Case Number: 2305094/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**

BETWEEN:

Mr N Prime **Claimant**

AND

Woodrow Digital Solutions Limited (1)
Nathan Woodrow (2) **Respondents**

ON: **11 August 2021**

Appearances:

For the Claimant: **Ms E Sole, Counsel**

For the Respondent: **Ms Duffy, Peninsula Representative**

JUDGMENT ON RECONSIDERATION

The Second Respondent's application for reconsideration of the judgment made on 30 December 2020 and sent to the parties on 7 January 2021 is refused.

Reasons

1. The Respondent made an application for reconsideration of the judgment made on 30 December and sent to the parties on 7 January 2021 by written application to the Tribunal on 19 January 2021. The grounds for the application were set out in an email from the Respondents' representatives, Peninsula. The email read as follows:

We respectfully apply to the Tribunal, under Rules 70 and 71 of the Employment Tribunal Rules of Procedure 2013, for a reconsideration of the judgment sent to the parties on 7th January 2021. In the judgment, the Tribunal found that the Claimant was entitled to arrears of pay for an amount of £25,088.11, against the First Respondent, Mr Nathan Woodrow.

It is necessary in the interests of justice to reconsider the judgment for the following reasons:

It is our understanding that a preliminary hearing was carried out on 17th December 2020, in which it was decided that due to the non-attendance of the Second Respondent, a judgment in default would be awarded to the Claimant, in the sum of £25,088.11. However, upon taking instructions from the Second Respondent, it has become apparent that the Second Respondent, did attempt attendance, only to experience technical difficulties that rendered it impossible to attend.

The First Respondent (acting on behalf of both himself and the First Respondent), received instructions to attend the Hearing by CVP and when attempting to use the link provided to attend the hearing, was faced with poor internet connection that severally impacted his ability to attend.

Upon experiencing these difficulties, the Second Respondent contacted the Tribunal by telephone to inform them of this issue of not being able to successfully attend the hearing. We attach emails exchanged between the Second Respondent and the Tribunal concerning these connectivity issues. The Respondent further held difficulty in connecting by telephone alone and recalls speaking to a representative from the Tribunal, "Jose" who was purportedly assisting with connecting the Second Respondent to the hearing.

The Second Respondent avers that they reside within a village in which internet connectivity is occasionally problematic and unreliable. The Second Respondent further states that it was their initial intentions to attend the hearing by using the internet connection in the Second Respondent's work premises (where the internet connection is much stronger), but that due to Tier 4 restrictions imposed by the ongoing Coronavirus pandemic, travel to these premises was not possible, nor safe to do so.

The Second Respondent was therefore forced to attend the Hearing in his private home but was unaware that doing so would pose such an issue in his ability to attend the hearing.

It is further evident that the Second Respondent wishes to defend the claim against him, given that he has previously submitted an ET3 Response on behalf of himself and the Company, dated 20th December 2019. Whilst we appreciate that there is uncertainty as to whether the Response was submitted, the Second Respondent avers that they sent the ET3 Response Form to the Tribunal by both post and email, confirmation of this being attached to this application.

In light of the above, it is the Second Respondent's position that they have unfairly lost their opportunity to put forward its defence to any claim raised by the Claimant. Furthermore, the Second Respondent maintains that they are able to provide an arguable defence to the claims presented and the interests of justice require this to be heard. Should the Respondent not be allowed to present its defence, the Claimant will otherwise receive an unjustified windfall of compensation, where liability (and the entire basis of any potential pay-related complaints) will be contested.

Allowing such an application is in line with the Tribunal adopting a flexible approach, where appropriate as per Rule 2(c) of the Employment Tribunal Rules of Procedure 2013.

In the circumstances, the interests of justice require the decision to be reconsidered and taken again at a new hearing. We are aware that there is a further preliminary hearing due to take place on 27th January 2021 and therefore, we respectfully request for this application to be placed at the Tribunal's attention ahead of this date.

