Case No: 2304141/2019/V

EMPLOYMENT TRIBUNALS

Claimant:	**Mrs A Soares**
Respondents:	**(1) Pockit Limited** **(2) Rosie Hewat** **(3) Lavona Bowers**
Preliminary hearing on:	**19 February 2021 by CVP**
Before:	**Employment Judge Pritchard**
Representation	
Claimant:	Mr M Lansman, Counsel
Respondent:	Ms A Greenly, Cousel

JUDGMENT

The First Respondent's application for an extension of time for presenting a response is refused.

REASONS

1. The preliminary hearing was held to consider the First Respondent's application under Rule 20 of the Employment Tribunals Rules of Procedure 2013 for an extension of time for presenting a response. If the application were to succeed, judgments issued under Rule 21 would be set aside under Rule 21(4). The Claimant opposed the application.

2. Alternatively, if the application under Rule 20 did not succeed, the First Respondent applied for reconsideration of the judgments issued in this case under Rules 70 to 73. The Tribunal had insufficient time within the two hour allocation to consider this alternative application.

3. Judgments have been issued in the Claimant's favour against the First Respondent only. The First Respondent will be described as "the Respondent" in this judgment unless otherwise stated.

4. The Tribunal heard evidence under oath from Christopher Baines, the Respondent's Vice President of Compliance and Operations, Data Protection Officer and Money Laundering Officer. The Tribunal was provided with a bundle of documents to which the parties variously referred. The parties made oral and written submissions in support of their respective arguments.

Findings of fact

5. The Respondent is a financial technology company that offers current accounts, remittances and a range of other financial services as an alternative to traditional banks. The Respondent is regulated by the Financial Conduct Authority.

6. The Claimant was employed by the Respondent on 8 April 2019 as a Customer Service Agent. Her written contract of employment shows her employer as:

> *Pockit Limited, registered number (07157877) of registered office 37 Warren Street, London, W1T 6AD and of trading address, 119 Marylebone Road, London, NW1 5PU.*

7. The Claimant's place of work was Southbridge House, Southbridge Place, Croydon CR0 4HA. During the period of the Claimant's employment, the Respondent employed in the region of 85 individuals.

8. On 10 April 2019, the Respondent changed its registered office from 37 Warren Street (W1T 6 AD) to 85 Great Portland Street (W1W 7LT) which was a specific registered office for firms to receive post.

9. By email dated 17 June 2019, the Claimant informed Lavona Bowers of the Respondent:

> *Hello Lavono*
>
> *Sorry I wont be able to make to work today as I did have seisures in the morning.*

10. Rosie Hewat, Chief People Officer, replied on the Respondent's behalf:

> *Hope you feel better soon Avril.*

11. The Claimant again emailed the Respondent on 19 June 2019 at 8.14 am:

> *Hello Lavona*
>
> *Sorry I wont be able to make it work today as well cause I am still recovering.*

12. Rosie Hewat replied the same day by email timed at 1.22 pm:

> *Hi Avril*
>
> *I do hope you feel better soon. But we have really tried to make this work and unfortunately as we are unable to rely on you, it's impacting on productivity of the team and company, please see attached letter terminating your employment with us.*
>
> *Please read this carefully and sign where indicated. Please post any items belonging to the Company in your possession to 85 Great Portland Street, London W1W 7LT.*

We wish you well with your future endeavours.

13. The Claimant queried the reason for the termination of employment to which Rosie Hewat responded in an email of 20 June 2019:

Hi Avril

Glad you are feeling better, but as stated in my email, we have really tried to make this work but unfortunately we are unable to rely on you, and it's impacting the productivity of the team and company. It is also very unfair to the staff that often have to be called last minute to try and cover.

14. The Claimant again emailed stating that she was still unclear why her contract had been terminated. Rosie Hewat replied:

Dear Avril

I am not having any further conversations on this matter. You were not working out for the business and we notified you and served you your contractual notice. We have stuck to the letter of the law and kept to the terms of your employment and consequent termination.

Please stop sending me emails asking the same questions repeatedly. I don't have another alternative answer to offer you.

15. On 21 June 2019, the Claimant notified ACAS to commence the early conciliation procedure.

16. On Sunday 21 July 2019, ACAS issued an early conciliation certificate and emailed a copy to the Respondent. The address shown on the certificate was the Claimant's place of work in Croydon. Rosie Hewat promptly replied as follows:

Dear ACAS

Can we have details in writing of what this claim is in relation to please? Thanks

17. On 29 July 2019, the ACAS Conciliator replied as follows:

Dear Rosie

Thank you for your email. This was an Early Conciliation and therefore there is no claim for me to provide. I do not have any further information other than what we discussed in our conversation on the 18/07/19. If Mrs Soares decides to submit a claim you will receive a copy of her claim form from the Tribunal.

