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## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100173/2020 (A)

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Reconsideration Hearing held remotely at Glasgow  
on 6 August 2020 (by telephone conference call)

Employment Judge: Ian McPherson

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Miss Bethany McDonald

Claimant  
In Person

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Sajida Chaudry

Respondent  
In Person

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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(1) Having heard oral submissions from the claimant in person, and the respondent in person, at this Reconsideration Hearing conducted remotely by telephone conference call, and after private deliberation in chambers, the Tribunal **grants** the respondent's opposed application for reconsideration of the **Rule 21** Default Judgment issued against the respondent, Mrs Chaudry, dated 3 March, and sent to parties on 4 March 2020, and **revokes** it, in terms of **Rule 70 of the Employment Tribunals Rules of Procedure 2013**, it being in the interests of justice to do so.

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(2) Further, having heard both parties, and after private deliberation in chambers on their submissions, the Tribunal also **grants** the respondent's opposed application under **Rule 21 of the Employment Tribunals Rules of Procedure 2013** to be allowed an extension of time to lodge a late ET3

response defending the claim, and **sets aside** the **Rule 21** Default Judgment issued against the respondent, dated 3 March, and sent to parties on 4 March 2020

- 5 (3) Having granted the respondent's opposed applications, the Tribunal **allows** the ET3 response submitted by the respondent, Mrs Chaudry, on 15 April 2020 to be accepted, and the case to proceed as defended by her on both liability and remedy.
- 10 (4) Further, in terms of its powers under **Rule 34 of the Employment Tribunals Rules of Procedure 2013**, it appearing to the Tribunal that there are issues between these two parties as to the proper identify of the claimant's employer as at the effective date of termination of her employment at the Chicken Cottage, Livingston, on 29 September 2019, the Tribunal **adds Mr Kashif Chaudry as an additional respondent** in these Tribunal proceedings, to be hereinafter referred to as the second respondent.
- 15 (5) Accordingly. the Tribunal **instructs** the clerk to the Tribunal to serve a copy of the now accepted ET3 response for the first respondent, Mrs Chaudry, on the claimant, and on ACAS, as well as the now second respondent, when issuing a copy of this Judgment to all parties.
- 20 (6) The Tribunal further **orders** that the claim and responses shall be listed for a Final Hearing, before any Employment Judge sitting alone, at the Edinburgh Employment Tribunal on a date to be hereinafter assigned by the Tribunal, for determination of all outstanding issues between those three parties, including, if still appropriate, determination of the currently disputed preliminary issue of the proper identity of the claimant's employer at the relevant time.
- 25 (7) In these circumstances, the Tribunal further **instructs** the clerk to the Tribunal to serve a copy of the ET1 claim form, as presented to the Tribunal on 14 January 2020, along with the now accepted ET3 response for the first respondent, Mrs Chaudry, on Mr Kashif Chaudry, as second respondent, at his home address of 43 Haymarket Crescent, Livingston, West Lothian, EH54  
30 8AP, on the basis of parties' joint information to the Tribunal, at this Hearing,

that the Chicken Cottage business, formerly trading from 5 Parkway Retail Square, Livingston, West Lothian, EH54 6ZW, is no longer trading from that address.

## REASONS

### 5 Introduction

1 This case called before me on the afternoon of Thursday, 6 August 2020, at 2.00pm, for a Reconsideration Hearing, further to Notice of Hearing issued by the Tribunal to both parties by email on 8 July 2020.

2 Following ACAS Early Conciliation between 17 December 2019, and 14  
10 January 2020, the claimant, acting on her own behalf, presented an ET1 claim form to the Employment Tribunal, on 14 January 2020, against Mrs Sajida Chaudry, trading as Chicken Cottage, 5 Parkway Retail Square, Livingston, as respondent. The claimant alleged that she was owed outstanding holiday pay totalling **£866**, following termination of her employment by the respondent  
15 as a Customer Assistant. In the event that her claim was to be successful, the claimant sought an award of £866 in respect of unpaid holiday entitlement. There was also a complaint that when she requested payslips, these were not produced for the claimant.

