EMPLOYMENT TRIBUNALS

Claimants: Mr R Mollett
Mr S Tugwell
Mr S Morley
Mr L Kinchin

Respondent: HMP Wandsworth

Heard at: London South via CVP **On: 29 March 2021**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: Mr McLaughlin, Union representative (POA)
For the respondent: Mr Kirk, Counsel

RESERVED DECISION ON THE RESPONDENT'S APPLICATION UNDER RULE 20

Decision

The respondent's application under Rule 20 (1) and 20 (4) succeeds. The judgment sent to the parties on 19 August 2020 is set aside. The respondent is granted an extension of time to enter a response within 28 days of the Tribunal sending this decision to the parties.

Reasons

(1) This was an application to set aside a Rule 21 Judgement dated 11 August 2020, sent to the parties on 19 August 2020, when judgement has been entered in favour of all four claimants.

(2) The application was made under Rule 20 (1) and (4), Schedule 1 of the Employment Tribunals Regulations 2013.

(3) The application came to be considered before Judge Richardson on 19 January 2021 but was postponed, essentially because the claimants had submitted a response to the respondent's application together with supporting evidence on 6 January 2021 but had not sent the documents to the respondent. Judge Richardson considered it to be in the overriding interest to re-list the Hearing.

(4) The Tribunal heard from Mr McLaughlin, secretary of the Wandsworth branch of the Prison Officers Association, Cynthia Clottey, Head of Learning Skills at HMP Wandsworth, Kate Nutley, Head of Reducing Reoffending at HMP Wandsworth, Mitchell Karim Finance Manager, Ann-Aitken Davies, secretary to the governor at HMP Wandsworth and Graham Barrett, Governor HMP Wandsworth.

(5) The Tribunal had a Hearing bundle of 219 pages. In addition the respondent had sent through, separately, PDF copies of various payslips and also contractual documentation in relation to the claimant because of a dispute between the parties about who was the correct employer/respondent in these proceedings which had some relevance to the respondent's application.

(6) The respondent also relied on two authorities ***Kwik Save Stores Ltd v Swain and others 1997 ICR 49*** and ***Bournemouth Borough Council v Leadbeater UKEAT/0010/11/SM.***

Relevant Findings of Fact

(7) The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

(8) Only relevant findings of fact relevant to the respondent's application and those necessary for the Tribunal to determine (the application), have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute in relation to the application. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

(9) The subject matter of the dispute between the parties was not being resolved today. However in summary and by way of relevant background, the dispute between the parties was in relation to an alleged unauthorised deductions claim. The respondent says the claimants' hours were reduced from 39 hours to 37 hours and the claimants were to lose two hours of Additional Contracted Hours Pensionable Payment ('ACHP') in 2015. The respondent asserts this was following national negotiation with the union. There was to be a pay protection period of 2 years between April 2015 and April 2017. However because of an error, this was not implemented until 27 March 2018 and the 2 year period was to end on 31 March 2020.

(10) The claimants argue that there was an agreement with an executive governor whereby the claimants' pay would remain unchanged.

(11) There have been two grievances in relation to the dispute both of which have been rejected including appeals. The second grievance post-dates the presentation of the claims before the Tribunal.

(12) The Tribunal was provided with a chronology from the respondent. This was not disputed/challenged by the claimants. Key/relevant dates were as follows, as expanded because of relevant additional matters/clarification/further information which arose during the course of the Hearing :

