Case No: 2502256/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mrs F Ollett**

Respondent: **Crown and Country Leisure Ltd**

Heard at: **North East region, by video** **On: 6 April 2021**

Before: **Employment Judge Aspden**

Representation
Claimant: Mr Ollett, spouse
Respondent: Mr Barker, solicitor

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form received by the Tribunal on 3 December 2020, the claimant complained that the respondent had made unauthorised deductions from her wages totaling £2220 in respect of a period during which she was furloughed as a consequence of Covid19. The claim form was sent to the respondent by post on 23 December 2020. The respondent failed to present a response within the time limit in rule 16. Employment Judge Johnson decided that a determination could properly be made of the claim on the information available, determined that the claim was well founded and issued a judgment under rule 21(2) on 21 January 2021 ordering the respondent to pay £2200 to the claimant. That judgment was sent to the parties on 22 January 2021.

2. On 1 March 2021, the respondent emailed the Tribunal applying for 'an extension of time and a reconsideration of the judgment'. In its email the respondent said "we are absolutely dumbfounded to have received an employment tribunal letter this morning from a former employee Mrs … Ollett. As you will be aware our business …has been closed since 2 November 2020 due to Covid19. We do not have a postbox at the hotel therefore our post goes to the local sorting office and we collect it once a month. We telephoned this morning to speak to an officer, he advised us

to send this email to apply for an extension of time and a reconsideration of the judgment." The respondent went on to set out its defence to the claim which, in summary, was that the company had been advised by HMRC that it did not qualify for furlough, that "furlough was never a guaranteed payment" and that the company "cannot pay furlough to our employees if we did not receive it."

3. Employment Judge Johnson considered the application and, upon his direction, the respondent was informed (a) that its application for reconsideration could not be considered because it had not been copied to the claimant's representative and was out of time; and (b) that if it wished to defend the claim it would need to submit a response form (ET3) which includes within it an application for it to be accepted out of time, and which should be copied to the claimant's representative. The respondent was sent copies of the original documents sent to it on the 23 December 2021.

4. On 10 March 2021 the respondent's representative emailed the employment tribunal attaching a letter, dated 9 March 2021 containing an application under rule 71 to reconsider and set aside the rule 21 judgment and to extend time for presenting a response. The letter set out the grounds on which the respondent relied in support of its application to set aside the judgment. Those grounds, in a nutshell, were that the ET1 claim form was not received by the respondent until 1 March 2021 and, therefore, the respondent had not had an opportunity to respond to the proceedings and it would be in the interests of justice to allow it an opportunity to respond. The respondent's explanation for the late receipt of the claim form was that its business (a pub) closed on 2 November 2020 due to the Covid19 pandemic; as there is no post-box at the respondent's premises it relied on collecting post from its local collection point; that office had recently been offering only a limited and sporadic service, due (reportedly) to sickness absence and, in addition, the address recorded in the ET1 (and to which the claim form was sent) was incorrect; the first the respondent knew of these proceedings was when post was collected on 1 March 2021, containing the tribunal proceedings dated 23 December 2020.

5. The respondent's email also attached a completed form ET3 containing details of the grounds on which the respondent wished to defend the claim. In summary, the respondent wished to contend that it was not contractually liable to pay the claimant any monies for the period of time that her job was furloughed because it did not receive money from HMRC and it was made clear when staff were furloughed that payment would be dependent on receipt of money from HMRC under the furlough scheme or, in the alternative, because the enforced closure of the respondent's business, caused by the pandemic and the guidelines imposed by the government as a result of the pandemic, served to frustrate the operation of the contract of employment, such that the respondent was not obliged to make payments to the claimant for work that she had not undertaken.

6. The respondent's application under rule 71 was considered initially by Employment Judge Johnson under rule 72(1). Consequently, a hearing was arranged to reconsider the rule 21 judgment. The reconsideration hearing took place before me on 6 April 2021.

7. A tribunal has power to reconsider any judgment where it is necessary in the interests of justice to do so: rule 70. On reconsideration, the original decision may be confirmed, varied or revoked and, if revoked, may be taken again. In this case the respondent contended that the original decision should be set aside ie revoked. The claimant's position was that the judgment should not be revoked but should, instead, be confirmed.