3 The claim was accepted by the Tribunal on 20 January 2020, and a copy of  
20 the claim was served on the respondent, Mrs Chaudry, trading as Chicken Cottage, at its then business address, on that date, requiring her to lodge an ET3 response at the Glasgow Tribunal office by no later than 17 February 2020. In that Notice of Claim, it was explained to the respondent that if her response was not received by that date, and no extension of time had been  
25 agreed by an Employment Judge before that date, then she would not be entitled to defend the claim. It was further explained that, where no response was received or accepted, an Employment Judge might issue a Judgment against her without a Hearing, and she would only be allowed to participate in any Hearing to the extent permitted by an Employment Judge.

### 30 Default Judgment

4 No ET3 response form having been received, by the due date of 17 February  
2020, or at all, the case file was referred to me, as duty Judge, for further  
direction. I decided, on the basis of the available material, and in terms of  
5 **Rule 21 of the Employment Tribunals Rules of Procedure 2013**, to issue  
a Default Judgment, making a declaration to the effect that the respondent  
had failed to provide the claimant with written pay statements, despite  
requests, and that the respondent had failed to pay the claimant's holiday  
entitlement, and so ordering the respondent to pay to the claimant the sum of  
£866. That Default Judgment, dated 3 March 2020, was sent to both parties  
10 on 4 March 2020.

5 The Tribunal's letter of 4 March 2020 to the respondent, addressed to her at  
the Chicken Cottage premises, stated that the Judgment had been issued  
without a Hearing under **Rule 21**, but that the respondent had the right to  
apply for a Reconsideration of the Judgment, within 14 days, and, if she now  
15 wished to defend the claim, she would also to have to apply for an extension  
of time to submit her response, and that would be considered by an  
Employment Judge.

### **Respondent's Application for Reconsideration**

6 Thereafter, by e-mail to the Glasgow Employment Tribunal, on 18 March  
2020, with subject entitled "***Default Judgement***", Mrs Sajida Chaudry wrote  
20 requesting "***a review of this Judgement***" and she further stated that:

25 ***"Although I feel that I should not be writing in respect of this case  
as I was incorrectly named as the respondent and the owner of  
the company Chicken Cottage Livingston I do not own this  
Company as stated in the Judgement letter against Chicken  
Cottage Livingston. This Company is owned and managed by  
Kashif Chaudry [proof can be provided] and I have nothing to do  
with it.***

30 ***There was nothing received from ACAS and nothing from the  
claimant and there was nothing from this Tribunal, the first I***

*heard about this matter was when I was made aware about this Judgement letter which was picked up outside the Chicken Cottage store.*

5 *There is a problem with post sometimes as there is no post box and sometimes the bigger letters/items are an issue. Sometimes they are delivered to the empty units next door to the store or returned.*

10 *I certainly would have responded and made the court aware of the fact that I was not the person responsible in this case and it should not go any further. I spoke with a lady from the Tribunal office and was told that this is usually done on an ET1 form, which wasn't received so I missed that opportunity. Could a copy of the ET1 form please be provided so this appeal could also be copied to the claimant as I don't have an e-mail address.*

15 *There is evidence available from Chicken Cottage contrary to the claims made in this case and if present and considered would I believe have affected the outcome.*

20 *In light of the information provided and reasons given I kindly request that this case's Judgement please be reviewed and some time given for the presentation of evidence."*

7 On my direction as Judge, following the case file being referred to me for initial consideration of the respondent's reconsideration application, that e-mail of 18 March 2020 was copied to the claimant for her comments, within 10 days. She replied to the Tribunal, by letter dated 22 March 2020, in the following terms:  
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*"I am writing in response to the email I've received regarding Mrs Sajida Chaudrys response to the judgement from the Employment Tribunal.*

