EMPLOYMENT TRIBUNALS

Claimant: Miss J Rylott

Respondent: Arggen 1 Limited

APPLICATION FOR RECONSIDERATION

Heard: Remotely, via CVP **On:** 5 February 2021

Before: Employment Judge Clark (sitting alone)

Appearances

For the claimant: Miss Rylott in person

For the respondent: Mr R Alford of Counsel

JUDGMENT

1. The application for reconsideration of the judgment is refused.

REASONS

1. Introduction

1.1 On 15 October 2020, the respondent's solicitors applied for reconsideration of a judgment. The substance of the application was drafted by Mrs Mistry and was explicitly made under rule 71 of schedule 1 to the Employment Tribunal (Constitution and Rules) Regulations 2013 ("the rules"). It is an application based on a single and simple issue, namely that none of the correspondence in the case has come to the attention of the respondent meaning it was not aware of the proceedings. I had conducted the remedy hearing and a remedy judgment was sent to the parties on 9 November 2019. Strictly speaking, the application is to revoke the earlier rule 21 liability judgment issued by Employment Judge Britton and sent to the parties on 19 August 2019. I have been appointed to deal with this

application partly out of convenience and practicality, but mainly because of the greater involvement I have had with the case at the remedy stage.

2. The Application

2.1 The respondent has elected to advance its application as an application for reconsideration under rule 71, as opposed to an application to extend time for the presentation of a response under rule 20. Indeed, no draft response was submitted with the application nor an explanation why that was not the case. A few days ago, on 2 February 2021, the respondent submitted a draft "Response to Claim" document setting out the basis of its defence should it be permitted to defend the claim. Whilst there is an extent to which the basis of the respondent's application has evolved and broadened somewhat since it was first made, it is still not put as an application under rule 20. However, I am persuaded I should take a broad approach and not let the procedural form stand in the way of my general discretion in this matter. The principal issue of non-receipt could have formed the foundation of an application under either rule and, as both rules are founded on the interests of justice test, there is little practical distinction although the claimant and her solicitors have responded only to the application based on non-receipt and I must keep any unfairness to her in mind in extending the scope of the hearing in this way. Likewise, if the presumption of service is rebutted, the result would almost certainly be that the respondent would be permitted to defend the claim. I say *almost* certainly as there could still be factors in any particular case where the respondent's delay in acting on other knowledge of the claim balanced against prejudice to the claimant could lead to a decision where it was still not in the interests of justice to revoke the judgment.

2.2 For those reasons, whilst the focus of the application is on the two addresses at which service was made, I also have to consider the circumstances of all correspondence from all sources sent to all addresses and the effect this has on the legal tests and my own assessment of the evidence before me.

3. Preliminary Assessment

3.1 The respondent's written application for reconsideration came before me on papers on 14 November 2020, by which time the claimant's solicitor had made written representations objecting to the application. I undertook a preliminary assessment under rule 72(1). I concluded that the merits of the application could not be said to fall within the test of no reasonable prospects of success such that it could be dismissed at that initial stage. I therefore set it down for today's hearing with directions for the filing and service of evidence. The issue of non-receipt was relevant to both the substantive application and also in satisfying the time within which the application should be presented. Rule 71 requires it to be brought within 14 days of the date the judgment was sent to the parties, subject only to my residual power to extend time under rule 5 where it is just to do so.

4. The hearing

4.1 The claimant remains supported by her solicitor but she appears in person today, no doubt for reason of cost. Her solicitor has filed a skeleton argument, relevant authorities and a bundle of documents in support of her position objecting to the application.

4.2 For the respondent, Mr Alford has filed a skeleton argument and authorities together with draft response to claim. I have heard evidence from Mrs Mistry, the director of the respondent employer. She has adopted a written witness statement with associated exhibits on affirmation and has been questioned.

4.3 As this is a decision with significant consequences to whichever party is disappointed, and because we had limited time in this CVP hearing, I have reserved the decision to be promulgated in writing.

5. The Facts

5.1 Arggen1 Limited trades under the name "Dent Care 1 Smile". Its registered office is at White House, Wollaton Street, Corner of Clarendon Street, Nottingham, Nottinghamshire NG1 5GF (the "White House" address). That address is actually the address of its accountants, called Higsons. At the material time, and until March of last year, it also operated an administrative office at a serviced office complex at Mercury House, Shipstones Business Centre, North Gate, Nottingham, Nottinghamshire NG7 7FN (The "Mercury House" address). It has three dental practices. One is based at 480A Mansfield Road in Nottingham (the "Mansfield Road" address). One is at 15-19 Portland Street in Lincoln (the "Portland Street" address). The third is at 23 Pen Street in Boston where the claimant was employed (the "Pen Street" address).

5.2 On 28 August 2018 Ms Rylott was dismissed from her employment as a part time dental nurse. That followed a period of sickness absence due to her being involved in a serious car accident resulting in severe muscle damage. The ET1 sets out how the claimant was dismissed by the respondent without process and by text message. It read: -

> ***Dear Miss Rylott, Re: Your sickness and absence. We have received your latest sick note provided by your Doctor. We are sorry to hear that you have been under a great deal of pain and suffering since your road traffic accident on the 23rd April 2018. After a great deal of consideration and thought of running the Dental Surgery, I would like to inform you that we are unable to keep your position of Dental Nurse open. I formally give you notice of termination of your contract as from the 13th September 2018 when your present sick note runs out. Wishing you all the best for the future. Yours sincerely Mrs Sangeeta Mistry.***

5.3 There can be no doubt the respondent was aware of the termination and her physical impairments and the underlying facts that would become the subject of the claims.