18. Rosie Hewat promptly replied:

Ok, and thank you. I guess we will keep our eyes out.

19. With regard to the Second and Third Respondents, the Claimant notified ACAS on 5 September 2019 and 24 September 2019 respectively, certificates being issued on 20 September 2019 and 25 September 2019. Confusingly, ACAS also issued a further certificate in respect of the First Respondent showing initial notification on 5 September 2019 and issue of certificate on 20 September 2019. All the certificates show the Respondent's former registered office address at 37 Warren Street.

20. By way of an ET1 presented on 25 September 2019, the Claimant alleged disability discrimination: failure to make reasonable adjustments, direct discrimination, and discrimination arising from disability. The Claimant contended that the Respondent knew that she had epilepsy.

21. In the section of the ET1 showing the Respondent's details, (and as c/o address for the other two Respondents in the case) the Claimant included the Warren Street address. She also included her place of work at Croydon.

22. The Tribunal notes that in respect of all three Respondents, the Claimant included early conciliation certificate numbers of the certificates issued in September 2019.

23. The Tribunal served the claim against all three Respondent at the Warren Street address. These were returned to the Tribunal marked "addressee gone away". Therefore, on 28 November 2019, the Tribunal re-served the Respondent company at its registered office as recorded at Companies House, namely 85 Great Portland Street, W1W 7LT.

24. Having made enquiries of the Tribunal administration, the Tribunal is now informed that the hand-written envelope containing the re-served ET1 was returned to the Tribunal on 5 December 2019 red stamp-marked "Return to sender. Not known at this address. Please amend your records". The hand-written name and address of the Respondent were struck through.

25. On 9 December 2019 Employment Judge Wright issued default judgment on liability under Rule 21 and ordered that the hearing listed for 3 March 2020 would be converted to a remedy hearing. Although the judgment included the correct case number, the name of the Respondent was misspelt as Pokit Limited. No further Notice of Hearing was sent.

26. On 11 December 2019, the Respondent changed its registered office from 85 Great Portland Street to Basepoint Business Centre, Riverside Court, Beaufort Park, Chepstow NP16 5UH.

27. The liability judgment was sent to the parties by the Tribunal on 3 February 2020. Enquiries of the Tribunal administration reveal that the liability judgment, together with accompanying letters, were sent to both 37 Warren Street and 85 Great Portland Street. Presumably the Tribunal was unaware that the Respondent had again changed its registered office.

28. On 3 March 2020, Employment Judge Freer held the remedy hearing. The Claimant was represented by Mr Lansman. The Respondent did not attend. The recital to Employment Judge Freer's judgment reads as follows:

Upon the claim initially being served on three Respondents and all being returned addressee gone away;

And upon the claim being re-served on the Respondent company only at its registered office;

And upon the Respondent company being at that registered office at the date of service, the Respondent company having moved registered office after the claim was served;

And upon default judgment being made against the Respondent company;

And upon the hearing of 03 March 2020 being converted to a remedy hearing:

29. Employment Judge Freer ordered the Respondent to pay to the Claimant the sum of £39,841.27. He gave instructions for his remedy judgment to be served on the Respondent's new registered address at Basepoint Business Centre in Chepstow. The remedy judgment was sent to the parties on 20 March 2020.

30. The Tribunal is informed that Employment Judge Freer also gave instructions for the Tribunal service database, Ethos, to be updated to record the Respondent's latest registered office address. The Tribunal is informed that Ethos was not updated and that any letters would continue to be generated by reference to existing data. Envelopes, however, are often hand-written. The Tribunal emailed a copy of the remedy judgment to ACAS on 20 March 2020 and the clerk added the following manuscript note to a hard copy of the email as follows: "Sent to Basepoint Business Centre, Wales".

31. The first national lockdown due to covid 19 commenced in March 2020. The Respondent made arrangements for staff to work remotely. A number of staff were put on furlough.

32. On 1 April 2020, the Respondent's solicitor, when reviewing recent Employment Tribunal decisions published on the government website, noticed judgment entries against a company listed as Pokit Limited. The Respondent's solicitor notified Rosie Hewat that there might be a Tribunal judgment against the Respondent.

