



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101969/2020

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Held via telephone conference call on 4 February 2021

Employment Judge P O'Donnell

10 Miss MP Stewart

Claimant
Represented by:
Mr Mercer -
Representative

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Mr Andrew Graham Ratcliffe

Respondent
In Person

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the time limit for presenting the
25 ET3 is extended to the date 28 days after a fresh ET3 form is sent to the
Respondent. In terms of Rule 20(4), the Tribunal's judgment of 4 August 2020, sent
to parties on 5 August 2020, is hereby set aside.

REASONS

Introduction

- 30 1. The Claimant had brought complaints seeking statutory redundancy pay and
damages for breach of contract arising from an alleged failure to give notice of
dismissal.
2. No ET3 on the prescribed form was received by the Tribunal within the time
limit prescribed by the Tribunal's Rules of Procedure. As a result, a judgment
35 under Rule 21 was made on 4 August 2020 (sent to the parties on 5 August

2020) awarding the Claimant a sum in respect of statutory redundancy pay and damages for breach of contract.

3. The Respondent, by correspondence dated 25 August 2020, submitted that he had lodged a response. This correspondence was treated as an application for reconsideration. The purpose of the present hearing was to determine whether that application should be granted.
4. At the outset of the hearing, the Tribunal explained that the hearing would not determine substantive issues; the Respondent has set out his defence to the claim in his correspondence and the Tribunal can quite understand why parties would wish to address that. However, it was explained to parties that this was not the purpose of this hearing and whether the defence was made out would only be a matter to be determined in the event that the Tribunal set aside the Rule 21 judgment.

Procedural history

5. The Tribunal considers that a short history of the procedure in this case should be set out to give context.
6. The ET1 was accepted by the Tribunal with effect from 26 March 2020. It had been initially rejected for reasons relating to ACAS Early Conciliation but a reconsideration application by the Claimant was granted and the claim was treated as being presented on 26 March 2020.
7. A Notice of Claim with a blank ET3 form was sent to the Respondent on 21 May 2020. The ET3 was to be returned by 18 June 2020. No ET3 in the prescribed form (or in any form) was returned by this deadline.
8. By letter dated 26 May 2020, the Claimant returned her date listing stencil and also provided copies of correspondence between her and the Respondent including a letter from her to the Respondent dated 10 March 2020 in which she set out the sums sought from him.

9. On 30 June 2020, the Tribunal wrote to the Respondent asking for comments on the letter of 10 March 2020 indicating that a judgment may be issued without the need for a hearing.
- 5 10. The Respondent replied by letter dated 8 July 2020 setting out his position that he had not dismissed the Claimant and challenging other matters which had been raised in the Claimant's correspondence. There was no accompanying ET3 and the letter did not make an express application under Rule 20 for an extension of time to lodge the ET3.
- 10 11. The Rule 21 Judgment was made on 4 August 2020 and sent to the parties on 5 August 2020.
12. The Respondent wrote to the Tribunal dated 25 August 2020 stating that he had provided a response to Tribunal by way of his letter of 8 July 2020. This was initially sent in error to the Employment Appeal Tribunal but then sent to
15 the Employment Tribunal. It has been treated as an application for reconsideration.

Respondent's submissions

13. The Tribunal took account of what was said in the Respondent's letter of 25 August 2020 which enclosed the earlier correspondence of 8 July 2020. He
20 stated that he believed that he had submitted a response to the claim in the form of his letter of 8 July 2020 and enclosed proof of postage and receipt.
14. At the hearing, the Respondent submitted that he could not recall having received the Notice of Claim dated 21 May 2020 but could not be sure. He was sure that he had replied to everything sent to him and on checking the
25 correspondence he had before him, he had everything but the 21 May correspondence.
15. When he received the letter of 30 June 2020, he replied straightaway and set out his position that he had not made the Claimant redundant.

16. The Respondent could recall that there were issues with the post around May which was during the early stages of the COVID pandemic.

Claimant's submissions

17. Mr Mercer made the following submissions on behalf of the Claimant.

5 18. It was her position that she was made redundant and that the Respondent said he was shutting the shop.

