



EMPLOYMENT TRIBUNALS

Claimant: Mrs E Da Silva

Respondent: First Col Limited

OPEN PRELIMINARY HEARING

Heard at: London South by CVP

On: 7 August 2020

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: in person

For the Respondent: Ms S Murphy solicitor

JUDGMENT on PRELIMINARY HEARING

1. The judgment dated 14 June 2019 is revoked.
2. The ET3 response is accepted out of time.
3. Case management directions including the date of the Hearing are enclosed.

REASONS

Preliminary

1. This has been a remote hearing because of emergency arrangements made following Presidential Direction because of the Covid 19 pandemic. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.

2. The preliminary hearing is to reconsider the judgment dated 14 June 2019 under rule 71 Employment Tribunals Rules of Procedure 2013 and consider whether a late ET3 should be accepted.

Evidence

3. The Tribunal heard the evidence of Mr M Sakutuwa, Ms P Filewood and Ms A Thornback in accordance with their witness statements which is not repeated here. There was a substantial bundle of documents to which reference will be made where necessary. The Respondents made written submissions.

Reason for delay in submitting ET3

4. The ET1 was correctly addressed. Ms Filewood's evidence was that the first the respondent heard about this claim was on the 7th October 2019, when she received an email from the Claimant seeking payment [3]. She was very surprised to receive this request and seriously doubted its authenticity as the respondent had never received any Tribunal papers in relation to this matter, and Ms Filewood was not aware of any hearing that had taken place, and she had not received any correspondence regarding the matter since the Early Conciliation stage in October 2018.

5. Ms Thornback Mr Sakutukwa's spoke to a specific procedure in place to handle post, and anything urgent that does arrive at the business address is immediately presented to the managing director in person. Ms Filewood, Ms Thornback and Mr Sakutukwa's confirmed that there was never any correspondence received from the Employment Tribunal, and had this been received it would have been dealt with promptly, as was the Claimant's email when this was received by Ms Filewood on the 7th October 2019. Ms Filewood forwarded this email to Peninsula to seek advice on how to proceed. There is an internal email from a Litigation Executive to 'Legal New Work' advising that the Respondent had been in touch regarding a Judgment made, and that Peninsula had dealt with the Early Conciliation but that the client hadn't received any correspondence from the Tribunal at all, and confirming the first the client became aware of this was the email from the Claimant chasing payment on 7th October 2019 [5].

6. Ms Filewood wrote to the Employment Tribunal on 14th October 2019 [6] informing the Tribunal that she had received a request for payment from the Claimant following a Judgment and that this is the first notification the Respondent had received, confirming they had not ever received any official documentation, and that they had not been invited to attend court and had had no opportunity to defend their case.

7. Ms Filewood contacted ACAS to request a copy of the ET1 claim form which was sent to her by ACAS on 15th October 2019 [7]. This is the first time the Respondent had sight of the Claimant's pleadings.

8. The Respondent's representative made an application for reconsideration on 8th November 2019 setting out the Respondent's position [38-39] and attaching an ET3 [48-50], requesting an extension of time to present this.

9. There was a case management hearing on 27 April 2020 which provided guidance to the Tribunal.

Merits of ET3 defence

10. It is the Respondent's position that the Claimant is not owed any outstanding wages whatsoever. The Claimant was required to work a particular shift pattern, and after taking a period of sick leave in August 2018 the Claimant never made herself available to work as per her contract of employment, would regularly turn down shifts offered to her and was unwilling to work. As such, the Respondent says that a claim for payment for hours not worked due to the Claimant's own refusal to make herself available cannot succeed.

Legal considerations

11. The terms of rule 71 were considered. Rule 5 of the Employment Tribunal Rules of Procedure gives the Tribunal discretion to extend any time limit as they see fit, if it is in the interest of justice to do so.

12. The Tribunal considered the case of **Kwik Save Stores Ltd v Swain and Others** [1997] I.C.R. 49 in which the EAT held:

'That an industrial tribunal chairman, in exercising the discretion to grant an extension of time to enter a notice of appearance, had 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 them on against the other, and to reach a conclusion what was objectively justified on the grounds of reason and justice; that it was important when doing so to balance the possible prejudice to each party; and that the industrial tribunal chairman had erred in failing to take into account the merits of the employer's defence or to balance the prejudice it would suffer if he withheld the extensions as against the prejudice the applicant would..'

Discussion and decision

13. The Tribunal accepted the evidence given by Ms P Filewood, Mr M Sakatukwa and Ms A Thornback who described the respondent's system for addressing mail who said that the claim had not been received by the respondent.

14. Once they did become aware of the claim (and subsequent Judgment) they acted promptly in dealing with this, both by seeking advice from their representative, contacting the Employment Tribunal themselves, and by contacting ACAS to request a copy of the ET1.

15. Granting the application would not put the Claimant at any significant disadvantage- she would still have the opportunity to pursue her claim which can be listed for a final hearing, but on the other hand should the application be refused the consequences for the Respondent would be significant- the Claimant has commenced County Court proceedings to enforce the Tribunal Judgment and those proceedings are on hold pending the outcome of this reconsideration hearing [53] therefore if the application is refused the Respondent will potentially be facing a County Court Judgment in relation to Tribunal proceedings they were never aware of and had no opportunity to defend. In weighing the balance of prejudice to both parties, and it is the Respondent who would suffer the substantial prejudice in the event that they are not granted leave to defend the claim brought against them.

16. The Tribunal accepted that the application for reconsideration under rule71 could not be made within 14 days.

17. The respondent has demonstrated a substantial defence to the claim.

18. It is in the interests of justice to revoke the judgment and allow the claim to be defended.

Employment Judge Truscott QC
Date: 7 August 2020