EMPLOYMENT TRIBUNALS

Claimant: Mr Simon Broadist

Respondent: Secretary of State for Justice (formerly in the proceedings the respondent was HM Prison Service)

Heard at: Manchester

Before: Employment Judge Phil Allen (sitting alone) **On:** 17 July 2020

REPRESENTATION:

Claimant: Ms L Quigley (Counsel)
Respondent: Mr S Lewis (Counsel)

JUDGMENT revoking the Judgment dated 10 March 2020 having been sent to the parties on 20 July 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a case that follows from a rule 21 hearing on 9 March 2020 at which judgment was entered for the claimant in respect of all of his complaints, being: indirect age discrimination; less favourable treatment as a part-time worker; constructive unfair dismissal; and breach of contract. Reasons for that judgment were provided and the claimant was awarded in total approximately £90,000.

2. This hearing was to consider the respondent's applications for: reconsideration under Rule 70, that is for the decision to be revoked; and an extension of time to enter its response, a draft response having been provided on 3 April 2020.

Hearing

3. At this hearing, the respondent has provided evidence from five witnesses, the contents of which was not disputed, and the Tribunal has read the statements

from those five witnesses. They are: Ms E Astin, an HR Business Partner at HMP Manchester; Mr J Hodkinson, the Head of Security and Intelligence at HMP Manchester; Ms D Pickering, the HR Case Manager at the Civil Service Casework Service; Ms J Gourley, who was previously Head of Business Assurance at HMP Manchester at the relevant time; and Mr R Young who was previously the Governing Governor at HMP Manchester at the relevant time.

4. The respondent has prepared a bundle for this hearing and the Tribunal has read the documents to which it has been referred. The claimant has also relied upon the original bundle from the original hearing. The Tribunal itself, unusually, also identified three documents from the Tribunal case file which were relevant to the issues and were provided to the parties shortly prior to the hearing.

5. Mr Lewis of counsel has represented the respondent. He made submissions on the respondent's behalf. A bundle of authorities and a skeleton argument was provided by him. Ms Quigley of counsel has represented the claimant, as she did at the hearing on 9 March 2020. She has made submissions on the claimant's behalf. A bundle of authorities and written representations were provided by her. I would like to thank both representatives for their submissions.

The Facts

6. The claimant worked for the respondent from May 1984 until he resigned on 12 May 2019. From 20 March 1987 he was a dog handler. From March 2017 he worked part-time. After his dog died, the respondent refused to allow the claimant to return to work as a part-time dog handler with an alternative dog. It identified an alternative role for him. A grievance was raised and not upheld. That was appealed and the appeal was also not upheld. The claimant subsequently resigned with immediate effect.

7. On 15 July 2019 the claimant entered his claim at the Employment Tribunal. That claim was sent out by the Tribunal on 15 August 2019 with a deadline for response of 12 September 2019. The evidence of the five witnesses, and the emails to which they refer, show that on 21 August 2019 the claim form had been received at HMP Manchester. Ms Caulfield, a litigation specialist, emailed it to Ms Pickering on that date, and also to Ms Gourley. On the same day Ms Gourley forwarded it to Ms Austin, Mr Young and Mr Hodkinson. Mr Hodkinson forwarded it to Mr Stanton. Accordingly, seven people at, or connected to, HMP Manchester had the claim form on 21 August 2019.

8. The statements explain why the five people did not further respond to the claim, which can be summarised as each person thinking that someone else would be dealing with it because it was not their responsibility. The Business Operation Support Team in the Civil Service Casework Service has sole responsibility for processing Employment Tribunal claims and, at that time, no-one forwarded it to them (or took ownership for ensuring that they knew about it). As a result, no response was entered at the Tribunal by the deadline.

9. On 30 September 2019 one of the Business Operation Support Team did email ACAS and the Employment Tribunal requesting a copy of the claim. The BOS received no reply from either (although the Tribunal did endeavour to send a copy on 8 November 2019 but that email was incorrectly addressed). There is no

explanation, besides human error, as to why the BOS team member did not chase further to obtain a copy of the claim form.

10. Thereafter there was an unfortunate series of events which meant that the respondent was written to by the Tribunal and the claimant at an address at which it was no longer located and had not been for some time. That resulted in a Rule 21 hearing which was not attended by the respondent.

11. Upon the claimant's solicitors contacting the respondent after the Rule 21 judgment, and following receipt of the statements and documents for that hearing at the Ministry of Justice London (at an address near to the one used by the Tribunal), the existence of the claim and outcome was identified by the respondent. The respondent rapidly thereafter applied for reconsideration and an extension of time, and provided a draft Grounds of Response.

12. The respondent's representative at the hearing apologised on behalf of the respondent and accepted it was at fault. The evidence is perhaps best summarised by Ms Pickering at paragraph 11 of her witness statement:

> "*The situation is, of course, unfortunate for everyone including Mr Broadist. The MOJ has established procedures in place to ensure that Tribunal claims are responded to and dealt with within the stipulated time limits. Regrettably, this case fell through the cracks*."