5.4 The claimant sought legal advice and was represented by Mr Randall of Ringrose Law Solicitors. On 12 December 2018 the claimant commenced early conciliation with ACAS. The method of communication was by email. Two certificates were issued on 28 December 2018. The addresses given to ACAS for the respondent were the correct addresses, one certificate citing the White House address, the other the Mercury House address. Whilst it seems to me more likely than not that some sort of contact was attempted with the respondent by use of that postal address, I have no direct evidence before me of what actual steps were taken by a conciliation officer or early conciliation case worker.

5.5 The ET1 claim form was presented to the employment tribunal on 28 January 2019. The claimant brought claims of unfair dismissal; disability discrimination; breach of contract

(notice pay); outstanding holiday pay; and arrears of pay. Following the same approach taken in early conciliation, the claim form purported to identify two respondents. In fact, it named the same legal entity twice but gave two different addresses. They were the White House and the Mercury House addresses. Administratively, the tribunal has treated the case as having two respondents and at each stage I find it has corresponded with the respondent at those addresses as detailed below.

5.6 There is no suggestion in this case that any of the five addresses relevant to the respondent and set out above were in any way incorrect. I find all of the correspondence apparently sent to it was in fact sent to it and was correctly addressed. Neither is there any dispute about whether the registered office for the respondent was correct. The respondent accepts it would have been validly served of proceedings at either the White house or Mercury House address.

5.7 At box 2.4 of the ET1, the claimant also gave details of the fact that she worked at a different address and there set out the correct “Pen Street” address although that is not an address used by the tribunal in its correspondence.

5.8 The claim passed the rule 10 and 12 vetting stages and was processed by the tribunal in the usual manner. That resulted first in the claim being processed as involving two respondents. The claim and response pack were sent by post to both the White House and Mercury House addresses by letter dated Saturday 13 April 2019. I suspect this day reflects the fact that certain clerks were then undertaking overtime working. I find it would not therefore have been posted until the Monday evening post, potentially arriving around 17 April 2019 when such correspondence would be deemed to have been received. The pack included a notice of a preliminary hearing to be held on 11 July by telephone; notice of how to respond and a notice of hearing which was then listed to take place on 15 June 2020. That notice also set out case management directions and other guidance on responding to a claim. The response pack gave a return date for the ET3 of 11 May 2019. I am satisfied that that correspondence was sent out.

5.9 The deadline expired and no response was received. At the end of May 2019, the case was referred to a Judge to consider a rule 21 default judgment. Employment Judge Hutchinson caused a letter to be sent to the claimant indicating that judgment could be issued but before a decision could be made she was asked to provide details of her losses claimed. That communication was sent by letter dated 5 June 2019. Once again, the correspondence from the tribunal was sent to the respondent at both the White House and Mercury House addresses.

5.10 I find the claimant received that correspondence by email, the respondent was sent it by post. No response was received to that correspondence from the respondent. The claimant’s solicitor responded by email on 21 June providing details of her losses. That is the only piece of interlocutory correspondence I can see that was not copied to the respondent. I will return to other inter-parties’ correspondence later.

5.11 In August 2019, the case was once again referred to an Employment Judge to consider issuing a rule 21 Judgment. Although the claimant had by then provided details of her financial losses, her claim included a claim for compensation for injuries to feeling and Employment Judge Britton therefore determined that remedy should be assessed following a hearing on evidence. As a result, the following things happened. First, a Rule 21 judgment on liability was issued on 13 August 2019. Secondly, the matter was listed for a remedy hearing to take place on Friday, 18 October 2019 at a hearing sitting at Boston County Court. Notice of both those matters was sent to the parties in correspondence dated 19 August 2019. Once again, both the White House and the Mercury House address was used by the tribunal to notify the respondent and was sent by post. Whilst no reply was necessarily required by this correspondence, as a fact I find it did not prompt any correspondence from the respondent either with the tribunal or the claimant's solicitor.

5.12 That remedy hearing was heard by me in Boston on 18 October 2019 as planned. The claimant attended in person and, as today, was receiving support from her solicitor at a distance. The respondent did not attend. Boston is a remote hearing centre at which the Employment Tribunal is not clerked, save for limited assistance of a County Court usher to bring the parties in. I considered whether I could practically take any steps to enquire about the respondent's whereabouts and concluded it was not only not practicable but, as I had the tribunal file before me, I could see that this was a rule 21 remedy hearing and that the tribunal had written to respondent at two addresses on a number of occasions without any response. Its non-attendance on the day did not come as any surprise in a way that, in other circumstances, it might have given greater cause for concern. Evidence was heard and an ex-tempore remedy judgment given on the day. On 9 November 2019, a written record of the judgment was sent to the parties by the tribunal together with associated notices relating to the Employment Tribunal's (Interest) Order 1990 and other information on seeking reconsideration and/or appealing against the decision to the Employment Appeal Tribunal. Again, these items were posted to the Respondent although the file suggests on this occasion they may have been sent only to the White House address.

