EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms Rebecca McKeith	Mr Liam Alexander

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Made at Newcastle Upon Tyne On 27 August 2020
EMPLOYMENT JUDGE GARNON

JUDGMENT

I refuse the application for a reconsideration of my Judgment on liability dated 27 May 2020 and, if such application is made, of my judgment on remedy dated 20 August 2020 under the powers in rule 72(1) of the Employment Tribunal Rules of Procedure 2013 (the Rules), because I do not consider there is any reasonable prospect of the either judgment being varied or revoked.

REASONS (bold print is my emphasis and italics are quotations)

1. The respondent has applied for a reconsideration of a judgment on liability made by me under Rule 21 in circumstances where no response had been presented, by an email from a Mr Mohammad Islam of " Premier Care" timed at 17:51 on 20 August 2020, copied to the claimant and to the respondent by email . It reads

Application for a reconsideration of Ms Rebecca McKeith v Liam Alexander - Case Number: 2500506/2020

We act for the Respondent in the above proceedings who applies under rule 71 of the Employment Tribunals Rules of Procedure 2013 (ET Rules) for a reconsideration of the judgment made by Employment Judge Garnon on 27th May 2020 that the claims of direct sex and pregnancy/maternity discrimination contrary to sections 13 and 18 of Equality Act 2010 are well founded.

*The Respondent believes it is necessary for the judgment to be varied or revoked because **the Respondent has not received any correspondence from the Tribunal of such a claim and was unable to submit a defence and was not aware of a tribunal hearing and also the remedy hearing**. The Respondent received a text message from the Claimant's partner today (20th August 2020) that they had succeeded the tribunal. The Respondent was unaware of what to do and this is when he contacted his representative and upon reviewing the judgement online, we immediately prepared the application. In accordance with rule 70 of the ET Rules, it would therefore be in the interests of justice to vary the judgment by allowing the Respondent the opportunity to submit a defence and comply with new case management orders and to attend a final hearing, or revoke the judgment.*

We further consider that making the order requested would be in accordance with the overriding objective because it would give the Respondent the opportunity to present their defence whereby both parties would be on an equal footing.

We confirm that we have complied with rules 30(2) and 92 of the ET Rules by copying in the Claimant and advise them that any objection to this application must be sent to the tribunal as soon as possible and to copy ourselves in all future correspondence.

2. The Rules include.

71. *Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.*

Process

72.*(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal.*

3. During the Covid19 pandemic, I, and some other Judges, were working from home without the paper file. The claim was **served by post to the respondent's address on 1 April**, and, as it was a discrimination claim, a preliminary hearing was listed for 27 May. No response was received by the due date, or ever. An Employment Judge is required by rule 21 to decide on the available material (which may include further information a Judge requires parties to provide) whether a determination can be made and, if so, **obliged** to issue a judgment which may determine liability only or liability and remedy. Employment Judge Arullendran, working from home, spotted on the Early Conciliation certificate, after the respondent's name, the words "Direct Payments". This alerted her to the possibly a company may have employed the claimant so rather than running the risk of a judgment against the wrong respondent, she directed a letter be sent asking the claimant to clarify. It was sent on 7 May and the claimant replied on 12 May:

"Sorry for the confusion regarding my employer. Liam Alexander is my employer not Direct Payments. Direct Payments are a company involved in Gateshead Council's payroll who give Mr Alexander the funding he needs in being able to employ people to care for him.
Again, I am really sorry for any confusion this has caused and again would like to ensure it is clear that Mr Liam Alexander is my employer."
Hope this helps!"

4.On **22 May a letter** converting the preliminary hearing to a telephone hearing due to the pandemic was **sent to both parties** . On consideration of the claimant's reply Employment Judge Johnson directed the parties could discuss at the telephone hearing if Gateshead Council should be added as a respondent. I was to conduct that hearing working from home.

5. I and most Employment Judges have encountered cases where a Local Authority, under a statutory obligation to care for vulnerable adults, funds their care under an arrangement whereby the person receiving the care is legally the employer of his carers. In some such

cases I have seen evidence the “employer” does not have mental capacity to enter into any contract, let alone understand obligations under employment law, or how to file a response. When I saw the information sent to me on 26 May, I recognised the respondent’s address as “supported” housing made available by Gateshead Council’s social services department for disabled people, many being elderly. I was alert to the possibility of post going astray during the pandemic and/or a disabled respondent not being able to send a response.