13. The respondent accepted it was unfortunate and accepted its share of responsibility. As the claimant's representative submitted, it was a collective failure to take responsibility for an ET1 involving multiple people. The respondent describes it as "*human error*".

14. It is not necessary for this Tribunal to address in detail other alleged failings. The Tribunal does not find there was gross and repeated negligence by the respondent without good explanation, as the claimant's representative contended. There was a failure by the respondent to respond to the claim, which seven people had on 21 August 2019, which was compounded by the failure of an eighth person to follow up on her own emails when she knew that a claim existed.

15. The respondent has argued, or at least the representative has argued, that the claimant or his representatives were at fault in some way and could have done more. The Tribunal does <u>not</u> find that to be the case. There was no fault whatsoever on the claimant's part. In an adversarial system there was no obligation on the claimant to try and find the right person in the respondent's organisation who might take responsibility for responding to his claim.

The Law

16. In terms of the law, both representatives presented submissions which were considered in full. The Tribunal does not reproduce all of those submissions in these reasons. The issues and law raised has been considered, whether or not it is expressly referred to.

17. The key starting point is of course rule 70 of the Employment Tribunal rules of Procedure. That says:

> "*A Tribunal may… on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again."*

18. Also relevant were rules 85-92 about the delivery of documents. These were considered but are not reproduced in this Judgment, save for Rule 91 which says:

> "*A Tribunal may treat any document as delivered to a person, notwithstanding any non-compliance with rules 86-88, if satisfied that the document in question, or its substance, has in fact come to the attention of that person"*

19. In terms of authorities, the Tribunal particularly noted the case of **Outasight VB Limited v Brown** UKEAT/0253/14 and noted what is said there where it refers to and relies upon the Judgment in **Flint v Eastern Electricity Board** [1975] ICR395**.** Phillips J in **Flint** stated the following (which was cited in **Outasight**):

> "*over and above all that, the interests of the general public have to be considered too. It seems to me that it is very much in the interests of the general public that proceedings of this kind should be as final as possible*"

20. Eady HHJ at paragraph 33 of **Outasight VB Limited v Brown** provides the following summary:

> "*The interests of justice have thus long allowed for a broad discretion, albeit one that must be exercised judicially, which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.*"

21. The Tribunal also noted the key passage from Underhill LJ in **Newcastle City Council v Marsden** [2010] ICR 743, in which he said the following:

> "*The principles that underlie such decisions as **Flint** and **Lindsay** remain valid and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles. In particular, the weight attached in many of the previous cases to the importance of finality in litigation or as Phillips J put it in **Flint** (at a time when the phrase was fresher than it is now) the view that it is unjust to give the losing party a second bite of the cherry seems to me entirely appropriate: justice requires an equal regard to the interests and legitimate expectations of both parties, and a successful party should in general be entitled to regard a Tribunal's decision on a substantive issue as final (subject, of course, to appeal).*"

22. The Tribunal also noted the point made in the claimant's submissions relying upon **Harris v Academy Enterprise Trust** [2015] IRLR 208, that is that the concept of justice in the overriding objective is wider than simply reaching a decision that is fair between the parties. It also involves delivering justice:

> "*Justice is a wide concept. It includes justice viewed from the perspective of the system of which the Tribunals are part in ensuring that indulgence given to*

one party does not deprive another party of that justice to which they are also entitled"

23. The respondent submitted, and the Tribunal accepts, that I do not need to find exceptional circumstances, for which the authority is **Williams v Ferrosan Ltd** [2004] IRLR 607.

24. I have also looked at the overriding objective and, in particular, the points emphasised by the respondent:

> *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases **fairly and justly**. Dealing with cases fairly and justly includes, so far as practicable –*
>
> *(a) ensuring that parties are on an **equal footing**;*
>
> *(b) dealing with cases in ways which are proportionate to the **complexity and importance** of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in proceedings;*
>
> *(d) avoiding delay, so far as compatible with **proper consideration** of the issues; and*
>
> *(e) saving expense.*

25. I have also taken into account the Judgment of Mummery LJ in **Kwik Save Stores v Swain** [1997] ICR 49, which is of course the key authority on extension of time. Whilst neither party expressly referred to that authority, I assumed that was because it was an authority that is so well-known. I have considered what that Judgment has to say in the sections under the headings of: the importance of time limits; and the discretionary factors. I have taken that into account and will not re-produce them in full.

26. On the merits factor, Mummery LJ in **Kwik Save Stores** cites Sir Thomas Bingham in **Costellow v Somerset County Council** [1993] 1 WLR 256, who says:

> "*A plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate*."

27. What Mummery LJ in **Kwik Save Stores** goes on to say is:

> "*Thus, 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. If no extension of time is granted for entering a notice of appearance the [Employment] Tribunal will only hear one side of the case. It will decide it without hearing the other side. The result may be that an applicant wins a case and obtains remedies to which he would not be entitled if the other side had been heard. The respondent may be held liable for a wrong which he has not committed. This 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."