2. There was no response from the Claimant to this application. Having considered it on paper I concluded that there was some prospect of the judgment being reconsidered and a letter was sent to the parties in these terms:

"Employment Judge Morton apologises for the delay in dealing with this application for a reconsideration of the default judgment that was sent to the parties on 7 January 2021. She has now considered the Respondent's application and has concluded that there is a reasonable prospect of the decision being varied or revoked.

It is not clear from the application submitted on behalf of the Respondents whether the Second Respondent will be able to show that he submitted a response to the claim. It is the Claimant's case that no response was submitted by the Second Respondent and that the Claimant is entitled to a default judgment, but that appears to be in dispute and the Respondent's arguments ought in the interests of justice to be considered further.

It also appears from the application that the Second Respondent did attempt to join the hearing on 17 December 2020 but was prevented from doing so by connection difficulties. It is in the interests of justice for the Second Respondent to be able to explain why he did not attend the hearing.

Employment Judge Morton does not consider that this application can be adequately dealt with on the papers and a three-hour preliminary hearing by CVP will therefore be listed before Judge Morton to enable the Respondent's application to be considered and to make any further orders for management of the case that are necessary following the outcome of that hearing. It is the responsibility of both parties to ensure that they are able to join a CVP hearing and have adequate internet connection.

3. The hearing was conducted by CVP, which was consented to by the parties and was necessary in light of the continued necessity to conduct hearings via CVP following the disruption caused by the Covid-19 pandemic. The Claimant did not attend the hearing. The Second Respondent, Mr Woodrow, attended the hearing and gave evidence via a written statement which I read before the hearing and in cross examination. I was also referred to a bundle of documents, referred to as necessary in these reasons.

4. At the start of the hearing I identified four matters that needed to be considered and dealt with:
    a. Was any response filed on behalf of the Second Respondent?
    b. If not, could the Second Respondent provide any other reason for the default judgment against him to be set aside?
    c. If not, was the Second Respondent entitled to be heard on the question of the remedy awarded to the Claimant?
    d. If so, could he put forward any reasons why the amount of the remedy awarded should be varied?

5. In relation to the first of these questions Ms Duffy submitted that the Respondent had not been professionally represented at the time the claim was submitted and had accordingly not appreciated that a response form needed to be sent for each Respondent to the claim. It was implicit in this submission that the Second Respondent had not sent a response and the first of the issues set out in paragraph 4 therefore fell away. Ms Duffy made no other submission on this point.

6. Ms Sole pointed out that it had been clear to both Respondents to the claim that there was a problem with the Second Respondent's response as early as January 2020 when case management orders were made by Employment Judge Khalil noting that no response had been received from the Second Respondent and indicating that a hearing would now be listed for the purpose of dealing with a judgment under Rule 21. This was almost a year before the Rule 21 judgment was actually made. The Respondents had nevertheless left it until the Rule 21 judgment had actually been sent to the parties to seek legal advice. This was, she submitted far too late and resulted in prejudice to the Claimant, including the prejudice of having to seek representation for the reconsideration hearing. Furthermore, the reason being put forward by Ms Duffy was not a reason relied on in either the reconsideration application itself or the witness statement Mr Woodrow had prepared for the hearing.

7. Having considered both sets of submissions I could find no reason to set aside the judgment I had made under Rule 21. The sole basis for the Respondent's application appeared to be that he was unrepresented at the time the claim was issued. He did not explain why it had not been possible for him to seek legal representation at the time. Nor did he explain the connection between his lack of representation and his failure to submit a response form for himself as well as for the First Respondent.

8. When a claim is brought against more than one Respondent, each Respondent receives a separate copy of the claim form with a letter setting out what each Respondent must do and when. It is clear from this process that each Respondent is expected to respond. The Employment Tribunal Rules are also clear. Rule 16 provides:

    Response

    16.—(1) The response shall be on a prescribed form and presented to the tribunal office within 28 days of the date that the copy of the claim form was sent by the Tribunal.