- 01.07.19 Early Conciliation commenced
- 31.07.19 ACAS certificate issued
- 14.08.19 ET1 claim form presented
- 15.08.19 The respondent wrote to the ACAS Conciliator asking for the conciliation period to be extended for 14 days. ACAS advised that the certificate had been issued and an extension was not possible. ACAS further advised that "conciliation can still be used to try and resolve the matter until an ET claim is received, if the Claimants decide to proceed down that route"
- 18.10.19 A Notice of Claim was sent to HMP Wandsworth. (There is a dispute about the correct employer/respondent in these proceedings)
- 07.11.19 One of the claimants (Mr Kinchin) emailed Cynthia Clottey (Head of Learning Skills at HMP Wandsworth) saying "we have been given the date 1 April 2020 time 11am for a full Employment Tribunal…Please let me know if you are free to attend"
- 13.11.19 Some recorded delivery post is signed for at HMP Wandsworth by a "Tareeq" [page 104], although this is denied by the relevant officer [page 135] and the Recovery Delivery Log Book for 13.11.19 – 14.11.19 [pages 105-106] reveals no relevant entry
- 15.11.19 ET3 due date
- 05.02.20 Ms Clottey responds to Mr Kinchin's email of 07.11.19 to say that she had "not received any formal notification" and asking "when am I likely to receive this". She asks Mr Kinchin to "get someone to deal with this please. If I do not receive anything then I am unlikely to attend" (page 107)
- 03.03.20 Mr Kinchin responds giving the details of the Hearing again but not attaching any Tribunal documentation, a copy of the claim or any notice of hearing. Ms Clottey responds, "as I said in my previous email, I

require formal notification from the Court [sic] that my attendance is mandatory. Please can you provide that" (page 108)

- 31.03.20 Richard Mollett (one of the claimants) emails Haroon Mazhar (HMP Wandsworth) stating "I just wanted to confirm with you that Leslie [Kinchin] and I will be attending an Employment Tribunal tomorrow"

- 01.04.20 the Hearing listed to consider the claimant is converted to a Telephone Preliminary Hearing because of Covid-19. At this Hearing Judge Siddall observed that although all four claimants had been named in box 8.2, the multiple claim box had not been ticked and it had not been processed as a multiple claim. Although the respondent had not entered a response, they were not aware, in any event, that there were three other claimants. She directed the claim (with the additional claimants) be re-served. There was no evidence before the Tribunal that this in fact had been done. The Tribunal hearing the application was working remotely without the benefit of the case file

- 29.04.20 The claimants raised a grievance in respect of the same subject matter as the claim (pages 115-118)

- 29.05.20 Grievance Meeting

- 19.06.20 Grievance Outcome Meeting

- 24.06.20 The claimants' grievance is not upheld (pages 120-123)

- 11.08.20 A Rule 21 Judgment is signed (and sent to the parties on 19 August 2020) (page 25). The basis of the sums awarded was not known to the parties/not made known to the Tribunal today

- 06.10.20 A Financial Penalty Warning Notice is sent to HMP Wandsworth (received on or around 09.10.20) (pages 26-27)

- 02.11.20 The claimants' grievance appeal is rejected (pages 130-131)

- 04.11.20 An HR Business Partner at the respondent writes to London South Employment Tribunal for a reconsideration of a Rule 21 Judgment because "unfortunately HMP Wandsworth was not aware of this Employment Tribunal and only became aware as the establishment Business Hub received a warning notice for a payment not being made". The email also requests for the Employment Tribunal to forward all ET paperwork so that HMP Wandsworth can seek the advice of Government Legal Department (page 55)

- 14.12.20 an email from the Government Legal Department to the Employment Tribunal is sent explaining that the documentation requested on 04.11.20 (above) has still not been received and asking for

copies of the ET1 and grounds of claim, Notice of Hearing and default liability and remedy judgments (page 54)

- 15.12.20 An email is sent from the Government Legal Department to the Employment Tribunal Penalties Office requesting relevant documentation (page 53)

- 16.12.20 The Notice of Claim and ET1 is re-sent to the respondent (page 52)

- 18.12.20 The Rule 21 Judgment is received by the respondent/Government Legal Department from Employment Tribunal Penalties (page 53)

- 23.12.20 The respondent applies for a revocation of the Rule 21 Judgment and an Order granting an extension of time to submit a response to the claim.

Applicable Law

(13) Rule 20 of the Employment Tribunals Regulations, Schedule 1 provides:

Applications for extension of time for presenting response:

20 (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.

(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.

(14) In ***Kwik Save***, the EAT stated as follows in respect of a Tribunal's discretion:

"*In some cases, the explanation, or lack of it, may be a decisive factor in the exercise of the discretion, but it is important to note that it is not the only factor to be considered. 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. An important part of exercising this discretion is to ask these questions: what prejudice will the applicant for an extension of time suffer if the extension is refused? What prejudice will the other party suffer if the extension is granted? If the likely prejudice to the applicant for an extension outweighs the likely prejudice to the other party, then that is a factor in favour in granting the extension of time, but it is not always decisive. There may be countervailing factors. It is this process of judgment that often renders the exercise of a*

discretion more difficult than the process of finding facts in dispute and applying to them a rule of law not tempered by discretion.