5.13 That is where the relevant part of the Employment Tribunal's file ends. It is not where the wider chronology ends so far as is relevant to other communications with the Respondent. Nor does it tell the full story of the extent of correspondence that has been sent to the respondent at various times in connection with this claim.

5.14 Going back to Mr Randall's first instruction by the claimant, as early as 13 December 2018, that is the day after notification to ACAS, I find he wrote to the respondent at the Mercury House address setting out the nature of the Claimant's claim and made various proposals for settlement. That letter did not prompt a response.

5.15 On 2 January 2019, that is shortly after the early conciliation period ended and before the claim was presented, Mr Randall wrote again to the Respondent. This time the correspondence was sent to the Pen Street address. Again, the letter set out the nature of the claim and made proposals for settlement. Again, I find the correspondence was sent and there was no response to it.

5.16 The case took its course within the tribunal during 2019 as I have set out above. After the remedy judgment was promulgated, on 20 November 2019 Mr Randall again wrote to the Respondent. Whilst no one could have mistaken the nature of his earlier correspondence, that letter carried an even greater degree of formality as it was now written under the formalities of the Civil Procedure Rules' General Practice Direction on Pre-action Conduct with a view to making an application to the County Court for registration and enforcement of the Remedy Judgment. The main significance of this correspondence, for present purposes, is that it was sent to the respondent at four separate addresses. They were the White House address, the Pen Street address, the Portland Street address and the Mansfield Road address.

5.17 Mr Randall received no response to any of those letters. Again, I am satisfied that those letters were in fact sent and the presumption of delivery in the ordinary course of the post arises which has not been rebutted. Moreover, I can say with certainty that the 3rd of those four letters was in fact delivered to the respondent because the respondent's application concedes as much. Mrs Mistry's application asserts that "this letter had not been passed to me due to staff members being ill at the time and post not being dealt with properly". I return to Mrs Mistry's evidence in more detail later but for present purposes that is a significant concession. Whilst the Portland Street address is neither the Respondent's registered office nor the place at which the claimant worked, it nevertheless gives an insight into the administrative systems operated by this employer and evidentially confirms as a fact, what is otherwise a legal presumption, that this item of post has arrived as addressed.

5.18 At some point during 2020 the claimant proceeded with her application to register the remedy judgment and to seek enforcement by way of a writ of control. I am not told exactly what happened in that regard and what further correspondence will have been attempted with the respondent by her solicitors, the County Court or the enforcement officers. However, I am satisfied that it is more likely than not that some further correspondence was sent to the respondent as a result. The notice of enforcement itself refers to the respondent's failure to respond to previous correspondence. On that, the respondent says that it did not receive it. On 5 October 2020, High Court Enforcement Officers attended to seek to enforce the judgment debt.

5.19 Mrs Mistry says that is the first she knew of the matter and she then promptly instructed solicitors and the application set out above was lodged. Mrs Mistry gave evidence of the administrative systems for handling post at the various premises operated by the respondent at the material time. I deal first with the two addresses to which service of the claim form was made.

5.20 The White House address is the respondent's accountant. The respondent uses its address as its registered office. I find Higsons provides this function for a number of its client companies. I am prepared to infer that it is aware of the significance of the public register of companies' registered addresses and the likelihood that formal notices will be posted to that address. The evidence I have consists of a single page extract from a manuscript "post book", a covering email from Higsons and what Mrs Mistry tells me, in a mix of opinion and hearsay evidence, that this information shows. The extract shows three columns indicating a

date, the forwarding recipient and a postage cost. Each row is an item of post that someone at Higsons has recorded as handling on behalf of a third-party entity. On balance, I would infer this is a service that is handled with reasonable diligence by Higsons as it forms part and parcel of their services to clients but I find the evidence put before me of this system is limited in a number of significant ways and does not lead me to find on balance that the date in the post book is the date that the item was received by Higsons or, more significantly, that it shows the claim was not served. First, I have no evidence from anyone at Higsons of the post handling and forwarding system. All I have is what the respondent has chosen to request and has then sought to explain. The covering email from an employee of Higsons apologises for the delay (that is, in responding to the request for the post book and not in respect of forwarding the item of post) explaining that "it was one of those mornings where 100 things all seemed to crop up at the same time". This suggests there are times when other demands divert the staff from tasks they might have waiting to do. She says she was able to find only one entry for April 2019 which is the extract now before me. Second, I have no evidence of which address Higsons then use to forward any incoming post or whether the address changes amongst the four other addresses relevant to the respondent's business. Third, the extract has been limited to a single page showing 2 days in April 2019. I am told that a number of items of general post were forwarded by Higsons but the respondent has chosen not to adduce any further evidence of how post has been handled generally and from which I might assess the system for handling post. Fourth, and more specifically, there is no evidence of how the other specific items of post sent to the respondent by the tribunal or claimant's solicitor to the White House address were handled. I know that there were five items of post sent and I am left to assess Mrs Mistry's evidence that she "could not recollect if this was the only item of post but could recollect that none of the other matters related to this claim". The effect of that has to be that the presumption of receipt is not rebutted and if Higsons do handle post with reasonable diligence, even if it is delayed, those other items were received and were forwarded on to the respondent. Fifth, the post book does show an entry of post being forwarded to the respondent at a postage cost of £1.03. It is listed next to a date of 26 April 2019. The column is headed "stamps bought". There is no evidence to explain whether this date is the date the incoming post was received by Higsons, the date that the "stamps were bought" or the date the item was posted onward to the recipient. Sixth, I have no evidence going to the nature of this item of post one way or another although I accept it would be unlikely anyone could evidence the content in such a case. I can infer that the forwarding postage cost is more than the cost of a single small letter and may be broadly consistent with the cost of posting the larger response pack but I do not place great weight on that fact alone. I agree that the time between when the claim form was likely to have been received and this date is potentially longer than one might expect if the date is "date received" and the respondent asks me to infer from this evidence that Higsons did not receive the claim form. The difficulty with that proposition is that no one can tell me what this date shows. The evidence does not allow me to say with any confidence that this is not, in fact, evidence of the claim form and response pack actually being received and sent on to the respondent. I have no evidence of the general effectiveness of this post forwarding system and whether there have been any other deficiencies in post getting to the respondent through this intermediary at all or on time. I have no evidence of the handling of other correspondence sent by the