    (2) A response form may include the response of more than one respondent if they are responding to a single claim and either they all resist the claim on the same grounds or they do not resist the claim.

9. That did not happen in this case. A response form was sent only by Woodrow Digital Solutions, the First Respondent and made no mention of Mr Woodrow, the Second Respondent, except as the contact person for the First

Respondent. This had the unfortunate effect of meaning that no response was received from Mr Woodrow in his personal capacity. If no response is submitted the Tribunal must then deal with the situation under Rule 21 of the Tribunal Rules which provides as follows:

> **Effect of non-presentation or rejection of response, or case not contested**
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> 21.—(1) Where on the expiry of the time limit in rule 16 no response has been presented, …. paragraphs (2) and (3) shall apply.
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> (2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone.
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> (3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.

10. In this case the matter proceeded under Rule 21 and the parties were made aware that this was going to happen by means of Judge Khalil's orders in January 2020. A hearing was listed as envisaged by Rule 21(2) for 17 December 2020 and a judgment was issued at the end of that hearing when Mr Woodrow had failed to attend (albeit that he had attempted to do so at the start of the hearing). Only then did Mr Woodward seek the advice of professional representatives, but even then, no application was made for an extension of time for submitting the response on Mr Woodward's behalf (as it might be expected that professional representatives would make in accordance with the Tribunal Rules) or any proper explanation given for the failure to submit a response in accordance with the rules at an earlier date. As is clear from the text of the letter set out at paragraph 1, the sole explanation was the lack of legal representation and various submissions about Mr Woodrow's attempts to attend the hearing on 17 December 2020. Given that Mr Woodward was plainly able to seek representation when faced with a judgment, it is not clear why he did not seek it at the outset when faced with the claim itself.

11. I have considered this matter in accordance with the overriding objective and the necessity to proceed justly. I accept that the interests of justice may mean that in some circumstances a Claimant should not receive a windfall. However, the meaning of the Tribunal Rules is clear and a Respondent that does not act in accordance with those rules is faced with certain consequences. In this instance the Respondent's predicament must also be seen in light of his failure to take advice when he received Judge Khalil's order in January 2020, which has contributed to the need for an additional

reconsideration hearing that might otherwise have been avoided. No arguments were presented to me at the hearing that persuaded me that it would be just to set aside a judgment that had been made in accordance with the Tribunal Rules. I took into consideration the fact that the First Respondent had defended the claim and that Mr Woodrow's defence would have been identical, but this did not override the fact that Mr Woodrow himself had failed to provide a response in accordance with the Tribunal Rules and had not provided a compelling reason for not having done so. Accordingly, I saw no reason why the judgment should not stand.

12. That leads me to the third and fourth questions set out above – was Mr Woodrow entitled to put forward submissions and arguments about the amount of money being awarded to the Claimant, either at the hearing on 17 December 2020, or at the reconsideration hearing and if so, did he put any arguments forward that would themselves have caused the amount awarded to be varied?

13. Ms Sole made submissions to the effect that Mr Woodrow had failed to attend the hearing on 17 December 2020 though his own fault. I considered these carefully and decided to allow Mr Woodrow to give evidence about what happened that day. Having considered that evidence I came to the view that his non-attendance had not been culpable and that given the timing of the hearing in relation to the Covid-19 pandemic, allowance should be made for the additional pressures under which people were working at the time and the relative lack of freedom in travel and other activities that might well have had a bearing on his decision to join the hearing from a location with a poor internet connection. I also took the view that he had been genuinely confused by the instructions he had received variously from the Tribunal and from the Claimant's representative and this caused him to use the wrong phone number to join the hearing. I was satisfied that his failure to join the hearing was not intentional and that he had formed the intention to join if he could.