5 *From the time I started to be employed by Mrs Chaudry I was always told she owned the Shop and Mr Kashif Chaudry was the manager who is her husband's brother. I also have messages sent from her to myself with my hours of work from her Phone number. I was always told by her when she came into the shop what jobs to do etc. She was often in the shop as the owner. I was always told by the manager that Sajida owned the shop and he was employed to manage it. I also know I'm not the only person they haven't paid properly as there was another girl at the same time I was employed going through the same problem. So to my knowledge she is the person who I was employed by not the manager Kashif Chaudry."*

8 On my instructions, on 7 April 2020, I directed the Tribunal administration to arrange a one hour telephone conference call with me as a Reconsideration Hearing to decide whether or not the **Rule 21** Default Judgment was to be set  
15 aside and, if so, whether any additional respondent needed to be added, and I directed that both the claimant and the respondent should attend.

9 The claimant was also asked to provide to the Tribunal a copy of the text messages with the respondent referred to in her letter to the Tribunal of 22 March 2020, and the respondent was asked whether, under **Rule 20**, she  
20 sought an extension of time to lodge an ET3 response defending the claim, and she was sent a blank ET3 to complete, and reply to the Tribunal.

10 On 15 April 2020, the claimant, using her mother's e-mail address, which is the K Tuck e-mail address which she had given in her ET1 claim form, sent to the Glasgow Tribunal office, but not copied to the respondent, a message,  
25 enclosing screen shots of text messages between herself and Sajida Chaudry, which the claimant submitted to the Tribunal as "**proof for my case**" that she was employed by Chicken Cottage.

#### **Late ET3 Response from Respondent**

11 Further, and also on 15 April 2020, the Tribunal received, from the  
30 respondent, Mrs Sajida Chaudry, a completed ET3 response form, giving her

contact address as her home address, stating that no correspondence was received from ACAS regarding early conciliation, and defending the claim, on the basis that she was not the business owner of Chicken Cottage, and she was not the employer of the claimant, and accordingly stating that she did not agree with the claims that the claimant had made against her.

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12 She explained that her only involvement in the business was on a voluntary basis where she helped out her brother-in-law, Kashif Chaudry, the owner of the Chicken Cottage, being the point of contact for his staff for sending out weekly messages for scheduled shifts, and on the odd occasion that she had gone and helped in the shop if he had been short staffed. While Mrs Chaudry did not expressly ask for an extension of time, under **Rule 20**, I treated her presentation of the late ET3 response as being such an application, in addition to her reconsideration application of 18 March 2020.

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13 Thereafter, following issue of the Notice of this Reconsideration Hearing, sent to both parties on 8 July 2020, by e-mail to the Glasgow Tribunal, on 29 July 2020, Mrs Chaudry attached a file showing examples of correspondence relating to Chicken Cottage, all of which are addressed to Kashif Chaudry, and Mrs Chaudry's e-mail explained that she is not the owner and as such there is no reference to her in any paperwork. That e-mail, sent to the Glasgow Tribunal office, was copied to Kathleen Tuck's e-mail address, that being the e-mail address on the claimant's ET1 claim form

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14 At this Hearing, the claimant clarified that Ms Tuck is her mother, but that she had not seen Mrs Chaudry's e-mail, and it had not been forwarded to her by her mother. By agreement between the parties, Mrs Chaudry e-mailed a copy to the claimant, during the course of this Hearing, so that she could look at it, there and then, and make comment. While noting the terms of the correspondence produced, the claimant's position remained that she believed that Mrs Chaudry was the owner, not Mr Chaudry, but that he was merely a Manager.