It is well established that another factor to be taken into account in deciding whether to grant an extension of time is what may be called the merits factor identified by Sir Thomas Bingham M.R. in ***Costellow v. Somerset County Council [1993] 1 W.L.R****. 256, 263:*

"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."

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 industrial 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. That will involve some consideration of the merits of his case."

(15) In ***Bournemouth Borough Council, Kwik Save*** was approved and the EAT said as follows about the predecessor to the Employment tribunals Rules 2013:

"*There is nothing in rule 33 of the 2004 Rules or indeed any other rule which states factors which cannot be taken into account or indicates that the matters set out in rule 33 (5) and (6) of the 2004 rules are the sole matters be considered. Second, the overriding objectives set out in rule 3 of the 2004 Rules include the obligation of Employment Judges to deal "fairly and justly" when exercising any power under those Rules. To my mind, the Kwik Save principles are merely giving guidance to Employment Judges on how to deal with matters such as applications to set aside default judgments "fairly and justly". Those principles are therefore not only applicable but, in my opinion, have to be considered in every case as Mummery J showed."*

Conclusions and analysis

(16) The following conclusions and analysis are based on the findings which have been reached above by the Tribunal and the application of the applicable law. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

(17) Applying the ***Kwik Save*** guidance/factors the Tribunal first analysed the explanation for the non-submission of an ET3 response in time.

(18) Essentially, the respondent's position was that they had not received the Notice of the claim or the Hearing in April 2020. In addition, they had not received the Telephone Case Management Order following the Hearing in April 2020 when the Hearing was converted. The Tribunal's letter of 31 March 2020 converting the case to a telephone Case Management Hearing was also not received by the respondent. This was not a case in which the respondent was saying that correspondence had been received but gone astray; neither was it saying that it had been received but in the wrong office or to an incorrect department. The premise was simply non-receipt.

(19) In this regard it was relevant that there was also a dispute about the correct identity/name of the employer. The respondent was saying this should be the Secretary of State in the draft response and in submissions. That dispute was not being resolved today but the Tribunal understood the respondent to be asserting either that the *fact* of the dispute was relevant as a partial explanation for why correspondence may not have come to the (correct) respondent's attention, alternatively that if the current respondent was not the employer and thus the correct respondent, proceedings had not been served on the correct respondent.

(20) In response to Tribunal questioning, Mr Barrett confirmed that HMP Wandsworth on average, would receive two to three pieces of correspondence in relation to litigation generally, beyond just Tribunal claims, so approximately 24 to 36 per annum. None of the other correspondence to the best of his knowledge had gone astray.

(21) There was obviously a long and established dispute between the parties which had been the subject matter of grievance and appeals and thereafter ACAS Early Conciliation.

(22) There may well have been an expectation of a Tribunal claim. That was not however evidence of receipt or service of proceedings. The email exchanges in March 2020 with Ms Clottey in relation to witness evidence required at a Tribunal did not include with it details of the claim or claims. It was obvious from Ms Clottey's email of 5 February 2020 that she was saying she had not received any other information or notification that there was a Tribunal claim/Hearing on 1 April 2020 she needed to attend for. She made the same point in her email of 3 March 2020. However, it was also the case that Ms Clottey did not make any further enquiry about the matter. Neither did anyone else on behalf of the respondent. There was at least information that there was a Tribunal claim and that there was a Hearing on 1 April 2020 in Croydon. Whilst there was an exchange of emails involving Ms Nadine Walsh (HR), Ms Aitken-Davies and Mr Barrett and it was clear there was ambiguity and confusion about whether or not there was any Tribunal claim, no enquiry was made with or without the assistance of the Government Legal Department at that time.