tribunal to this address against which to analyse the handling of this important piece of correspondence. All that is compounded by the fact that the Easter Holiday lands in the middle of this part of the chronology falling between the likely receipt date and when this unidentified item of post was handled by Higsons. Even a reasonably diligent approach to post forwarding could occasionally experience delay of a few days, particularly over a long bank holiday weekend such as this.

5.21 The second address relevant to the service is the Mercury House address. Post is received at the address and sorted by the reception staff employed at the offices. Each company using the serviced offices has a pigeon hole for incoming post which I am told is filled by the reception staff. I accept Mrs Mistry would visit this office at least once a week. She describes in general terms the possibility that the receptionist could put post in the wrong pigeon hole or that post could be inadvertently taken out of her company's pigeon hole by another tenant. It is said, in equally general terms, that these things happen from time to time. I have nothing to illustrate whether this has in fact happened to the respondent or the circumstances of the general assertion that it has happened. As with Higsons' approach to their intermediary service, so it is that I infer a reasonable degree of diligence to post handling of those operating the serviced offices. The post handling is part of their business model and deficiencies in that service would be likely to reflect in complaints. Where there was an ongoing problem, it is likely to have come to the attention of all those tenants suffering lost post and not just the respondent. That is a state of affairs not put in evidence. Equally, although my focus is on the initial service of the claim, I have no evidence of why there would be repeated failures in respect of the other items of post sent to the Mercury House address.

5.22 Although service may be affected by delivery to either of these addresses, for Mrs Mistry or any other employee or agent to have knowledge of its content relies on the respondent's administrative systems. In the case of Mercury House, that depends on when Mrs Mistry visits and what she does with any incoming post actually received. Beyond the fact she collects that which is waiting for her, I have no evidence of what happens with it thereafter. In the case of the White House address, the process of forwarding post to the respondent means an item which is by then validly served on the respondent's registered address is then put through the general postal system for a second time before it is then handled in just the same way as any other item of incoming post within the respondent's business.

5.23 I then turn to what administrative systems were in place at the various locations for post handling. Whilst not directly relevant to the question of service at the two addresses in question, it is of wider relevance to the respondent's knowledge of the claim which takes on a particular relevance as much of Mrs Mistry's evidence was couched in terms that "*she had not seen the items*" or that "*they had not reached her"* as opposed to them not actually being received. It is also relevant to how I have reached my findings of fact that all the correspondence was in fact sent.

5.24 Each of the three further addresses were clinical settings. They each had someone employed in a supervisory, or team leader, type role. I accept it was part of that person's duties to deal with incoming post. I find they would decide if anything needed Mrs Mistry's

attention and it would be left for her. It follows that the post is therefore opened at this stage. I do not accept Mrs Mistry's evidence in chief that such items of post were "forwarded" to her by her staff. I find the act of the post being "left for her" involved nothing more than it was simply left somewhere for when Mrs Mistry was next at the clinic in question. Mrs Mistry's own work schedule meant she would attend at all three premises from time to time. I did not find Mrs Mistry's own approach to handling post to be one that suggested any particular urgency or importance was attached to such administrative processes or that there was any organised system. The manner in which Mrs Mistry dealt with such a serious matter as dismissing the claimant gives a flavour of a lack of formality in the management and administrative systems. On balance, the evidence painted a picture where I find items of post could be left unread, unactioned, forgotten or lost. This was compounded by the fact that the system relied on someone pointing out to her the fact that an item of post was waiting. At the material time, that is around April 2019, Mrs Mistry accepted that she had "a couple" of her team leaders off sick. That is two of the three clinical sites the respondent operates meaning in one of them the respondent's post system was functioning in the way she expected. She described the effectiveness of the postal system at that time in terms that "*correspondence was not dealt with by anyone at that point and it was all just put to one side waiting for them to get back to work, it would eventually get passed to me - assuming they actually came back to work*". That is not evidence which instils confidence. Mrs Mistry clearly knew of this gap in the system and was content to leave post unattended to.

