EMPLOYMENT TRIBUNALS

Claimant: **Ms G Dora**

Respondent: **Kenwood Travel Ltd**

Heard via Cloud Video Platform (London Central) On: 2 September 2021

Before: Employment Judge Davidson

Representation

Claimant: Mr P Daniels, Solicitor
Respondent: Mr J Anderson, Counsel

JUDGMENT ON RECONSIDERATION

1. The respondent's application for an extension of time in which to file a Notice of Appearance is granted.

2. The Rule 21 Judgment of EJ Lewis dated 18 March 2021 is set aside.

Employment Judge Davidson

Date 9 September 2021

JUDGMENT SENT TO THE PARTIES ON

.10/09/2021.

FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP hearing

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by video. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a

bundle of 72 pages, the contents of which I have recorded. The order made is described at the end of these reasons.

REASONS

Background

1. The claimant was employed by the respondent from 1 June 2015 as a Data Loader until her dismissal by reason of redundancy with effect from 31 August 2020.

2. She went through early conciliation with ACAS.

3. On 26 October 2020, she lodged her claim in the employment tribunal claiming unfair dismissal, age discrimination and a protective award under section 188 TULRCA 1992.

4. No ET3 was received from the respondent.

5. On 17 March 2021, a telephone preliminary hearing for case management took place before Employment Judge Lewis. She entered Judgment for the claimant in the unfair dismissal claim under Rule 21. She held that a hearing would be necessary to determine remedy, the age discrimination claim and the protective award claim.

6. The case had previously been listed for 4 days from 2 September 2021 and the case remained in the list.

7. The Rule 21 Judgment was sent by email to George Koumi, Managing Director of the respondent at an email address supplied to the tribunal by the claimant.

8. On 24 March 2021 Mr Koumi emailed the tribunal expressing surprise at the Judgment as he was not aware of the tribunal claim or the hearing. He was aware that the claimant had started early conciliation but had not received tribunal papers. He asked for the opportunity to put the respondent's case to the tribunal.

9. Mr Koumi did not hear back from the tribunal and followed up on 29 April and by telephone on various occasions. He sent a further email on 13 May asking for the ET1 and other documents on file. He sent a further request on 1 June 2021 to which he received the standard automatic response from the tribunal.

10. Mr Koumi then instructed lawyers who wrote to the tribunal on 29 July 2021 with a formal request for a reconsideration of the Rule 21 Judgment. By letter dated 2 August, the claimant's representatives objected to the request. There was then an exchange of correspondence between the parties on the reconsideration issue.

11. On 18 August 2021, the respondent received a copy of the ET1 and Particulars of Clam. The ET3 and Grounds of Resistance were submitted on 25 August 2021.

12. On 27 August, REJ Wade directed that there should be a preliminary hearing to consider the respondent's application for a reconsideration of the Rule 21 Judgment. She postponed the listed hearing as the parties were not ready to proceed with that hearing.

The hearing

13. The issue for today's hearing, therefore, is to consider the respondent's application for the ET3 to be accepted out of time and for the Rule 21 Judgment to be set aside.

14. George Koumi was unable to give evidence to the tribunal because he was travelling. His son, who also works in the business, Anthony Koumi gave evidence.

15. He explained that the offices of the respondent had been closed since April 2020 due to the pandemic but that he attended about once a week to collect the post. The address is multi-occupied and there is nobody to sort out the post between the various tenants. The tenants are responsible for collecting their own post. It is possible that the respondent's post could in advertently have been collected by the wrong tenant. Anthony Koumi confirmed that he had not collected any correspondence from the employment tribunal at the office address.

16. He was unable to assist the tribunal in relation to the events after George Koumi became aware of the Rule 21 Judgment.

Respondent's submissions

17. The respondent's representative submitted that the primary element for the tribunal's consideration was the balance of prejudice between the parties.

18. There can be no criticism of the respondent for not submitting an ET3 when it had not yet received the ET1. A party cannot draft pleadings on the basis of the complaint put forward by a claimant in internal proceedings or in the early conciliation process with ACAS. Even on receiving the Rule 21 Judgment and Case Management Summary, the respondent was not aware of the claims in the ET1. The tribunal is invited to accept Anthony Koumi's evidence regarding the postal arrangements and the likely explanation for the documents going missing.

19. The tribunal has the power to extend time limits pursuant to Rule 5.

20. George Koumi's email of 24 March 2020 (within 14 days of the date of the Rule 21 Judgment) is a request for a reconsideration in layman's language. The

tribunal system was not dealing with correspondence promptly at this stage and the respondent was awaiting a response to numerous contacts with the tribunal. It may not have been in the correct format but Rule 6 allows the tribunal to waive the irregularity. The respondent submits that the communications in March, July and August are all possible requests for reconsideration under Rule 70.

21. In correspondence, the claimant drew an analogy with the strict time limits for claimants to file their ET1 and suggested that the same approach should be taken in respect of respondents who are late. The respondent submitted that this was not the correct test: claimants are subject to the 'reasonably practicable' test, which was not the test for late submission of the ET3.

22. In terms of the main consideration for the tribunal, namely the balance of prejudice, the respondent submitted that the claimant has put in a high value remedy claim and the respondent is not necessarily given the right to respond where there is a Rule 21 Judgment. This is in the discretion of the Judge. The possibility of not being able to participate in a remedy hearing would be a significant prejudice to the respondent.

23. There is a finding on liability which is prejudicial to the respondent which has not had an opportunity to put its case.

24. A hearing would, in any event, be required for the remedy and the other claims albeit it might be shorter if the respondent were not able to participate.