33. The Tribunal notes that the liability judgment was added to the website on 14 February 2020 and the remedy judgment added on 31 March 2020.

34. In early June 2020, the FCA license of the Respondent's e-money institution, Wirecard, was temporarily suspended and required the Respondent to expend significant resources to minimise detriment to approximately half a million vulnerable customers. The Respondent was required to move to an alternative provider. Having dealt with the furlough process and subsequent redundancy process leaving the Respondent with approximately 25 employees, Rosie Hewat left the Respondent's employment on 31 July 2020, although she later returned as a consultant.

35. On 27 July 2020, the Department for Business, Energy & Industrial Strategy sent to the Respondent at its registered address at Basepoint Business Centre in Chepstow a Warning Notice of financial penalty for non-payment of an

Employment Tribunal award. With interest added the Respondent was required to pay £40,966.83 by 24 August 2020 failing which a penalty of £5,000 would become payable in addition. The Respondent acknowledges that this Warning Notice was received.

36. On 21 August 2020, the Respondent made the application which is the subject matter of this preliminary hearing. The Respondent contends that it did not receive any judgment or other notification about the Claimant's claim. Despite its request for a copy of the ET 1 from the Tribunal on 21 August 2020, this was not provided until 15 February 2021, just four days before this preliminary hearing.

37. By email dated 28 August 2020, the Claimant opposed the Respondent's application.

Applicable law

38. Rule 2 provides:

> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the 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 the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules…

39. Rule 5 provides:

> The Tribunal may ... extend ... any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.

40. Rule 20 provides:

> <u>Applications for extension of time for presenting a response</u>
>
> (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) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow the extension, any judgment issued under Rule 21 shall be set aside.

41. Although a case decided under the Industrial Tribunals Rules of Procedure 1993, both parties referred to the judgment of Mummery J (as he then was) in Kwik Save Stores Ltd v Swain 1996 ICR 49. The Employment Appeal Tribunal stated that the process of exercising a discretion involves taking into account all relevant factors, weighing and balancing them one against the other and reaching a conclusion which is objectively justified on the grounds of reason and justice. When exercising a discretion in respect of the time limit, the Tribunal should always consider:

41.1. The employer's explanation as to why an extension of time is required. The more serious the delay, the more important it is that the employer provide a satisfactory and honest explanation.

41.2. The balance of prejudice. Would the employer, if its request for an extension of time be refused, suffer greater prejudice that the claimant would suffer if the extension of time were to be granted?

41.3. The merits of the defence. If the employer's defence is shown to have some merit in it, justice will often favour the granting of the extension of time, otherwise, the employer might be held responsible for a wrong which it had not committed

42. Rule 86 provides:

Delivery to parties

(1) Documents may be delivered to a party (whether by the Tribunal or by another party) –

(a) By post;
(b) …

43. Rule 89 provides:

Substituted service

Where… it appears that service at any such address is unlikely to come to the attention of the addressee, the President, Vice President or a Regional Employment Judge may order that there shall be substituted service in a such manner as appears appropriate.

44. Rule 90 provides

Date of delivery

Where a document has been delivered in accordance with rule 85 or 86, it shall, unless the contrary is proved, be taken to have been received by the addressee –

(a) If sent by post, on the day on which it would be delivered in the ordinary course of post;

(b)…

45. Section 7 of the Interpretation Act 1978 provides: [w]here an Act authorises or requires any document to be served by post then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

46. Mr Lansman referred to Zietsman (trading as Berkshire Orthodontics) v Stubbington [2002] ICR 249 in which the Employment Appeal Tribunal considered a review of a decision to issue default judgment under the 1993 Rules of Procedure on the ground that a party did not receive notice of the proceedings served at his former place of business. There was no evidence that the proceedings were not delivered in the ordinary course of post, only that the respondent had not received them. Having reviewed the predecessor rules, the Employment Appeal Tribunal held that deemed service had been effected because they had been served on the respondent's "last known place of business". The Employment Appeal Tribunal stated (at paragraph 33):

> *The right to a fair trial applies to both employee and employer. Were we to find that [the applicable rule] required a current, as opposed to a last known address or place of business, that would place employees in real difficulty in establishing an address for service of proceedings. Conversely, as the employment tribunal pointed out in the present case, it is a simple matter for the employer to make arrangements for collection or redirection of post addressed to his last place of business.*

Conclusion

47. The Respondent maintains that it was completely unaware of proceedings until notified by its solicitors on 1 April 2020. However, the Tribunal finds the Respondent's explanation unsatisfactory.