5.25 I have also considered whether the respondent's response to the enforcement officer's visit is indicative that there was no prior knowledge. That is a factor to weigh but I do not accept that that follows automatically or that it is even simply a likely indicator. One might hope that a business would not ignore claims and, less still, judgments, but it is a reality that not every business is well organised, not every claim is defenced and not every judgment is enforced. In this case I have grave concerns about what Mrs Mistry has told me of what she had, or had not, received. I accept that it is always possible for an item of post to go astray. For it to repeatedly do so is less likely. For it to happen to this extent to correspondence sent to five different addresses by three different senders over a period of more than a year strongly suggests that non-receipt is not the reason. The respondent's case is that all but one item was not received. Mrs Mistry's oral evidence softened that position to one where "the post had not reached me", which I find to be distancing from the responsibilities that the statutory director of a limited liability company has. The respondent's own case is that there was a lengthy period where it accepts deficiencies in its internal post handling where Mrs Mistry must have been aware that post was building up yet it is not said that this ongoing state of affairs prompted her to intervene to deal with those deficiencies. If that were the case, other important items of post must have gone unanswered yet it is not in evidence before me. The respondent's position amounts to one of two. Either the claimed deficiencies in its internal administrative systems only affected correspondence relating to this claim, which is next to impossible, or the wider effect on all correspondence for the business suddenly stopping was something the respondent was content with and did not seek to remedy. Neither of those two positions seem credible or likely and they leave the way open for the third explanation. Over all, I am left unable to accept that Mrs Mistry's first awareness of Ms Rylott's claim was the day the enforcement officers attended on 5 October 2020. On

the balance of probabilities, I find as a fact that the respondent did in fact receive the correspondence from the tribunal and the claimant's solicitors and that the respondent, through its agents or employees, was aware of the existence of the claim and the judgment. I cannot separate Mrs Mistry from those employee's opening the post and have to conclude that I do not accept Mrs Mistry was not aware of the claim. I find, on balance, that she was aware of the prospect of the claim from soon after the correspondence dated 2 January 2019 from the claimant's solicitor and was aware of its existence from soon after the correspondence from the tribunal dated 13 April 2019. It also follows from this conclusion that I find the respondent has therefore elected not to engage with the litigation process until enforcement was commenced.

5.26 The claimant did not give evidence. She did question Mrs Mistry and did make closing submissions. I have been careful in how I treat those matters as some comments were particularly damning of the respondent's administrative systems, suggested other staff were aware of her claim from the correspondence and that the respondent had a track record of failing to respond to formal demands but these submissions were not subject to cross examination and it seems to me the most I can take from that is that she confirmed the picture of administrative inefficiency in post handling that I do, in any event, conclude from the respondent's own evidence.

6. Discussion and Conclusions

The law

6.1 The 2013 rules deal with service, correspondence and date of delivery. Rule 86 of the 2013 rules governs the manner by which documents may be delivered to a party. Post is clearly one of the permitted forms of delivery. By rule 86(2) such documents shall be delivered to the addresses given in the claim form. Rule 90 provides a scheme of deemed dates of delivery depending on the method of delivery. It provides

> ***"where a document has been delivered in accordance with rule 85 or 86, it shall, unless the contrary 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;"***

6.2 The settled authorities establish that to be deemed to be the second business day after posting.

6.3 It follows, therefore, that unless this application succeeds, the claim form was properly served and the application of the rules thereafter proceed to deal with the necessary case management throughout the life of the case up to and including the rule 21 and remedy judgment which remain valid judgments.

6.4 The jurisprudence behind rule 90 flows from that arising under section 7 of the Interpretation Act 1978 and its predecessors. That provides: -

> ***7 References to service by post.***
>
> ***Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) 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.

6.5 I approach matters on the basis that the authorities on section 7 are informative for the interpretation of rule 90. The application of the equivalent predecessor rules has been approached consistently with that. (see *T & D Transport (Portsmouth) Limited -v- Limburn [1987] ICR 696*).

6.6 Both statutory provisions set up a rebuttable presumption. As such, it is open to the defaulting party to rebut it to show that the correspondence was not in fact received. The common phrase used in both provisions is "unless the contrary is proved" which means the process of rebutting that presumption must be done by evidence. I must therefore be satisfied that the correspondence in question was not received by the intended recipient either at all or, where timing is in issue, on the date on which it is deemed to have been received. Mr Alford accepts this approach and that the burden rests with the respondent to rebut the presumption in respect of both addresses. I stress that the standard is the civil standard, that is on the balance of probabilities. The respondent does not need to make me sure of non-receipt. Having said that, the balance of probabilities is just that, a balance of the likelihood of a state of affairs applying or not. The more weight there is on one side of the conceptual scale, the more that is required on the other to overcome it.