25. The respondent has submitted full Grounds of Resistance which deals with the merits. The respondent has shown grounds on which the claim will be resisted and is only required to show an arguable defence, which it has done. There are now competing sets of pleadings which should be resolved.

26. The case relied on by the claimant (*Maruffo*) does not assist as it deals with Rule 30 relating to case management orders. This is not the same as Rule 20 and Rule 70, which are relevant to this case.

Claimant's submissions

27. The claimant's representative submitted that time limits are strict and should only be departed from where there is a good reason, being the exception not the rule. In this case, the ET3 is months out of date.

28. The claimant does not accept the respondent's explanation regarding the non-receipt of the ET1 and tribunal papers. If the post is collected weekly, then there is no reason to suppose these papers were not received.

29. Once the respondent was aware of the Rule 21 Judgment, George Koumi could have done much more than simply send emails to the tribunal. He could have taken legal advice at an earlier stage, he could have sought guidance from ACAS or from the Federation of Small Businesses. George Koumi did not

attend the tribunal and the tribunal therefore had no explanation why these steps were not taken.

30. The application for reconsideration was made four months after the date of the Rule 21 Judgment, not within the statutory period of 14 days. The respondent could have put in a holding ET3 without seeing the ET1.

31. The claimant rejects the contention that the email of 24 March from George Koumi should be regarded as an application for reconsideration. In the case of *Maruffo v Bournemouth Council UKEAT/0103/20/BA*, the EAT held that applications for case management orders should make it clear what is being requested and the tribunal cannot be expected to read the mind of the author. The 24 March email did not make it clear that a reconsideration was being requested and therefore it should not be read that way.

32. The tribunal must balance delay and prejudice. The prejudice to the claimant is that she has waited 11 months, she is out of work and cannot afford a barrister to represent her and she is finding the process very stressful.

33. The prejudice to the respondent is entirely driven by its own actions. If the tribunal allows the application, this could be a 'floodgates' decision.

34. The respondent has no reasonable defence to the claim and there is not enough prejudice to the respondent in upholding the judgment than there is to the claimant in allowing the application and increasing the delay.

35. If the Rule 21 Judgment is in place, the respondent can make submissions on remedy.

Decision

36. I accept the respondent's evidence that the ET1 and tribunal papers were not received. The tribunal administration would have sent the Notice of Hearing with the ET1 and therefore it is my view that only one set of papers was sent and this was not received.

37. George Koumi sent an email to the tribunal within 14 days of receiving the Rule 21 Judgment. Although it may not be compliant with Rule 70, it is clear that he was not aware of the claim or the hearing and he asked for an opportunity to put his case. The email may not use the word 'reconsideration' but I find that this is what George Koumi was requesting. He was unrepresented at that point and, in my view, should not be criticised for not using the correct terminology. Pursuant to Rule 6, I waive any compliance requirement. I do not find that the *Maruffo* case is of assistance as it deals with applications under Rule 30.

38. The delay between the 24 March email and the formal request made by solicitors in July for a reconsideration is attributable largely to the delays in dealing with correspondence within the tribunal administration. George Koumi chased by telephone and followed up with further emails but received no

responses. Eventually, he instructed lawyers and a more formal application was made. I accept that he could have taken that step earlier but I do not consider that delay, when he was expecting a response from the tribunal, is fatal to his application.

39. I have also taken into account the claimant's submission regarding the importance of time limits. However, the specific statutory test of 'reasonable practicability' which applies to late claimants does not apply to late respondents. The issue of time limits in these cases is part of the consideration of the overriding objective and the balance of prejudice.

40. The claimant's representative described the prejudice to her of further delay. While delay should be minimised, the reality of the tribunal system is that cases often take a long time to come through the system. Today's hearing was originally intended to be a remedy hearing and a substantive hearing on the other elements of the claimant's claim before the respondent made the formal application for reconsideration. REJ Wade noted that the parties were not ready for those matters to be heard and postponed that hearing, replacing it with this hearing. The case has been delayed whichever decision I reach today.

41. The claimant's representative also made reference to the stress being felt by the claimant. It is an inevitable part of bringing claims that there will be stress involved. In commencing proceedings, the claimant cannot have had an expectation of a Rule 21 Judgment and would have anticipated having to make her claim in a full merits hearing. There was a windfall to her in the respondent's failure to file an ET3 but allowing the respondent to defend the claim simply puts her in the position she would have expected to be in when she brought her claim.

42. Another element of prejudice mentioned by the claimant's representative is that she will not be able to afford counsel and will only have her solicitor to represent her. Tribunals are used to dealing with litigants in person and a party represented by a solicitor instead of counsel is not, in my view, a significant prejudice.

43. I accept that allowing this application causes some prejudice to the claimant. She understood that she had won her unfair dismissal claim and that the respondent would not be able to defend the other claims. This will no longer be the case if the respondent succeeds. However, I find that the prejudice to the respondent in not allowing the application is far greater. The respondent would be prevented from putting forward its case and would be subject to the discretion of the tribunal as to whether it would be able to make representations on remedy, in a case where the claimant's remedy claim includes reinstatement/re-engagement, unlimited compensation for career losses of earnings and aggravated damages.

44. I have considered the merits of the claim and the respondent has a case to put forward and is prejudiced by not being able to present it.

45. While I sympathise with the claimant, and the respondent's cause was not advanced by the failure of George Koumi to attend the tribunal, these aspects were not sufficient to displace my original finding on the balance of prejudice in favour of the respondent. I have taken into account the explanation for the delay, the merits of the defence and I have balanced the possible prejudice to each party.

46. I therefore allow an extension of time in which to submit the ET3 under Rule 20. As a result, the Rule 21 Judgment will be set aside. The case will be listed for a hearing and the respondent will be able to rely on its ET3 and Grounds of Resistance.