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- 15      When the case called before me, at 2.00pm, the claimant was in attendance, representing herself, while Mrs Chaudry attended, representing herself. While her e-mail to the Tribunal of 29 July 2020 had stated that her witness would be Kashif Chaudry, who would be available, I was not advised that he  
5      was there, and, anyway, I explained to both parties, at the start of the Hearing, that this was not an evidentiary Hearing, but a Reconsideration Hearing, to decide whether or not it was appropriate to revoke the Default Judgment I had previously issued against Mrs Chaudry and, if so, what implications that had for further procedure before the Tribunal.
- 10      16      This Hearing was an audio Hearing (“A”) held entirely by telephone conference call, and parties did not object to that format. On account of the ongoing Covid 19 Pandemic, and joint Presidential Guidance issued by the President of the Employment Tribunals in Scotland, and England & Wales, and on account of there currently being no In Person Hearings conducted,  
15      both parties were notified accordingly that this Hearing would be held by telephone conference call given the implications of the Pandemic.
- 17      As the parties were not legally represented, and neither advised me that they had any knowledge of Employment Tribunal practice or procedure, or the relevant law, I advised them that, consistent with my **Rule 2** duty to deal with  
20      the case fairly and justly, I was obliged to apply the relevant law, as interpreted by the higher Tribunals and Courts, and that I would do so.
- 18      From my pre-read of the Tribunal’s case file, I started the Reconsideration Hearing by raising a number of questions of clarification for each of the claimant, and respondent. To assist me, I stated that I would ask each of  
25      them questions to help me ingather information relevant to the applicable legal tests which an Employment Tribunal should take into account in deciding whether or not to grant a reconsideration application, and / or allow an extension of time to lodge a late ET3 response.

**Submissions by Parties**



- 19 In addressing the Tribunal, Mrs Chaudry stated that ACAS had never contacted her about early conciliation, and she was “**gobsmacked**”, when the “**court thing**” (which she clarified, was the Tribunal’s letter of 4 March 2020, enclosing copy Default Judgment against her) came through in March 2020.
- 5 20 Having seen the claimant’s e-mail of 15 April 2020, with copy text messages, sent to the Tribunal office, but copied by the Tribunal office to her for her information, Mrs Chaudry stated that she did not dispute that the texts show what they show, but she stated that she was not, and never had been the claimant’s employer, and she stated that the employer was Kashif Chaudry, as he was the owner of the Chicken Cottage, and that he is her brother-in-law.
- 10 21 She referred to, and relied upon, the “**ownership documents**” which had been forwarded by her to the Tribunal, and copied to the claimant’s e-mail address, on 29 July 2020, to show that the owner of the Chicken Cottage was Kashif Chaudry, and that she was not the owner, and so not the employer of the claimant.
- 15 22 In reply, and after having received Mrs Chaudry’s e-mail of 29 July 2020, copy sent to her during the course of this Reconsideration Hearing, the claimant stated that she still claimed that Mrs Chaudry was her employer, and she added that there was no written contract of employment, no payslips indicating her employer, and that she had been paid cash in hand, every Sunday, by Kashif Chaudry whom she understood to be the Manager.
- 20 23 At this point, Mrs Chaudry intervened to state that Kashif Chaudry had told her that he did issue payslips to the claimant, and that copies could be produced. While initially indicating that those payslips showed Kashif Chaudry as employer, Mrs Chaudry then corrected herself, and stated that they might have shown the Chicken Cottage. She stated that the Chicken Cottage was not a limited company, but it was Kashif Chaudry trading as the Chicken Cottage.
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- 24 In reply to Mrs Chaudry's comments, the claimant advised that she had never been issued with payslips, nor a P60, nor a P45, and that she had reported Chicken Cottage to HMRC. When I asked Mrs Chaudry whether Kashif Chaudry was aware of the proceedings, and whether he had seen the ET1 claim form, and her ET3 response, she stated that he was aware, but he had not lodged an ET3 on his own behalf, as she did not understand that was required. She had put in an ET3 response in her own name to say she was not the claimant's employer, as the claimant had sued her.
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- 25 When I asked Mrs Chaudry to clarify what it was, by way of outcome, that she was seeking from the Tribunal at this Reconsideration Hearing, she stated that she was seeking revocation of the Default Judgment, and for the Tribunal to allow her late ET3 response, so she can defend the claim brought against her, wrongly in her view. She explained that she had had to speak to Kashif Chaudry to get information, and then reply, and that she has a full-time job herself, and Chicken Cottage is not her business.
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- 26 She added that it was for the Tribunal to note that Kashif Chaudry does not agree with the claim brought by Ms McDonald, and Mrs Chaudry further stated that she understood the claimant had been issued with a P45, and payslips, through the accountants for Chicken Cottage, albeit she accepted that the claimant says that was not the case, and nothing had been submitted to the Tribunal as supporting documents in the email of 29 July 2020.
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- 27 The claimant, in her further oral submission, asked the Tribunal to give her her money, and stated that she was owed her holiday pay from Sajida Chaudry, the respondent, and she was concerned that the Chicken Cottage business had now been shut, after Notice of this Hearing before the Tribunal had been issued. She added that Mrs Chaudry said, and so the claimant assumed, she was her employer, as she set out her shifts, and she also showed her what to do when she was involved when there was short staffing, or it was really busy.
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- 28 The claimant further stated that Kashif Chaudry told her that Sajida Chaudry was the owner, and that he was only running the business. The claimant
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stated that she objected to the late ET3 submitted by Mrs Chaudry, and that **“stuff”**, by which she clarified she meant the correspondence from the Employment Tribunal, would have been delivered to Chicken Cottage, and she added that she had also sent Recorded Delivery letters to Chicken Cottage herself, and she had proof of that, but not yet produced to the Tribunal.