6.7 The determination of this question goes both to the substance of the respondent's application and the procedural requirement that such applications are made within 14 days of the date on which the written record was sent to the parties. However, I stated at the outset that successfully showing a failure in service will almost always lead to the judgment being revoked. Unlike the part 13 of the civil procedure rules, there is no strict rule to this effect dealing with setting aside default judgments. The application of the analogous situation in the employment tribunal therefore derives from general principles of justice and the overriding objective and the changes in the 2013 rules removing the specific grounds of review have not removed those factors from the interests of justice test (*Outasight VB Ltd v Brown UKEAT/0253/14*). However, that potentially leaves open some residual discretion in extreme cases where the balance of injustice falls so clearly against taking that course. This is a matter of judicial discretion but I accept the claimant's submission that that is not boundless and it must be exercised judicially. Judicial discretion must always be approached with relevance, reason, justice and fairness in mind. Within that I must have regard not just to the interest of the respondent but also the interest of the claimant and, indeed, to the public interest requirement that there should as far as possible, be finality of litigation (see e.g. *Flint -v - Eastern Electricity Board [1975] ICR 395 401*) so long as that does not also offend the equally important requirement of fairness and justice.

6.8 Similarly, however, that broad judicial discretion could tip the other way and, as Mr Alford submits, even if I conclude the respondent was properly served, there may still be factors in the case which mean it is in the interest of justice to permit the respondent to reopen some or all of the judgment against it. This is not a rule 20 application and it is not put as such. Nevertheless, it seems to me consideration of that wider residual discretion in the

interest of justice would follow the same approach and the relevant guidance including cases such as *Kwik Save Stores Ltd v Swain [1997] ICR 49 EAT* would apply.

7. Discussion

7.1 The starting point is that the claimant properly presented a claim against the correct respondent giving three correct addresses. Two were used to formally serve the claim form and response pack and the respondent accepts both were valid addresses for service. That must be so as one of the addresses is that given in compliance with the director's obligations under section 86 of the Companies Act 2006 to maintain an effective postal address to which all communication and notices can be addressed.

Time of the application

7.2 An application under rule 71 must be made within 14 days or such further time as I permit where it would be in the interest of justice to do so. Clearly, in this case the written record of the remedy judgment was sent on 9 November 2019. The application was made on 16 October 2020 almost a year late. The respondent clearly has to satisfy the tribunal that it should exercise its discretion under rule 5 of the 2013 rules to extend time for the presentation of the application. The underlying substance of that application considerably overlaps with the substantive application to the extent that two issues (when they were understood to be the only issues in the application) were rolled up into this single hearing albeit that they remain subject to separate consideration and determination.

7.3 My focus is slightly different as between determining the timing point and the substantive question. So far the substantive application is concerned, my focus is whether the respondent has satisfied me that it did not receive either of the two original notices of claim and associated response packs. When it comes to the time this application is presented, I must consider the totality of the evidence and the correspondence that has been sent to the respondent at various addresses such as would put it on notice of either the existence of the original claim proceeding through the process or to the outcome of the default and remedy judgment.

7.4 At the preliminary consideration of this application, I did consider refusing extension of time on what the respondent had then put before me. By its own admission, notice of the remedy judgment had been received by it in early November 2019 and its own administrative inadequacies had been the reason why the judgment had not been dealt with. That is not a powerful argument to extend time but at the time I considered it necessary to hear evidence and argument on the point. On Mrs Mistry's account, her application was lodged 10 days after she first became aware of the existence of the remedy judgment. On my findings, however, it was lodged, about two years after the respondent is fixed with knowledge of the existence of the claim and a year after the judgment itself. It is out of time.

7.5 That then leads to whether it is just to extend time under the general power to do so under rule 5. This is a question of balancing the justice between the parties of granting or refusing an extension of time. As with all exercise of judicial discretion, this be performed judicially and particularly with regard to the overriding objective. Mrs Mistry has operated a

business where, on her case, she was aware of deficiencies with administration and that post was not being dealt with due to staff absences. Against that, I have to consider the likelihood that so many items of post failed to get delivered or come to her attention. I have been unable to accept that was the case. There is a weight of correspondence from different sources sent to five different addresses which substantially raises the bar for what the employer has to rebut and weighs heavily against displacing the presumption of delivery. I am being asked to accept that none of the items of post was received or, if they were, they did not come to the attention of Mrs Mistry. I have not accepted that as a fact and concluded that they were not only received but the fact of the claim came to the Mrs Mistry's knowledge early in 2019. I have concluded, on the balance of probabilities that the respondent has exercised a choice not to engage in the process. Its right to a fair trial was engaged with the litigation procedure conducted by the tribunal under the rules giving it the opportunity to engage. It has sought to change that only when the claimant sought to enforce the remedy judgment. None of that weighs heavily in the respondent's favour.

7.6 Competing with that is a claim that was properly presented in respect of a dismissal occurring around 2½ years ago. The judgment itself is over a year old. The further time likely before any reopened case could be determined would be in the region of approaching 4 years from dismissal. Delay in itself often does not weigh particularly heavy in such questions but that depends on the weight of justice on the other side. In this case it is enough as I cannot apply much weight at all to a state of affairs brought about by the respondent itself.

7.7 As a matter of formality, therefore, I would decline to extend the time for the rule 71 application. However, it seems to me little turns on that conclusion for two reasons. First, I have in any event dealt with my negative conclusion on the substance of the application and, secondly, had the application been framed under rule 20, there would not have been any formal time limit, albeit whether a respondent acted promptly is inevitably a relevant consideration in the interests of justice test.