8. In deciding whether to revoke or confirm the judgment the tribunal must seek to give effect to the overriding objective to deal with cases fairly and justly as set out in rule 2. That includes, amongst other things, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay and saving expense. It also includes taking into account established principles. Those established principles mean the tribunal must have regard not just to the interests of the party seeking the review (the respondent in this case), but also to the fact that a successful party (the claimant in this case) should in general be entitled to regard a tribunal's decision on a substantive issue as final, and to the public interest requirement that there should, as far as possible, be finality of litigation. As the court stressed in Flint v Eastern Electricity Board [1975] IRLR 277, QBD 'it is very much in the interests of the general public that proceedings of this kind should be as final as possible.'

9. I heard evidence from Mr Ellis for the respondent, who had prepared a witness statement ahead of the hearing. Having heard his evidence, and considered the parties' submissions, I made certain findings of fact as follows.

10. The premises at which the claimant worked (and to which the letter to the respondent enclosing the claim form was addressed) does not have a letter box. The premises were closed for business at the time the claim form was sent to the respondent by the Tribunal. The Royal Mail, therefore, could not deliver the claim form to the respondent in the usual way by posting it through a letter box. Instead, the respondent was able to collect post from its local Royal Mail delivery office at Houghton le Spring.

11. The claim form and covering letter sent by the Tribunal on 23 December 2020 was received at the Royal Mail delivery office at Houghton le Spring: that is clear from the fact that the respondent accepts it received the claim form from that delivery office. I rejected the suggestion that the receipt of those documents by the delivery office was delayed because they had been incorrectly addressed: the address in the claim form to which the documents were sent contained no material errors: the correct postcode and property name were used and the address was the same as that used by the respondent itself in some business correspondence to which I was referred. Allowing for Christmas holidays, I found it more likely than not that by no later than 30 December 2020 the documents sent by the Tribunal had not only been received at the delivery office but that the delivery office had identified the intended recipient.

12. The judgment, sent to the parties by the Tribunal on 22 January 2021, was received at the delivery office and the intended recipient would have been identified by the delivery office within three working days of that date ie before the end of January 2021.

13. Mr Ellis gave evidence as to the respondent's attempts to collect post from the delivery office. I found his evidence to be unreliable. It was inconsistent and implausible. In particular, in an email sent to the Tribunal on 1 March, the respondent said it collected its post once a month; the letter of 10 March implied that post could not be collected more frequently because the office had been offering only a limited and sporadic service, evidence which was repeated by Mr Ellis in his witness statement. This was inconsistent with evidence Mr Ellis gave when questioned: he claimed then that someone went to collect the post from the delivery office two or three times a week and managed to collect some post on those occasions. Mr Ellis also claimed that he, or someone else at the respondent, had been told by someone from Royal Mail that the local postman had kept some post in his van in order to be able to drop it off at the respondent's premises if he ever saw someone there, rather than return it to the delivery office when he saw the premises were closed and did not have a letterbox. I found it implausible that a postal delivery officer, having tried to deliver the envelope containing the claim form in late December or (at the latest) very early January, and having found the premises to be closed, would have kept hold of that post for in excess of two months, on the off-chance of seeing somebody on the premises, notwithstanding that it remained closed, and that the delivery officer did the same with the envelope containing the judgment (which the respondent also claims not to have received) for around month. The suggestion was even less plausible when one considers that the delivery officer did not do the same with those items of post that the respondent was able to collect from the delivery office in the same period.

14. I found it more likely than not that the respondent did collect the letter from the Tribunal of 23 December 2020 enclosing the claim form in good time before the time for filing a response expired.

15. The respondent knew of the proceedings and could have presented a response to the claim in time. In light of that finding I rejected the submission by Mr Barker that the respondent did not have an opportunity to respond to the claim. It did have an opportunity to do so but did not avail itself of that opportunity. I accepted that, had the respondent chosen to file a response, its defence would have been arguable and a Judge may, after a fully contested hearing, have decided that the respondent did not owe the claimant the monies claimed. That being the case, I recognized that if I did not revoke the judgment the respondent would not have a second chance to put forward that defence. On the other hand, allowing the respondent's response would have afforded the respondent a second chance to put forward that defence but that would have been at the expense of the claimant's entitlement to regard the tribunal's judgment as final and the public interest in the finality of litigation.

16. In all the circumstances I concluded that, the respondent having had an opportunity to defend the claim and having failed to do so without good reason, its interests in having a second chance to defend the claim were outweighed by the interests of the claimant and the general public in the finality of litigation and that, therefore, it was not in the interests of justice for the judgment be revoked and for the respondent to be given an extension of time to file a response to the claim.

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Employment Judge Aspden

23 July 2021