(23) Notwithstanding the observations in the paragraph above, the Tribunal was satisfied that there was no deliberate avoidance or concealment of receipt of proceedings or any intentional conduct which caused there to be a delay in knowledge of the proceedings. Whilst the Tribunal noted the error in name of the person receiving/signing for post (in relation to the claim form and other documents sent by the claimants) ('Tareeq' not 'Tariq'), it was not clear who had taken responsibility to type the name on the delivery note. However, Mr Tariq Mahmood had said it was not his signature and there was no evidence of this item in the recorded delivery log (pages 104-106). The Tribunal also accepted Mr Barrett's evidence that he did not accept receipt of documents on or around 30 September 2019.

(24) Whilst non-receipt of multiple pieces of correspondence/documentation in relation to this claim was unusual, it did not, in all the circumstances and having regard to the Tribunal's acceptance of the respondent's evidence on knowledge, amount to deliberate avoidance or concealment.

(25) In ***Kwik Save*** it was also said:

"*The Tribunal may form the view that it is a case of procedural abuse, questionable tactics, even, in some cases, intentional default. In other cases it may form the view that the delay is the result of a genuine misunderstanding or an accidental or understandable oversight"*

This case does not slot in to either 'set' of examples but the Tribunal did conclude there was no procedural abuse, there were no questionable tactics or intentional default.

(26) The Tribunal's conclusion on whether the respondent had knowledge of these proceedings before they came to learn of the warning notice dated 6 October 2020 is that they did not. Whether the respondent could have reasonably learned of these proceedings sooner is a matter, in the Tribunal's conclusion, more relevant to prejudice.

(27) In relation to prejudice, the Tribunal concluded that there would be a far greater comparative prejudice to the respondent in not being able to defend the proceedings. There are four claims with a combined value (based on the Rule 21 Judgment) of just under £28,000. That is a significant sum. The prejudice to the claimant is that the issues need to be litigated but that is a far lesser comparative prejudice. The Tribunal considered if the respondent could and ought to have made enquiries sooner of any potential claim against it when it was put on notice that there may be a claim 'in the system'. There was some force in that argument. However, viewed holistically, that may not have made a material difference in the light of the conversion of the full Hearing to a Telephone Case Management Hearing (because of the Covid-19 Pandemic) and because the claims of three of the claimants had not been served on the respondent.

(28) The Tribunal had regard to the measures the respondent took following being on notice of a financial penalty warning notice - that it sought to have the

Judgment reconsidered, it requested the claim form and all documents from the Tribunal on 4 November 2020 and 14 December 2020 and made the application before the Tribunal today on 23 December 2020 following receipt of the Tribunal's letter of 16 December 2020 enclosing the claim form and the Rule 21 Judgment on 18 December 2020 from the Employment Tribunals penalties office. There was a gap in 'action' between 9 October 2020 and 4 November 2020 but the Tribunal did not consider that to be a significant enough factor to outweigh the prejudice to the respondent.

(29) With regards to merits, the Tribunal concluded, based on the draft grounds of resistance and the respondent's submissions that the respondent has an arguable defence such that there are triable issues which would require oral testimony. Further, the exact detail/breakdown of the alleged unauthorised deductions and the amount/quantum of the claim was not clear. The Tribunal did not know and parties were unable to assist with regard to the basis of the calculations for the Rule 21 Judgment. In addition there is a live issue, it would appear, regarding the true/correct identity of the employer/respondent. Whilst the Secretary of State did ultimately become aware of these proceedings, the current respondent as a purported executive agency may be incorrect and may not even be an identifiable legal entity.

(30) In submissions, the claimants did not address the Tribunal on prejudice or the merits of the proposed grounds of resistance. The authorities relied upon by the respondent were acknowledged however.

(31) The Tribunal's analysis also took into account the overriding objective to deal with cases fairly and justly which was also referred to in ***Bournemouth Borough Council.***

(32) In pursuance of the foregoing consideration of the ***Kwik Save*** guidance/factors and with the overriding objective in mind, the Tribunal grants the respondent's application and sets aside the Judgment sent to the parties on 19 August 2020 and grants an extension of time to submit a response within 28 days of this decision being sent to the parties.

(33) A notice of Telephone Case Management Hearing for 2 hours (to set down the case for a full Hearing and to provide directions/Orders for compliance) will follow.

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Employment Judge Khalil

31 March 2021