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29 As, however, Mrs Chaudry was denying she was the owner, the claimant stated she could see why the matter should perhaps be served on Kashif Chaudry, as, in her view, **“somebody is lying”**. She sought one Hearing going forward, rather than the possibility of two, one being to identify her legal employer, and the other to deal with her claim, and stated that she had been waiting a long time already, it being some eight months since she first went to ACAS. The claimant further stated that **“they are a family and they will stick together so I don’t get what I am owed”**.

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15 30 By way of response, Mrs Chaudry, the respondent, stated that if the Default Judgment was not revoked, it would be **“inconvenient”**, as she is not the claimant’s employer, and she had been called to take part in something that does not involve her. She also asked me to take into consideration that she is at risk of having to pay out the sum of £866 to the claimant, in terms of the Default Judgment already issued, when she states she is not, and she was not, the claimant’s employer.

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31 If the Tribunal was to revoke the Default Judgment, the identity of the claimant’s employer would still be in dispute, and, on that basis, Mrs Chaudry agreed that Mr Kashif Chaudry would need to be served with the claim, and, as the Chicken Cottage is now no longer trading, having been sold to a third party, she stated that proceedings could be served on Kashif Chaudry at his home address, which is also her home address.

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32 Having heard both parties, I invited them to confirm whether or not there was anything further that they wished to add, but neither had anything further to say. In those circumstances, I stated that I was reserving judgment, and I would consider matters further in private deliberation in chambers, and a

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written Judgment, with Reasons, would follow as soon as possible. This Hearing concluded at 2.45pm, having lasted around three quarters of an hour.

### Relevant Law

33 In considering the **Rule 70** reconsideration application, I have taken into  
5 account the helpful judicial guidance provided by Her Honour Judge Eady QC,  
EAT Judge, in her judgment delivered on 19 February 2018, in **Scranage v  
Rochdale Metropolitan Borough Council [2018] UKEAT/0032/17**, at  
paragraph 22, when considering the relevant legal principles, where she  
stated as follows (underlining is my emphasis): -

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***“The test for reconsideration under the ET Rules is thus straightforwardly whether such reconsideration is in the interests of justice (see Outasight VB Ltd v Brown UKEAT/0253/14 (21 November 2014, unreported). The “interests of justice” allow for a broad discretion, albeit one that must be exercised judicially, which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.”***

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34 **Outasight VB Ltd v Brown** is, of course, an earlier EAT authority [2014] UKEAT/0253/14, now reported at [2015] ICR D11, also by HHJ Eady QC, where at paragraphs 27 to 38, the learned EAT Judge reviewed the legal principles. The EAT President, then Mr Justice Langstaff, in **Dundee City Council v Malcolm [2016] UKEATS/0019-21/15**, at paragraph 20, states that  
25 the current Rules effected no change of substance to the previous Rules.

