



EMPLOYMENT TRIBUNALS

Claimant: Mr T Haynes

Respondent: DFS Trading Limited

UPON APPLICATION of the Respondent made by letter dated 18 February 2021 to reconsider the Rule 21 judgment dated 2 February 2021 (*the Rule 21 Judgment*) under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a hearing

JUDGMENT

1. The Rule 21 Judgment is revoked.
2. The Respondent is granted an extension of time to a date falling 14 days after this Judgment is issued to file its response to the claim.

REASONS

1. The Claim in this case was presented to the Tribunal on 18 May 2020.
2. Notice of the Claim in standard form ET2 was posted to the Respondent by the Tribunal on 28 July 2020. The postal address used was Redhouse Interchange, Adwick-le-Street, Doncaster, South Yorkshire, DN6 7NA. This is the correct address for the Respondent's Head Office.
3. The file came before me on 2 February 2021 in circumstances where no response to the claim had been received by the Tribunal. There was also no request for an extension of time present on the file. I directed that a Rule 21 judgment be issued regarding liability, with remedy to be determined at a hearing on 5 March 2021.
4. The Rule 21 Judgment was sent to the parties on 5 February 2021.
5. On 18 February 2021 the Respondent, through its solicitors, Clarion, issued an application for reconsideration and for an extension of time to present the Response. Its grounds in support of the application were, in summary, that:
 - a. The ET1 Claim Form and Notice of Claim had not been received;

- b. The first notice the Respondent had of the claim when it received the Rule 21 Judgment;
 - c. When the Rule 21 Judgment was seen by the Respondent's Head of Employee Relations, he immediately instructed solicitors;
 - d. Clarion contacted the Tribunal on 12 February 2021 to obtain a copy of the ET1;
 - e. The application enclosed draft Grounds of Resistance to demonstrate that the Respondent is willing and ready to promptly progress management of its defence of the claim;
 - f. The prejudice to Respondent of refusing the application would exceed the prejudice to the Claimant of granting it, particularly as the Claimant is formally represented by a legal advisor;
 - g. It is in the interests of justice (as per rule 70 of the ET Rules) for the claim to be determined on a contested basis; and
 - h. Granting the application accords with the overriding objective as it would ensure the parties are on an equal footing and deal with the case in a way that is proportionate to the complexity and importance of the issues, particularly as there are more than reasonable prospects of the Respondent successfully defending the claim (as demonstrated by the draft Grounds of Response), and therefore ultimately deal with this case fairly and justly.
6. On 22 February 2021 the Claimant's solicitors provided representations in resistance to the application, its arguments being in summary that:
- a. It is likely that the Respondent did receive the previous correspondence yet took no action until receiving the Rule 21 Judgment. The Respondent's claim that they did receive the Rule 21 Judgment but no previous correspondence is not credible;
 - b. Despite receiving the Rule 21 Judgment dated 5 February 2021, it took a further seven days for the Respondent to contact the Tribunal, and the draft Response was only submitted to the Tribunal, along with the Respondent's application, on 18 February 2021. The Respondent should have contacted the Tribunal earlier;
 - c. The Rule 21 Judgment does not prevent the Respondent from engaging in the remedy process, it merely prevents engagement in a dispute over liability;
 - d. Accordingly, the overriding objective should prevent the Tribunal from allowing the application.
7. I subsequently ordered that the remedy hearing listed for 5 March 2021 be postponed pending resolution of this application.
8. In a letter issued to the parties on 29 March 2021 I indicated my provisional view that the application could be dealt with without a hearing. Both parties have agreed with me taking that approach. I am satisfied that it is in accordance with the overriding objective to deal with cases fairly and justly for this application to be determined without a hearing. Both parties have made submissions in writing and I do not consider that there is anything more that could be achieved by convening a hearing. Moreover, proceeding

in this way avoids delay and saves expense.

9. I have considered the written submissions of both parties. I find on the balance of probabilities that:
 - a. The notice of claim was not received by the Respondent. It is credible that delivery was affected in the circumstances of the coronavirus pandemic, and the Respondent's subsequent actions are consistent with this finding. The circumstances in July 2020 (when the ET2 was sent) and February 2021 (when the Rule 21 Judgment was sent) were rather different, so I do not consider that the fact the Respondent did receive the latter necessarily confirms it received the former.
 - b. Upon becoming aware of the claim, the Respondent took reasonable steps to obtain a copy of the claim form and to issue its application (together with draft Grounds of Resistance). I do not accept the Claimant's submission that there was any meaningful delay in the Respondent taking the steps that it did.
10. I accept the Respondent's submissions that the prejudice to Respondent of refusing the application outweighs the prejudice to the Claimant of granting it. Both parties are now represented. It is in the interests of justice for the claim to be determined on a contested basis. The draft Grounds of Resistance demonstrate, on their face, that there are serious questions to be tried.
11. I am therefore satisfied that it would not be fair and just for the Rule 21 Judgment to stand in all the circumstances. It shall be revoked.
12. It is also appropriate for me to determine the application for an extension of time under Rule 20 at this stage, as I am in a position to consider all of the relevant factors set out by the EAT in *Kwik Save Stores Ltd v Swain and ors* [1997] ICR 49, namely:
 - a. the employer's explanation as to why an extension of time is required;
 - b. the balance of prejudice; and
 - c. the merits of the defence.
13. For the same reasons that I have revoked the Rule 21 Judgment, I am satisfied by the Respondent's explanation as to why an extension of time is required and that the balance of prejudice is in favour of granting an extension. The Respondent has a defence, as set out in its draft Grounds of Resistance, which on its face has reasonable grounds of succeeding. I will therefore grant an extension of time for filing the ET3 to 14 days after the date that this Judgment is issued to the parties.
14. On the basis that the ET3 is filed in materially the same form as already provided, I will also make a case management order, which will be issued separately from this Judgment.

Employment Judge Abbott
Date: 1 September 2021

JUDGMENT SENT TO THE PARTIES ON
Date: 7 September 2021

FOR THE TRIBUNAL OFFICE