48. The information on the red stamp on returned envelope containing the re-served ET1 was plainly incorrect: the Tribunal received the stamped envelope on 5 December 2019, six days before the Respondent changed its registered address to Chepstow. Whether or not Mr Baines was unable to find any record of the ET1 having been received by Ms Gregory or Ms Hewat, it is clear that the Respondent was properly served with proceedings when sent to its registered address at 85 Great Portland Street.

49. With regard to the Respondent's further change of registered office, if the Respondent had no arrangements for forwarding mail from 85 Great Portland Street to Chepstow, the Tribunal accepts that the Respondent might not have received the liability judgment and notification that the hearing of 3 March 2020 had been converted to a remedy hearing. The Tribunal would find it surprising however, given the nature of the Respondent's business and the fact that it is

a regulated company, if the Respondent had no mail forwarding arrangements from its previous registered address.

50. Employment Judge Freer clearly knew by 3 March 2020 that the Respondent's registered office had further changed to Basepoint Business Centre in Chepstow. His instruction that the remedy judgment should be sent to that address appears to have been complied with as evidenced by the clerk's note on file. Although this is information gleaned from the file and not specifically addressed during the preliminary hearing, Mr Baines told the Tribunal that he could find no record of scanned post having been received from Basepoint Business Centre. The Tribunal accepts the likelihood that the Respondent would have faced significant disruption to its business on or about 20 March 2020 when the first national lockdown commenced. Notwithstanding, the Respondent's evidence that it has no record of the remedy judgment having been received when it had been posted to its registered address is inexplicable.

51. The Respondent, having been informed by its solicitors of the judgments on 1 April 2020, then delayed making the application until 21 August 2020, over four and half months later. Mr Baines says he was not informed of the judgment on 1 April 2020; he only knew of the claim about the time this application was made. Although he was able to state that Ms Hewat would have been busy dealing with furlough arrangements and redundancy procedures, he was unable to explain with any particularity why the application had not been made sooner. The Respondent's assertion that an adverse finding of discrimination is detrimental to its business as a regulated firm is inconsistent with the fact that the Respondent failed to make this application to the Tribunal with any expedition. Mr Baines said he became aware of the Warning Notice when it was received; given the proximity of receipt of the Warning Notice and the date this application was made, the Tribunal finds it more likely than not that it was the receipt of the Warning Notice that prompted the Respondent to make the application. The Respondent has failed to provide a satisfactory explanation for the delay in making this application.

52. Having only had sight of the ET1 claim form a few days before the preliminary hearing, the Tribunal accepts that the Respondent's advisors have had insufficient time to take instructions and prepare a detailed response to the claim in this case to support its application.

53. Nevertheless, the Respondent's application states that an investigation has concluded that the Claimant failed to disclose her alleged medical condition to the Respondent prior to or during her employment. Although the Tribunal makes no findings as to the alleged disability or the Respondent's knowledge of it, this contention sits uneasily with the content of the Claimant's email of 17 June 2019 referred to above in which she said she had "seisures".

54. Further, the Respondent's application contends that the Claimant was served notice during her probation period due to "concerns surrounding her performance and repeated unexplained absences". This contention too sits uneasily with content of the email exchanges referred to above, in particular with regard to the Claimant's explanation for her absences on 17 and 19 June 2019.

55. There is much force in Ms Greenly's submission that discrimination claims merit a factual enquiry. Nevertheless, her submission that "we say we have a strong

defence" was unsupported by any evidence. The Tribunal is unable to conclude that the Respondent's proposed defence has merit.

56. If the application were to be granted, it is likely that more than two years will have elapsed since the alleged discrimination is said to have taken place and the Tribunal determining the case. Key witnesses might become unavailable and with time memories fade. Further costs would be incurred. In many ways these factors might adversely affect both parties. However, in the circumstances, in particular in light of the Respondent's unsatisfactory explanations referred to above, the Tribunal concludes that the balance of prejudice falls in the Claimant's favour. It is not in the interests of justice for the application to be granted.

57. The Respondent indicated that if the application was refused, it would wish to pursue its alternative application for reconsideration. If the Respondent still wishes to pursue such an application, it should inform the Tribunal promptly so that it might be considered.

58. The Tribunal was of the view that such an application should be reserved to Employment Judge Pritchard. However, upon reflection, given the general availability of Employment Judge Pritchard and the time that has already elapsed in this case, in order for it to be considered as soon as possible it would be more sensible for the application to be considered by available any Employment Judge.

Note

Employment Judge Pritchard
Date: 24 February 2021