6. On 27 May 2020 I conducted that hearing which the respondent did not attend. I asked the claimant about him. She told me he is a young man who has muscular atrophy which results in him having little movement from his neck down but he is studying for a university degree and has full mental capacity. His carers open his post and he gives instructions how to deal with it. He is IT literate and uses a laptop well. He advertised for a carer which is how the claimant got the job. She worked for him without problems until she became pregnant. Three days before the hearing, he had emailed her asking if there was a way they could settle their differences. She told me of her attempts and those of ACAS to contact the respondent being ignored. She had spoken to Gateshead Council who said they had no liability for what the claimant had done but they doubtless had social workers maintain contact with him

7. Until I spoke to the claimant, I was cautious about issuing a Rule 21 judgment. After doing so,I was reassured he could have responded . He could still be heard on remedy. I had in the claim form sufficient to enable me to find the claims proved on a balance of probability but not enough to determine the sums to be awarded. Therefore, on 27 May 2020, I gave judgment in default under Rule 21. During the pandemic, it helped Judges working from home without printing facilities to have everything relevant in one electronically accessible document so I converted pdf to Word documents, copied and pasted all relevant parts of the claim into the written reasons running to two full pages. I set out when the claim was presented and served that a response had been due by 29 April but none was received even by the date of the telephone hearing . I set out the enquiries I made of the claimant and her evidence of how the respondent’s mental capacity , how his carers dealt with his post. and that he had contacted her by email three days earlier.

8. The liability judgment **sent to the parties on 28 May 2020** together with orders that remedy would be decided at a two hour hearing on a date to be fixed. **Notice of it was sent with the judgment .** The claimant was to provide to the respondent and to the Tribunal, an itemised statement of outcomes sought. She did so on **10 June by email copied to the respondent**. The respondent was to file a response within 14 days but has not done so.

9. I conducted the remedy hearing which the respondent did not attend. The judgment running to four full pages repeated some of my earlier written reasons.That judgment sent by post on 21 August would have been received by the respondent in the normal course of post by 22nd. There is no draft response with the application for reconsideration and none has been sent since, The claimant told me her statutory sick, and later maternity, pay came by transfer into her bank account from the respondent’s, not from the Council.

10. I do not know who Premier Care are and the email address PremierCare@msl.co.uk takes one to a home care service in the Midlands .Mr Islam’s assertion, based on what the respondent has told him, is ***the Respondent has not received any correspondence from the Tribunal of such a claim and was unable to submit a defence and was not aware of a tribunal hearing and also the remedy hearing*** and that is the only basis of the application. After the claim was sent by post on **1 April** with notice of a preliminary hearing, a

letter converting the hearing to telephone due to the pandemic was posted on **22 May**. On **28 May** the liability judgment and orders for the remedy hearing were posted. On **10 June** the claimant copied to the respondent her schedule of loss by email. On **13 July** notice of the CVP hearing was posted to the respondent. Not one of four letters posted has been returned undelivered by Royal Mail

11. It is, literally, beyond belief that four letters have gone astray between April and July, to say nothing of the emailed schedule of loss copied to the respondent and the email he sent her, which I have not seen, on about 24 May. Everything I have read and heard leads me to the view he ignored the claim. He had not responded to the claimant and though I can see why he would not deal **with her** , that is no reason for him not contacting the Tribunal.

12.The commonly cited cases eg Kwik Save-v-Swain, and Pendragon plc-v-Copus concern delay in responding, as Mummery P said in Kwik Save, " *as the result of a genuine misunderstanding or an accidental oversight* ". That is not the case here. Under the 2013 rules, the only ground for a reconsideration is whether one is necessary in the interests of justice. That means justice to both sides and to other litigants.

13 The prejudice to the claimant of a reconsideration would be that she has been through two hearings and obtained two judgments and would now be "back to square one". I and the other Employment Judges who have dealt with this case have been ultra cautious to ensure there was no reasonable possibility the respondent, due to his disability and/or the pandemic, had not had the opportunity to have his say.The modernised rules are designed to do justice between the parties. Everyone is still entitled to a hearing if they follow the rules to avail themselves of that right. The Employment Tribunals send to every respondent very detailed explanations of what they must do, when they must do it and the consequences of not complying. For whatever reason this respondent has ignored the claim and a procedure has followed which resulted in two judgments. To allow a respondent, who has not taken advantage of the opportunity to defend, to do so after a Rule 21 judgment would not be just.

EMPLOYMENT JUDGE T.M. GARNON
JUDGMENT AUTHORISED BY THE EMPLOYMENT JUDGE ON 27 AUGUST 2020