28. I of course take the point that that case involved an extension of time only and not a reconsideration and extension of time.

29. I have been referred to a number of authorities which deal with the facts or the merits of the case, and in particular the issue of costs as a justification and the requirements of costs plus. I have noted them but will not refer to them.

30. To summarise the respondent's arguments, these are as follows:

(1) The respondent made an unfortunate initial mistake but it would be disproportionate to deny it the opportunity to defend the claim as a result;

(2) It is important to the respondent, taking into account the level of compensation and also the discrimination finding;

(3) The respondent says that its response has a reasonable prospect of success, indeed the representative argued that it should be put as high as a good prospect of success;

(4) If reconsideration was granted then it would now be an orthodox case with a straightforward process;

(5) Whilst public policy requires finality of litigation, that would be outweighed by the other factors present for this case;

(6) If the claimant's claim is well-founded he will still win, but if it is not he will have had an unjustified windfall; and

(7) the problems for the claimant in reconsideration overturning the judgment could be met in other ways, including: interest on any award which would accrue; an increased injury to feelings award; and/or (whilst the respondent did not expressly say so) the award of costs.

31. The claimant, in summary, says:

(1) This mistake was entirely the respondent's;

(2) The claimant will suffer significant prejudice if judgment is reconsidered;

(3) The respondent has had the claimant's witness statement and the Judgment in advance of needing to prepare its own case/statements, being a prejudice to the claimant;

(4) There has been significant delay and the delay will now be even more significant;

(5) There is financial prejudice to the claimant as a result of the additional hearings required;

(6) It cannot be in the interests of justice to overturn a judgment based on the negligence of the respondent, which is a large and sophisticated organisation; and

(7) the response has no reasonable prospects of success.

Conclusion – applying the law to the facts

32. In terms of service, under rule 91 on irregular service I do treat the document, the claim form, as having been delivered and having been served on the respondent when it came to the attention of the various people I have referred to on 21 August 2019. Eight people at the respondent knew that there was a claim and seven of them had seen the claim form.

33. It is the interests of justice which need to be determined in this decision.

34. The respondent is at fault. The claimant is not. It is human error that led to the response not being entered; it was not a wilful decision.

35. I agree with the claimant's representative's point that this is a large and sophisticated organisation, or matrix of organisations. There is prejudice to the claimant in delay, and I do think there is some prejudice to the claimant in terms of his witness statement having been provided first and the Judgment being available to the respondent before it needs to respond or prepare its evidence.

36. Addressing the issue of merit, I do think there are arguments available to the respondent in this case, and clearly it is the case that the respondent's defence, if it is allowed to proceed, has some reasonable prospect of success. The arguments around justifying discrimination or less favourable treatment with reliance on costs plus and where the boundary lies between that and costs-alone, is a very complex argument and it is not one I am able to determine today. What is clear, on reviewing my original Judgment and the findings in it, is that for justification in particular the claimant succeeded because the respondent did not make out its justification arguments. That was because the respondent was not there, or at least partly because the respondent was not there. My conclusion is that the respondent's defence does have some prospect of success. I do not think it is for me to determine where on the spectrum of merit it falls, once I have concluded that it is reasonably arguable and it has some prospect of success.

37. Some of the negative impact on the claimant of what has occurred and would result from revoking the Judgment and an extension of time, can be addressed in other ways. The respondent is right that: the award of interest may offset any delay in the receipt of an award; injury to feelings can reflect the ongoing proceedings; and costs can be awarded to the claimant for the additional costs incurred, if a costs application is made (a point emphasised in **Costellow**). I would also expect that the Tribunal hearing the case will consider the order in which statements have been prepared when considering the evidence.

38. Whilst I have taken into account all the relevant factors, the key question for me in applying the interests of justice, is the application of the balance between: the finality of litigation, as emphasised in **Flint**, **Outasight** and **Marsden**; and what might be summarised as the windfall argument, being more particularly all of the factors identified by Mummery LJ in **Kwik Save** and in particular those explained in the

passage I have quoted. I have decided that in the circumstances of this case, the latter outweighs the former.

39. Without any enthusiasm and with some understanding of the frustration that the claimant will inevitably feel, I have decided that the decision should be revoked and the respondent granted the extension of time for its response to be submitted.

40. I should add that in the course of the hearing there was some exploration of whether it would be appropriate to vary the Judgment as opposed to entirely revoking it. For example, it might have been possible to vary it to allow the respondent to argue that it was justified, but not to re-open the primary findings of fact. This was something which I raised with the parties. However, I have concluded that the issues are too complex and intertwined for a variation of this kind to be possible. In any event, a variation would not achieve the full hearing on the merits with both parties engaged which I have decided the interests of justice require. I have concluded that the interests of justice require my entire Judgment be revoked, they are not met by some form of variation.

Employment Judge Phil Allen

Date: 20 August 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

26 August 2020

FOR THE TRIBUNAL OFFICE