Case Number: 2501004/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr David Bramwell**

Respondent: **Nonlinear Technologies Limited**

RECORD OF A PRELIMINARY HEARING

Heard at: Newcastle upon Tyne Hearing Centre by video
On: Tuesday 2nd November 2021

Before: Employment Judge Speker OBE DL

Appearances
For the claimant: Mr Max Winthrop (Solicitor)
For the respondent: Mr John Craggs of Counsel

DECISION ON RECONSIDERATION OF DEFAULT JUDGMENT AND ORDERS

1. The default judgment entered by Employment Judge Aspden on 20th August 2021 is revoked on reconsideration.

2. The time for the respondent to file and serve a response is extended and the response form filed is now accepted and validated.

3. A further preliminary hearing will take place by telephone on Tuesday 30th November 2021 at 11.30am in order to consider the making of case management orders, to define the issues and discuss the suitable length of the final hearing. Agendas will be sent out to both sides which should be completed, filed and served at least seven days before the preliminary hearing.

REASONS

1. This hearing was listed as a remedy hearing following the making of a default judgment by Employment Judge Aspden on 20th August 2021 in which she found that the complaints against the respondent (then described as the first respondent) of unfair dismissal and under Section 93 of the Employment

Rights Act 1996 were well-founded and it was directed that there would be a remedy hearing.

2. Originally the claimant, Mr Bramwell, had issued proceedings against Nonlinear Technologies Limited as first respondent and Biosignatures Limited as second respondent. Neither companies filed a response. A default judgment was entered against Nonlinear Technologies. The claimant's solicitor was asked whether in those circumstances the claimant wished to proceed with his claim against the second respondent, Biosignatures Limited, bearing in mind that it had been notified that that company had gone into liquidation but Mr Winthrop confirmed to the tribunal that the claim against the second respondent was not to be continued and therefore it was dismissed on withdrawal.

3. The claim was presented to the tribunal on 12th July 2021 in advance of which the respondent company's director had engaged with ACAS during the early conciliation process.

4. Today's hearing was to determine remedies and on 27th October 2021 a witness statement was filed from the claimant dealing with remedy issues together with a short bundle of documents.

5. On 1st November 2021 solicitors instructed by the respondent sent an e-mail to the tribunal stating they had become aware of the remedies hearing listed for 11.30am that day and stated that an application was being made to apply for an extension of time to file and serve the requisite ET3 on the basis that Mr Purvis, a non-executive director of the respondent, had only just received notification of the remedies hearing and had been unaware that Mr Bramwell had issued a claim in the tribunal and also was unaware that default judgment had been entered. In the e-mail, explanation was given with regard to a presumed change in the registered office of the company following Biosignatures Limited having been placed in liquidation and that as a result of this it was presumed that the papers in the tribunal case did not reach Mr Purvis and that this was the reason why no response had been filed.

6. For today's hearing Mr Craggs, who represented the respondent, had prepared a skeleton argument which reached me shortly before the commencement of the hearing. Attached to the skeleton argument were some relevant correspondence together with the report of the case of Kwiksave Stores Limited v Swain & Others 1997 ICR49. Mr Craggs supported a skeleton argument with verbal submissions and also called to give evidence Mr Steven Graham Purvis, a director of the respondent company. Mr Purvis explained the circumstances in relation to which Biosignatures Limited was in the same group of companies as the respondent. He stated that because of action by the liquidators who had been appointed in relation to Biosignatures Limited it had to be presumed that they had altered the registered office not only of Biosignatures Limited but also of Nonlinear Technologies Limited and that the consequence of this was that neither he nor anyone in relation to the company had received the tribunal papers. If they had been received, he said that they would have been dealt with accordingly. He gave, as examples of

this, the fact that he had responded very quickly to a request from Mr Winthrop for written reasons of dismissal and which he had provided by sending a copy of the letter of dismissal of the claimant by Biosignatures Limited, it being the respondent's case that the claimant was employed by that company and not by the respondent. He also confirmed that he had responded to approaches by ACAS under the early conciliation process even though this had not led to any resolution. He described for me the position of the respondent company that it did not have any employees and that the claimant had been employed by Biosignatures Limited. With regard to a document produced to me which appeared to be an employment contract between the claimant and the respondent, Mr Purvis stated that this must have been replaced by another document but certainly all of the documentation in relation to the claimant, including his payslips, clearly showed that the employer was Biosignatures Limited. Reference was also made to other proceedings in the High Court issued by Mr Bramwell against the respondent company in the Insolvency and Companies list had produced an order by His Honour Judge Davis White QC which referred to the court being satisfied that notice of the trial had been served on the defendant. In those proceedings again the respondent had, as yet, taken no part because they had not been notified and it was presumed that this was for the same reason in relation to the change of the registered office. Mr Purvis stated that an application was to be made to set aside the order in the High Court proceedings.