19. Mr Mercer did not consider that there was anything to reconsider and was surprised this hearing was going ahead.

10 20. The Claimant had sent a letter to Mr Mercer on 10 March 2020 before lodging her claim and he had never replied.

21. The correspondence which the Claimant had indicated that the Notice of Claim sent on 21 May 2020 was sent to the Respondent and he was copied into all correspondence.

Relevant Law

15 22. The presentation of a response to a claim are set out in the following Rules of Procedure.

16 Response

20 (1) *The response shall be on a prescribed form and presented to the tribunal office within 28 days of the date that the copy of the claim form was sent by the Tribunal.*

(2) *A response form may include the response of more than one respondent if [the responses give rise to common or related issues of fact or law or if it is otherwise reasonable to be made on a single response form.]*

25 (3) *A response form may include the response to more than one claim if the claims [give rise to to common or related issues of fact or law or if it is otherwise reasonable to be made on a single response form.]*

17 Rejection: form not used or failure to supply minimum information

(1) *The Tribunal shall reject a response if—*

(a) *it is not made on a prescribed form; or*

(b) *it does not contain all of the following information—*

5 (i) *the respondent's full name;*

(ii) *the respondent's address;*

(iii) *whether the respondent wishes to resist any part of the
claim.*

(2) *The form shall be returned to the respondent with a notice of rejection*

10 *explaining why it has been rejected. The notice shall explain what steps
may be taken by the respondent, including the need (if appropriate) to
apply for an extension of time, and how to apply for a reconsideration of
the rejection.*

18 Rejection: form presented late

15 (1) *A response shall be rejected by the Tribunal if it is received outside the
time limit in rule 16 (or any extension of that limit granted within the
original limit) unless an application for extension has already been
made under rule 20 or the response includes or is accompanied by
such an application (in which case the response shall not be rejected
20 pending the outcome of the application).*

(2) *The response shall be returned to the respondent together with a
notice of rejection explaining that the response has been presented
late. The notice shall explain how the respondent can apply for an
extension of time and how to apply for a reconsideration.*

25 **20 Applications for extension of time for presenting response**

(1) *An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reason why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and if the respondent wishes to request a hearing this shall be requested in the application.*

(2) *The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.*

(3) *An Employment Judge may determine the application without a hearing.*

(4) *If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside.*

21 *Effect of non-presentation or rejection of response, or case not contested*

(1) *Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.*

(2) *An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone. [Where a judge has directed that a preliminary issue be determined at a hearing, a judgment may be issued by a judge under this rule after that issue has been determined without a further hearing.]*

(3) *The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.*

5 23. The principles to be applied by the Tribunal in considering an application under Rule 20 are set out by Mummery J in *Kwik Save Stores Ltd v Swain* [1997] ICR 49. These require the Tribunal to consider all relevant documents and other factual material put before it to explain both the non-compliance and the basis on which it is sought to defend the case on its merits. In exercising their discretion, the employment judge must take account of all relevant factors which would include the explanation (or lack of explanation) for the delay and the merits of the defence. The Tribunal must come to a conclusion which is objectively justified on the grounds of reason and justice which takes into account the possible prejudice to each party.

15 24. The relevant Rules relating to reconsiderations are as follows.

70 Principles

A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or 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.

72 Process

(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. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the*

parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

5 (2) *If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.*

10 (3) *Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.*

Decision

25. In deliberating on this matter, the Tribunal came to the view that this application should be treated as an application by the Respondent under Rule 20 to extend the time for the ET3 to be presented rather than as an application under Rule 70.

26. The reasons for this are as follows:-

- a. If the Tribunal were to allow an application under Rule 70 and revoke the judgment then this would put the case back in the position in which it was, that is, no ET3 being submitted. The Tribunal would then

inevitably have to address that issue and deal with the question of whether an extension under Rule 20 should be granted.

5 b. On the other hand, if this matter is addressed by way of Rule 20 and the Tribunal found in the Respondent's favour then Rule 20(4) automatically sets aside the Rule 21 judgment. This route is, therefore, more straightforward in dealing with the issues.

c. The factual matrix does not change if the matter is addressed by way of Rule 20 as opposed Rule 70.

