribunal to the Respondent on 20/9/2019, with a notice that the Respondent's response to the claim was required by 18/10/2019, and further that there would be a final hearing of the claim at Victory House, London, on 11 and 12 March 2020. This material was sent to the Respondent's correct address namely 650 Pavilion Drive, Northampton Business Park, Northampton, NN47SL.

3. ACAS sent the Respondent (also at the same correct address) a letter dated 16/10/2019 referring to the claim and offering its services to try to help resolve it. This letter was marked for the attention of "*the Personnel Manager/Director*".

4. On 26/2/2020 the Claimant, by way of preparation for the hearing in March, sent a letter to both the tribunal and to the Respondent, which letter refers to both the claim number and to the tribunal in which it was proceeding. The Claimant sent his letter to the Respondent at its correct address by recorded delivery and he has produced the Royal Mail Ltd proof of delivery of the letter on 27/2/2020.

5. There was no response from the Respondent to any of the above communications.

6. On 10/3/2020 the tribunal issued a notice that, as the Respondent had not entered a response, the hearing was to be curtailed to 2 hours on 11/3/2020. This notice was received by the Respondent only after the hearing had taken place.
7. On 11/3/2020 there was no appearance by or on behalf of the Respondent at the hearing, at which the Claimant appeared and gave unchallenged evidence on oath in support of his claim. I accepted his evidence and entered judgment in his favour for damages payable by the Respondent to him in the sum of £26633.80

8. The judgment was issued by the Tribunal on 13/3/2020 and came to the attention of a Respondent HR manager in Northampton on 17/3/2020. Steps were then taken to instruct the Respondent's lawyers, who made an application by email on 2/4/2020 for an order setting aside the judgment and for an extension of time to serve the ET3. Draft Grounds of Resistance dated 5/4/2019 were then filed on 11/5/2020.

9. These Draft Grounds do not deal with the claimed problems prior to 2019 referred to by the Claimant, and admit that there were problems when the Claimant tried to book his annual leave in 2019, but state that this was caused by a new IT system which caused "*technical'* and "*teething*" problems" and by a lack of managers who knew how to log leave onto the system correctly.

10. When the application was brought to my attention I gave directions for some additional information to be provided, which I have considered.

11. This includes a witness statement dated 5/6/2020 from Bethan Eades, a paralegal employed in Bristol by the Respondent. In it she states that a search has found no record of any communication of or about the claim being received by the Respondent's Northampton office prior to its receipt of the judgment. She also states that the Respondent "*has robust safeguards in place to ensure that no claim is missed"*. However, she gives no details as to what, if any, specific arrangements or safeguards were in fact in place in the Northampton office to record and deal responsibly with incoming correspondence.

12. Ms Eades asserts *'I am more than confident in saying that it is highly likely that the claim was never received."*

13. I received further oral submissions during a 30 minute telephone hearing today.

The law

14. The leading authority on extensions of time for presenting a response, albeit under a previous version of the Rules, is the decision of the Employment Appeal Tribunal in Kwik Save Stores Ltd v Swain and others [1997] ICR 49. Mummery J pointed out that time limits are laid down as a matter of law and are therefore requirements to be met, particularly in employment tribunal litigation which is intended to provide a quick, cheap and effective means of resolving employment disputes *("failure to comply with the rules causes inconvenience, resulting in delay and increased costs*"). He then outlined the essential principles to consider in deciding whether to permit a response to be presented late: *"The explanation for the delay which has necessitated the application for an extension is always an important factor in the exercise of the discretion ... The tribunal is entitled to take into account the nature of the explanation and to form a view about it ... In each case it is for the tribunal to decide 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 in the exercise of the discretion, but it is important to note that it is not the only factor to be considered". … "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 if the extension is granted? If the prejudice to the applicant for an extension outweighs the prejudice to the other party, then that is a factor in favour of granting the extension of time, but it is not always decisive. There may be countervailing factors. If a defence is shown to have some merit in it, justice will often favour the granting of an extension of time ... That 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".

15. Whether the default judgment should be set aside and an extension should be granted is essentially a discretionary matter for the Tribunal considering the case, weighing up the various relevant factors as above. Also, I must have regard to the overriding objective to deal with cases fairly and justly, including, so far as practicable, ensuring the parties are on an equal footing, but also avoiding delay, so far as compatible with proper consideration of the issues and saving expense.

Consideration

The reasons for the delay and failure to defend

16. I do not share Ms Eade's view of the matter (that it is highly likely that the ET1 was not received by the Respondent).

17. It is highly unlikely that three separate pieces of correspondence all referring to the claim, and sent in September 2019, October 2019 and February 2020 respectively, and all to the correct address, would not have been delivered to the Respondent. We have positive confirmation that the February letter, which refers clearly to the claim, was in fact delivered by Royal Mail Ltd, yet that too, apparently, is unable to be found.

18. I find on a balance of probabilities that the ET1 and notice of the hearing were delivered to and received by an employee or employees of the Respondent in Northampton, on or about 22/9/2019, but that through inefficiency, negligence, recklessness or other similar failure they were simply not dealt with, and that similar problems caused the Respondent to ignore the ACAS and Claimant letters.

19. The generalised assertions that robust safeguards were in place do not bear scrutiny. If robust safeguards and record keeping were in place these communications would have been dealt with. Any one of these communications should have been enough to alert a reasonable employer to the fact that a claim had been made. It goes without saying that a large employer such as the Respondent should deal with legal matters in a business-like fashion.

20. There is therefore no good and acceptable reason for the Respondent's failure to defend the claim and for its non-appearance at the trial.

The merits of the draft defence

21. I have not heard the evidence and cannot reach a fully considered view of the merits of the draft defence at this stage. However, I note that the draft Grounds of Resistance admit that there were problems affecting the Claimant booking his leave in 2019. The ability to take annual leave is an important right of employees. An employer frustrating and hindering an employee in this regard is likely to be in fundamental breach. The fact that the admitted 2019 problems in this case may not have been intentional but were caused by a lack of familiarity on the part of managers with a new system may not afford a valid defence because whether an employer has fundamentally breached is to be determined objectively and not by reference to the intentions of the employer or within a range of reasonable responses. (Bournemouth University Higher Education Corporation v Buckland, 2010 IRLR 445).

22. I note further that the draft grounds of Resistance have dealt with the latest incident in 2019 only and have not engaged with or responded to the Claimant's claims about his previous problems booking leave which, he claims, started in 2017. Ms Welsh confirmed during the hearing today that the Respondent would have to apply to amend the draft ET3 if the judgment was set aside, but I have seen no proposed amendment.

23. In summary, I am not convinced that the proposed defence as it stands would be strong or even likely to succeed.

Prejudice

24. There will almost always be prejudice to the Respondent where an application to set aside a default judgment is refused. It is important to balance the interests of both parties and take into account the importance of finality in litigation. The Claimant will suffer significant prejudice if the judgment is set aside. The primary facts are now stale and it would be unsatisfactory for him to be required to have to come to the tribunal again to prove his case a second time simply because the Respondent has failed to act responsibly at the proper time. Furthermore, if the matter was to be relisted now, having regard to the state of the lists at London Central, it would highly unlikely that another trial could be arranged before Spring 2021 at the earliest, particularly if the Tribunal had to deal with amendments to the Respondents case before the trioal could take place .

Conclusion

25. Taking these factors, and all other matters submitted to me on behalf of the Respondent, into account, I find that the interests of justice are best served in this case by not re-opening this case and I accordingly refuse the Respondent's applications.

J S Burns Employment Judge
London Central
11/6/2020
For Secretary of the Tribunals

date sent to the Parties – 12/6/2020