7. Relying upon the principles set out in the Kwiksave v Swain case Mr Craggs submitted as follows:

    7.1 that the tribunal was entitled to exercise a broad, general, discretion in the interests of justice and should do so by extending time for the lodging of the ET3;

    7.2 that it was relevant to consider the respondent's explanation for the failure to lodge the ET3 response and that in this case the failure did not represent any procedural abuse or intentional default but was the result of an accidental or understandable oversight;

    7.3 that the length of the delay from the respondent discovering the proceedings to taking action was very short;

    7.4 the respondent would be significantly prejudiced if the extension was not granted;

    7.5 there were merits in the respondent's defence and that should weigh with the tribunal where it could be shown as here that there was a significant arguable issue;

    7.6 regard must be had as to whether there was good reason for the response not having been presented in term and it was argued that clearly there is in this case.

8. On behalf of the claimant Mr Winthrop argued that papers had indeed been

properly served on the company by being sent to its official registered office. There was no reason demonstrated why the respondent could not have dealt with responding to the claim in a proper and timely manner. No evidence had been produced to the tribunal from, or concerning, the liquidators to confirm that indeed they had taken any action whatever with regard to the registered office. He submitted that the judgment should be maintained and that it should not be revoked.

9. In considering this application for reconsideration of the judgment, I must comply with the principles which are set out in Rule 70 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which states as follows: "70 A tribunal may either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment **where it is necessary in the interests of justice** to do so. On reconsideration the decision (the original decision) may be confirmed, varied or revoked. If it is revoked it may be taken again."

   Rules 71 and 72 set out the procedure process of applications for reconsideration.

10. Although the Kwiksave case was at a time when the reconsideration rules were different, it is still considered to be good law. Furthermore the main change with regard to the principles of reconsideration of judgments is that instead of setting out a list of circumstances in which the tribunal can reconsider a decision and vary or revoking it, the present rule states that this is to be done "where it is necessary in the interests of justice to do so". This is an overriding principle which takes into account the previous stated circumstances where consideration should be an option.

11. In the present case I am satisfied from the evidence provided that, on the balance of probabilities, the existence of these tribunal proceedings did not come to the attention of Mr Purvis. I am persuaded that had he been aware of the proceedings he would have dealt with them. This is consistent with the fact that he responded promptly to the claimant's solicitors when requested to provide details of the reasons for dismissal (albeit dismissal by Biosignatures rather than the defendant) and also responded to ACAS under the early conciliation procedure.

12. Under the overriding objective in Rule 2 the purpose of the tribunal hearings is to deal with cases fairly and justly. This includes ensuring the parties are on an equal footing. It is a fundamental principle of natural justice that in making judicial decisions it is necessary to hear both sides. For reasons which have been explained and which do not establish any wrong-doing on the part of the respondent, this respondent has not been given the opportunity of stating its case or defending the proceedings. The decision to be made between these parties should be one based upon a consideration of the issues and the hearing of valid evidence and viewing relevant documents, together with the opportunity of each side to challenge the case put by the other. Accordingly, I find that the interests of justice require that this default judgment be set aside and I have ordered accordingly. In view of the shortness of time

available and with the agreement of both parties it is now arranged that the identification of issues and the making of suitable case management orders should be left to a further preliminary hearing by telephone. I was able today to obtain a suitable date for this which was agreeable to both parties and that is the date set out at the heading of these orders. It has also been arranged that agendas be sent out to both sides which should be completed one week before the hearing. This gives the parties the opportunity to try to agree the case management orders and if possible a list of issues and the case can then proceed to a full hearing with suitable time allowed and an outcome achieved based upon findings of fact and the application of the law to those facts.

Employment Judge Speker OBE DL
Date: 13th November 2021