14. I then turned to the question of whether in the circumstances of this case Mr Woodrow would have been entitled to make submissions about the amount of compensation to be awarded if he had joined the hearing. I drew the attention of the parties to the Court of Appeal's decision in *Office Equipment v Hughes [2018] EWCA Civ 1842*, which suggested that cases in which a separate remedy hearing takes place will in general enable a Respondent who has received a judgment on liability under Rule 21 to make submissions at the remedy stage, but that where judgment on liability and remedy are made at the same hearing such an opportunity is effectively lost.

15. Ms Duffy submitted that she had not come to the hearing prepared to deal with matters relating to remedy and that the notice of hearing had not indicated that remedy issues would be addressed. She therefore sought a further hearing for this purpose. I said that I found this position surprising and that professional representatives ought to have anticipated that they might be given at a reconsideration hearing the opportunity to attack the basis on which compensation had been calculated and that she should have prepared accordingly. I note also that the application for reconsideration made on

behalf of Mr Woodrow said the following: "Furthermore, the Second Respondent maintains that they are able to provide an arguable defence to the claims presented and the interests of justice require this to be heard. Should the Respondent not be allowed to present its defence, the Claimant will otherwise receive an unjustified windfall of compensation, where liability (and the entire basis of any potential pay-related complaints) will be contested" (my emphasis). In my judgment this clearly suggests that the Respondent's representatives had in mind that they wished to challenge the basis on which compensation had been calculated when they made the application for reconsideration. I therefore did not consider it to be in the interests of justice for a further hearing to be listed, given that Mr Woodrow's entitlement to challenge the amount of compensation was in any event put into doubt by the decision in *Office Equipment v Hughes*.

16. Ms Sole submitted that if I were to allow Mr Woodrow to challenge the remedy elements of my judgment, it would not be just to allow him to do so other than on the basis that he could have done had he actually attended the hearing on 17 December 2020. Any other approach would turn Mr Woodrow's non-attendance at the hearing on 17 December into an advantage to him, which would not be just to the Claimant. In particular the Respondent should not be permitted to refer to any documents that had not been available on 17 December. I accepted that submission. I decided however, that notwithstanding the decision in *Office Equipment v Hughes* it would be in the interests of justice in all the circumstances of this case to enable Mr Woodrow to challenge any aspect of the sums I ordered to be paid to the Claimant that he could show were wrongly awarded, by reference to the documents that had been available at the hearing on 17 December. I then adjourned the hearing to enable Ms Duffy to take instructions accordingly.

17. When the hearing resumed Ms Duffy challenged a number of elements of the Claimant's Schedule of Loss, including the award for loss of statutory rights, but Ms Sole reminded the Tribunal that the decision on remedy had been based solely on the Claimant's discrimination claim and the sum for loss of statutory rights had not been awarded. As there was insufficient hearing time left for further submissions I decided to adjourn the hearing and to reread the bundle of documents provided at the hearing on 17 December with a view to identifying whether Mr Woodrow could clearly show on the basis of those documents that the sums awarded to the Claimant had been wrongly calculated. I noted that there had been no counter-schedule of loss prepared by the Respondent, which again might have been expected in the circumstances of this case.

18. Having reviewed the documents after the hearing I was unable to identify any document that proved (rather than simply asserted) that the sums awarded to the Claimant had been wrongly calculated or had been based on rights that he did not enjoy as the First Respondent's employee. I could see that the Respondents were disputing the Claimant's claim for commission, but the available documents did not prove that that he was not entitled to commission as opposed to merely asserting that the commission had not in effect been earned because a sale had not been completed. This assertion was not

documented and I found no other documents that undermined the way in which the Claimant's remedy had been calculated. The onus was clearly on Mr Woodrow, who was now professionally represented, to put forward a clear basis for any variation to the compensation awarded and this did not happen.

19. I therefore was unable to find any compelling reason to vary the amounts awarded to the Claimant on 17 December 2020. The Second Respondent's application for reconsideration therefore fails and is dismissed.

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Employment Judge Morton
Date: 25 August 2021

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