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35 Further, I have also taken into account the Court of Appeal’s judgment, in **Ministry of Justice v Burton & Another [2016] EWCA Civ.714**, also  
30 reported at [2016] ICR 1128, where Lord Justice Elias, at paragraph 25, refers, without demur, to the principles “***recently affirmed by HH Judge Eady in the EAT in Outasight VB Ltd v Brown UKEAT/0253/14.***” . I also

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remind myself that the phrase “*in the interests of justice*” in Rule 70 means the interests of justice to both parties.

36 In coming to my reserved judgment in this case, as regards the Rule 20  
application, I have addressed the factors identified in the judgment of Mrs  
Justice Simler DBE, then President of the Employment Appeal Tribunal, in  
5 Grant v Asda [2017] UKEAT/0231/16/BA, and reported at [2017] ICR D17.  
For ease of reference, I reproduce here the full text of paragraphs 16, 17 and  
18 from Grant v Asda:

10 16. *Rule 20 of the ET Rules provides as follows:*

15 ***“(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.***

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

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

25 ***(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.”***

30 17. *Again, unlike its predecessor, Rule 20 permits an application for an extension of time after the time limit has expired. Rule 20 is otherwise silent as to how the discretion to extend time for presenting an ET3 is to be exercised. Guidance on the approach to be adopted by tribunals*

in exercising their discretion was given in **Kwik Save Stores Ltd v Swain** [1997] ICR 49 EAT, a case concerning a respondent's application for an extension of time under the **Employment Tribunal Rules 1993**. Mummery J gave guidance at pages 54 to 55:

5                   ***“The discretionary factors***

***The explanation for the delay which has necessitated the application for an extension is always an important factor in the exercise of the discretion. An applicant for an extension of time should explain why he has not complied with the time limits. The tribunal is entitled to take into account the nature of the explanation and to form a view about it. 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. In each case it is for the tribunal to decide what weight to give to this factor in the exercise of the discretion. In general, the more serious the delay, the more important it is for an applicant for an extension of time to provide a satisfactory explanation which is full, as well as honest.***

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***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***

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*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 them to 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 MR in Costellow v Somerset County Council [1993] 1 WLR 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.” (Original emphasis)*

18. *The approach set out by Mummery J was subsequently adopted in relation to the **2004 Rules** in **Pendragon plc (t/a CD Bramall Bradford) v Copus** [2005] ICR 1671 EAT. In our judgment, it applies with equal force to the **2013 Rules**. So, in exercising this discretion, tribunals must take account of all relevant factors, including the explanation or lack of explanation for the delay in presenting a response to the claim, the merits of the respondent's defence, the balance of prejudice each party would suffer should an extension be granted or refused, and must then reach a conclusion that is objectively justified on the grounds of reason and justice and, we add, that is consistent with the overriding objective set out in **Rule 2** of the **ET Rules**.*

## 15 **Discussion and Disposal**

37 Having carefully considered matters, in chambers, during private deliberation, after this Hearing, I have now come to my decision, to grant the reconsideration application under **Rule 70**, as also the **Rule 20** application, and allow the case to proceed as defended, and to revoke my earlier Default Judgment, it being in the interests of justice to do so.

38 I am also satisfied, having regard to the Tribunal's overriding objective, under **Rule 2**, to deal with the case fairly and justly, that this disposal is appropriate and proportionate. Mrs Chaudry has taken steps, once this claim came to her attention, after issue of the Default Judgment, to enter the legal process, and state a defence, in particular, that she is not, and she was not, the claimant's employer, and that the employer was her brother-in-law, trading as the Chicken Cottage.

39 The claimant disputes that, and asserts that the respondent could have, and should have, defended these proceedings far earlier than this stage. While Mrs Chaudry had lodged a late ET3 in her own name, defending the claim,



she clarified that Kashif Chaudry is aware of the claim, albeit he has not himself lodged any ET3 response.