Rebutting the statutory presumption

7.8 The substantive question before me under the rule 71 application is whether the respondent has rebutted the statutory presumption of delivery. Has it proved to the civil standard that it did not receive notice of the claim at either address?

7.9 I am not satisfied that it has. There are two addresses served and I accept there is more force in its position in respect of the White House address as there is at least evidence of some sort of system applicable to the handling of post. That system means if it was received by Higsons, it was deemed received by the respondent and validly served. Any consideration of what happened to it thereafter is no different to any other item of post received but not processed by the business internally by the staff or Mrs Mistry herself. At most, that would fall into a general interests of justice discretion but not go to rebut the presumption of receipt.

7.10 I am not satisfied that the evidence adduced in respect of the White House address is sufficient to say, on the balance of probabilities, that it was not received. The evidence must

go beyond an assertion it was not received and the evidence adduced by the respondent does indeed go beyond a bald assertion. However, it leaves many gaps and questions unanswered and does so in the face of other evidence consistent with the presumption of delivery being the case in fact. The respondent has not persuaded me I can properly conclude it was more likely that it was not received than received and the evidence adduced actually appears reasonably capable of demonstrating that the claim form and response pack was in fact received. I therefore reach the conclusion that the presumption has not been rebutted.

7.11 If I am wrong in reaching that conclusion, the unusual circumstance of this case is that the respondent was named twice at two addresses. To benefit from what will usually be an automatic right to defend the claim, it has accepted that it has to rebut the statutory presumption of service at both valid addresses. The circumstances applicable to the White House address are different to those applicable to the Mercury House address. Although I have rejected the respondent's case in respect of the White House address, it is arguably the stronger of the two. In respect of the Mercury House address, the highest that can be said about this is that there *might* be some reason why after post was successfully delivered to the address it *might* not have found its way to Mrs Mistry. Again, there are too many other questions left unanswered including evidence of other post received or not received through this address. I have decided the evidence is not sufficient to rebut the presumption of service.

7.12 The claim was therefore properly served and received by the respondent in April 2019. The application before the tribunal under rule 71 would therefore be refused, even if I extended time for its presentation.

The wider discretion to set aside the judgments.

7.13 Having refused to revoke or vary the judgment on the reconsideration application actually before me, I have nonetheless considered whether, had this been an application under rule 20, there were factors that would weigh in the exercise of discretion so as to tip it in favour of reopening the judgments against it. This is a question of identifying and weighing the relevant factors against the ultimate question of the balance of hardship.

7.14 I say at the outset that I am not entirely comfortable with this late evolution of the application as this was not the application that the claimant thought she had to meet at this hearing and the respondent has not actually complied with rule 20. However, as I have said I was persuaded that it is a question I should address in the circumstances of what is before me subject to being alert to any prejudice arising to the claimant.

7.15 The factors that I have identified as relevant are the merits of the respondent's draft defence, why the application is made now and whether the respondent acted promptly, the delay and its effect, where we stand in the life of the claim, the wider effect on access to justice, costs, and the value of the claim before balancing the hardship between the parties of permitting or refusing the application.

7.16 The first factor of relevance is the merits of the respondent's defence. It is ordinarily enough that the defence is more than merely arguable. In broad terms, however, Mr Alford submits that its defence is not only reasonably arguable but that it has a strong position to successfully defend all the claims and that that should weigh heavily in the scale of the balance of prejudice. I take the view that the defence is not as strong as Mr Alford submits and in some cases is in fact close to being fanciful. First and foremost, the defence to the claim of unfair dismissal has focussed on the reasons and surrounding circumstance without explicitly engaging with procedural aspects of the dismissal. A dismissal by a single text message flies in the face of any procedural expectations and would need clear explanation as to why the circumstances were such as to bring that summary process within the range of reasonable responses. This has not been set out beyond a generic plea of reasonableness under s.98(4) of the 1996 Act. What might be called the substantive defence may therefore have greater application to remedy than liability but even that will depend largely on the discrimination claims associated with dismissal. The award for unfair dismissal in this case was limited to basic award and loss of statutory rights.

7.17 I also do not accept that the disability claims carry the force Mr Alford submits. Much of this case flows from the respondent's own state of knowledge expressed in the dismissal text and the reasons given for that decision. As to disability status and associated knowledge, it demonstrates enough knowledge to seriously question whether it would overcome the "reasonably ought to" element of the test. It also shows knowledge, or belief, in the existence of impairments, their seriousness and their long-term nature enough to question whether it can seriously challenge the relatively low threshold of disability generally, and particularly the "could well happen' meaning of what is likely. That knowledge or belief in the impairments were expressly material to the reason to dismiss to raise a question about the force of the direct discrimination claim. Similarly, the s.15 claim of discrimination arising from disability is prima facie made out as explicitly being because of absence, enough at least to turn to the respondent to justify it. It justifies the action based on the legitimate aim of keeping the business going which is a reasonably arguable pleading but subject to proportionality which, in turn, would be assessed against the alternatives of less discriminatory actions. Faced with a summary decision without any meaningful enquiry or consideration of alternatives, that is likely to limit the respondent's ability to justify its actions. The strongest point in the disability discrimination claims is that the explicit reasonable adjustment claim is not well articulated in the claim but that does not mean other alternatives to dismissal would not be relevant to the proportionality of any justification defence.