10 d. The relevant factors which the Tribunal would take into account are the same or broadly similar in relation to both Rules.

e. The Tribunal could see no prejudice to either party in dealing with the matter under Rule 20 as opposed to Rule 70.

15 f. The Respondent was a party litigant and did not necessarily appreciate the need to label his application as being under one Rule as opposed to another. Indeed, he did not specifically say that his letter of 25 August was an application under Rule 70 and it was the Tribunal that labelled it thus.

20 g. It would be in keeping with the overriding objective to deal with the issue expeditiously by way of a more straightforward route rather than having to consider multiple applications under different Rules of Procedure.

27. Having decided to deal with this under Rule 20, the Tribunal went on to consider the factors set out in *Swain*.

25 28. The reason given for the failure to lodge the ET3 within the 28 day deadline is that the Notice of Claim had not been received by the Respondent. The Tribunal does note that other correspondence, sent to the same address, was received by the Respondent. However, it is not impossible that one piece of mail has gone missing in transit.

29. The Tribunal does note that the Respondent responded timeously to all other correspondence and there is no reason to suggest he would not have returned the ET3 if it had been received. The Tribunal considers that it is more likely than not that the Respondent did not receive the Notice of Claim.
- 5 30. The previous correspondence from the Tribunal may have created some confusion for the Respondent in this regard. The Tribunal can understand why a party litigant may have understood the correspondence of 30 June to be his opportunity to put in his defence to the claim and would not appreciate that they should have been sent a prescribed form to be used at an earlier date especially where the correspondence explaining what was required had not
10 been received by them.
31. With the benefit of hindsight, the Respondent's letter of 8 July could have been treated as a Rule 20 application. Again, a party litigant may not have understood the detail of the Rules and would not have appreciated the need to
15 label their correspondence as an application under a particular Rule of Procedure.
32. The Tribunal, therefore, considers that there is a reasonable explanation for the delay in the Respondent lodging an ET3; he was not aware of the existence of the claim until the Tribunal's correspondence of 30 June and that the
20 Tribunal did not treat his subsequent correspondence as an application under Rule 20 as it could have done.
33. Turning to the merits of his defence, there is a statable case in that the Respondent disputes that he dismissed the Claimant. If this is correct then it would provide a defence to the claims being pursued.
- 25 34. The Claimant takes a different position and her case is that she was dismissed when the shop in which she worked was closed by the Respondent. This is a dispute that can only be resolved by the Tribunal on hearing evidence from both parties and any other relevant witnesses. In these circumstances, there is potential merit in the defence assuming that facts are found which support
30 the Respondent's position.

35. For the avoidance of doubt, the Tribunal has not come to any view on whether the Claimant or the Respondent is correct. No evidence was heard at the present hearing and so the Tribunal made no findings in fact.

36. There is a prejudice to the Respondent if the application is not allowed as he would not be permitted to defend the claim; he presently faces a liability which he should not face if he is able to make out the facts to support his case.

37. There is a prejudice to the Claimant if the application is allowed. She presently has a judgment in her favour which she could enforce and that would be set aside if the application is allowed. However, any prejudice is tempered by the fact that she would not then be prevented from pursuing her claim and would have the opportunity to meet the Respondent's defence. If she is successful then she would secure a judgment in her favour and the only prejudice would be a short delay in the matter being resolved.

38. The Tribunal considers that the balance of prejudice falls in favour of the Respondent; refusing the application denies him the opportunity to defend the claim whereas granting the application does not prevent her from putting her case.

39. In these circumstances, the Tribunal grants the Respondent's application. The Tribunal directs that a fresh ET3 form be sent to the Respondent and extends the period of time for the Respondent to present the ET3 to a date 28 days after the fresh form is sent to him. In terms of Rule 20(4), the judgment of 4 August 2020 is hereby set aside.

25 Employment Judge: Peter O'Donnell
Date of Judgment: 9th February 2021
Entered in Register: 17th February 2021
Copied to Parties