40 While Mr Chaudry appears to be aware of the claim, but he has not lodged  
any ET3 in his own name, setting out his position, Mrs Chaudry has made  
5 certain assertions on his behalf at this Hearing. He has not yet, for whatever  
reason, sought, on his own initiative, to actively participate in these  
proceedings on his own behalf.

41 **Rule 34 of the Employment Tribunal Rules of Procedure 2013** provides  
that a Tribunal may, on its own initiative, or on the application of a party or  
10 any other person wishing to become a party, add any person as a party, by  
way of substitution or otherwise, if it appears that there are issues between  
that person and any of the existing parties falling within the jurisdiction of the  
Tribunal which is in the interests of justice to have determined in the  
proceedings, and may remove any party apparently wrongly included.

15 42 At this stage of the proceedings, where no evidence has been led and I am  
proceeding on the basis of *ex parte* statements made by the claimant and Mrs  
Chaudry respectively, the Tribunal is not in a position to make any judicial  
finding that Mrs Chaudry has been wrongly included in this claim. In the  
circumstances, she must remain as the first respondent, at least for the time  
20 being.

43 However, I have decided, in terms of my powers under **Rule 34**, that it is  
appropriate to serve the claim now on Kashif Chaudry, in order that he can, if  
so advised, lodge an ET3 response in his own name, fully setting out his  
position in respect of the claim, and clarifying whether he accepts that, at the  
25 material time, he was the claimant's employer, and whether he accepts, as  
she alleges, that there was a failure to issue payslips, and a failure to pay  
holiday pay owed to the claimant outstanding at the effective date of  
termination of her employment. If he fails to present an ET3 response, then  
he runs the risk of a Default Judgment perhaps being sought against him.

44 If, as Mrs Chaudry asserted, payslips were issued to the claimant, as also the  
P45, then these documents should be produced to the Tribunal, by Mr  
Chaudry, along with his ET3 response, and copied to the claimant.

45 On receipt of any ET3 response from Mr Chaudry, I will then be able to  
5 determine further procedure with a view to saving time and expense, to all  
involved, rather than having a discreet public Preliminary Hearing on the  
identity of employer and, if appropriate, thereafter the Final Hearing against  
Kashif Chaudry only, if he is to be identified as the claimant's employer. Both  
the claimant and Mrs Chaudry agreed that one Hearing would be preferable  
10 from their perspectives, and, on that basis, I would reserve to that Final  
Hearing any unresolved preliminary issue as regards identity of employer.

46 As I have allowed the **Rule 20** application for an extension of time, **Rule 20**  
**(4)** provides that a **Rule 21** Default Judgment shall be set aside. As, however,  
the matter was also before me, by way of the respondent, Mrs Chaudry's  
15 application for reconsideration under **Rule 70**, I have granted that application,  
it being in the interests of justice to do so, and accordingly revoke my earlier  
Default Judgment. The practical effect, whether labelled revoked, or set  
aside, is that my Default Judgment is no longer there, and so it cannot be  
used by the claimant to seek enforcement against Mrs Chaudry.

20 47 I order that the defended case be listed, in due course, on a date to be  
hereinafter assigned by the Tribunal, for a Final Hearing, for full disposal,  
including remedy if appropriate, including any preliminary issue that arises  
from this Judgment, and any ET3 response to be lodged by Mr Chaudry, as  
regards proper identity of the claimant's employer.

25 48 In coming to this decision, I have taken into account the ET1 claim form, the  
ET3 submitted by Mrs Chaudry, as also both the claimant and Mrs Chaudry's  
oral submissions to me at this Reconsideration Hearing, as also the relevant  
law, as I have detailed it earlier in these Reasons.

49 Mrs Chaudry has explained to the Tribunal why her ET3 response was not  
30 lodged earlier, and I have accepted that explanation, and I am satisfied that,

following correspondence with the Tribunal, and my earlier directions, she has lodged a detailed response setting forth her position. Her position is disputed by the claimant, and there is therefore the disputed matter of fact which requires to be judicially determined by a Tribunal, if parties do not use the services of ACAS, or other means of resolving their dispute, by agreement.