7.18 The breach of contract claim is more than reasonably arguable although the remedy judgment explicitly made no award for that claim. Similarly, there was no award for any claim of arrears of pay.

7.19 The second factor is the promptness of the application and reason for it. I have found not only that the correspondence was sent but that the employer, through its director, was aware of the claim and chose not to engage in the process until enforcement was attempted. That does not carry any weight at all in the respondent's favour and in fact aggravates the simple factor of delay and its effects. That already weighs heavily in the claimant's favour. It

is over 2½ years since the claimant was dismissed and over a year since judgment was issued. There is then a second level of lack of promptness in this particular application. It arises from the fact that the respondent made its rule 71 application on 14 October 2020 yet has only provided a draft "response to claim", and not an ET3 response, on 2 February 2021.

7.20 The effect of delay on the evidence in a case is a factor which has a general negative effect on both parties' ability to advance cogent evidence. In itself it could therefore be said to be neutral. It should not have that effect when the justice of why it is a relevant factor flows from the respondent's lack of engagement and it is of added significance where the issues are likely to rely on oral testimony, rather than contemporaneous documentation as in this case.

7.21 As to where we are in the life of the claim, I take the view that this is only a marginally relevant factor in that the claim has been determined to finality. In itself it weighs against the respondent but, of course, by definition every application to set aside a judgment occurs after judgment. What force it has may be better expressed as part of delay or promptness as although the employment tribunal claim has been concluded, the application comes after a consequential stage of enforcement was attempted. I do not apply much weight to it.

7.22 I then consider the effect on access to justice for all users of the system. Tribunal resources are finite. More claimants are seeking justice. Setting aside this judgment will add to the volume of cases in the system and the delay other users suffer. However, whilst it seems to me that this might be a relevant factor, it does not seem to me to add anything to the general principals of finality of litigation subject to doing justice and fairness between the parties and too much attention to it might well obfuscate those principals. I therefore consider it neutral.

7.23 The next factor is costs. I do not regard the ability to order the respondent to pay costs to weigh heavily. It has not been offered by the respondent as part of the application and whilst I could award costs, it would only become relevant to the balancing exercise to the extent of addressing financial prejudice to the claimant of unnecessary expenditure. I can either ignore the costs the claimant would have inevitably wasted if the judgments were set aside or I can take them into account and at the same time weigh the effect of the respondent meeting a costs order. Either way, it reduces costs to a neutral factor in this case.

7.24 A factor that on the face of it appears to weigh in the respondent's favour is the value of the remedy judgment. I am alert to the fact that had the respondent merely failed to respond to the claim on time, but otherwise had engaged in the process it would have been entitled, almost as of right, to participate fully in any remedy hearing (see *Office Equipment Systems v Hughes [2018] EWCA Civ 1842*). Although we have passed the application of that principal after remedy judgment has been given, I have nonetheless also given consideration to whether the balancing exercise within my discretion tips in a different direction if only the remedy judgment was considered. A central argument is that the dismissal was a one off event and the quantum of pecuniary compensation does not justify such an award for someone of the claimant's low income. Injury to feelings flows not by reference to the claimant's previous income and nor would it be appropriate to assess compensation in such a

way meaning higher paid employees discriminated against could receive greater injury to feelings compensation than lower paid employees suffering the same injury. Over half of the award related to injury to feelings in respect of which it is open for a tribunal to conclude the injury arising from a discriminatory dismissal should not be limited to the less serious, or one-off, lower Vento band. (*Voith Turbo v Stowe [2104] UKEAT/0675/04*). All discrimination awards attract statutory interest. Nothing was awarded for breach of contract. Annual leave is formulaic. Unfair dismissal was limited to the basic award and loss of statutory rights. I suspect that any argument not previously before the tribunal could have some effect on reducing the overall remedy figure but I am not persuaded they are likely to be significant. The fact that there might be some reduction does not lead to an automatic right to reopen the issue. I acknowledge it is a factor very much in the respondent's favour but one which has to be weighed against the overall balance of prejudice of reopening the remedy just as the question of liability and the same factors weigh in the balance. A weighty factor on the other side of the scale is that the reason the respondent has to make this application is down to its own decisions it takes and how it manages its own affairs.

7.25 Assessing all those factors in the round, I am not persuaded the balance in this case weighs in favour to permit the late presentation of the ET3. Equally, I am not satisfied that there is sufficient to persuade me to set aside only the remedy judgment but to otherwise leave the liability judgment standing. At its most basic, I am essentially being asked to accept a position where a respondent can do nothing about the litigation process until the outcome is known and tangible and goes beyond what it can accept and then expect to have a right to resurrect the litigation. I am not satisfied that the interest of justice between the parties is such that the balance tips in favour of the respondent even if there might be marginal challenges to remedy.

7.26 For those reasons the wider basis of the application is refused also.

EMPLOYMENT JUDGE R Clark
DATE 30 April 2021

JUDGMENT SENT TO THE PARTIES ON

7 May 2021
……..……..

AND ENTERED IN THE REGISTER

……..…….

FOR SECRETARY OF THE TRIBUNALS