5

50 Whilst Mrs Chaudry was insistent that she had no knowledge of the ACAS early conciliation, it is clear, from the copy early conciliation certificate on the Tribunal's file, that that process was followed by the claimant, and it preceded presentation of the ET1 claim form. As ACAS is a separate body from the Employment Tribunal, the Tribunal has no knowledge of what contact, if any, ACAS had, or tried to have, with the respondent.

10

51 At this Hearing, the claimant opposed the applications made by Mrs Chaudry but, in the interests of justice, I have preferred the submissions made by Mrs Chaudry and, in terms of the Tribunal's overriding objective, and the interests of justice, that requires that I do justice to all parties involved in this dispute, by allowing them all to be heard. That is why I have, in terms of **Rule 34**, made an order to join Mr Kashif Chaudry as a second respondent to these Tribunal proceedings.

15

52 In balancing prejudice as between the claimant and Mrs Chaudry, as the current, and only respondent, I have taken into account that if I had refused her late ET3 response, then she would not have been able to defend the claim brought against her, and she could end up with the claimant seeking to enforce the existing judgment against her, and an order for her to pay sums which she denies are due, from her, as the claimant's employer, and that without having had the opportunity to put forward her case in evidence that she is not, and was not, the employer of the claimant at the relevant time.

20

25

53 On the other hand, it seems to me that prejudice to the claimant will be less, and all she has lost at this stage is the loss of a windfall of having been able to get an undefended Default Judgment in her favour, without having to give evidence, or to argue the point now raised by Mrs Chaudry in her late ET3, that she is not the employer, and accordingly not the correct respondent.

30

54 In these circumstances, I have decided that the prejudice to Mrs Chaudry, as  
the now first respondent, outweighs any prejudice to the claimant, and that it  
is appropriate to let in the late ET3 response, and the merits of all parties'  
respective positions can be adjudicated upon by the Tribunal at a Merits  
5 Hearing, after hearing evidence from all parties.

55 While, in terms of **Rule 34**, I could simply have substituted Mr Kashif Chaudry  
as respondent, I decided that it was not appropriate to do so, when albeit Mrs  
Chaudry stated he was the employer, I had not directly heard from him, and,  
in any event, the claimant disputed that he was the employer, insisting that  
10 the employer was Mrs Chaudry, and that Mr Chaudry was merely her  
manager of the business.

56 The documents produced by Mrs Chaudry, with her email of 29 July 2020, do  
not conclusively prove that the claimant was employed by Mr Chaudry, nor  
that he was her employer at Chicken Cottage – they merely indicate that, in  
15 business terms, he received correspondence, from suppliers, insurers, and  
the local licensing authority, but that is all. They do not relate to the claimant's  
employment.

57 Indeed, the claimant states that there are no documents evidencing the  
employment relationship. No written statement of employment particulars  
20 appears to have been issued to the claimant, and it is in dispute whether or  
not payslips were issued – even if they were, it is not clear who is shown as  
the employer. Likewise, no P45 / P60 have been produced by either party.  
Ownership of a business is not necessarily allied to who employs a specific  
individual working in a business. The question of the proper identity of the  
25 claimant's employer remains at large for judicial determination.

58 Wherein the truth lies, as to who was the claimant's employer at the relevant  
time, that is not a matter for determination at this stage, but for a future  
hearing. On receipt of Mr Chaudry's ET3 response, further procedure can be  
determined, but it will be important, in that regard, that Mr Chaudry's ET3  
30 response is drafted on an "**all cards on the table**" basis, and provides as  
much information as possible, together with any supporting documents to be

relied upon by him as second respondent, if, as Mrs Chaudry asserted on his behalf, it is to be asserted by him that payslips etc were issued to the claimant, and to deal further with her claim for unpaid holiday pay, and whether or not that is disputed and, if so, on what basis.

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Employment Judge: Ian McPherson

Date of Judgment: 11 August 2020

Entered in register: 20 August 2020

10 and copied to parties