



EMPLOYMENT TRIBUNALS

Claimant: Mr Kheng Tan
Respondent: Mans Catering Ltd

Record of a Reconsideration Hearing at the Employment Tribunal

Heard at: Nottingham **On:** 4 November 2021

Before: Employment Judge Hutchinson (sitting alone)

Representation

Claimant: Mr M Game, Solicitor
Respondent: Mr Lyons, Counsel

JUDGMENT

1. The application for reconsideration of the Judgment succeeds.
2. The Judgment of Regional Employment Judge Swann dated 10 June 2021 is revoked.

REASONS

Background to this Hearing

1. The Claimant presented his claim to the Tribunal on 2 February 2021. He said he had been employed by the Respondent from 28 February 2018 until 26 September 2020 when he was dismissed without notice. He claimed;
 - Unfair dismissal.
 - A redundancy payment.
 - Holiday pay.

2. The address given for the Respondent was their business address, which was Unit B4 Chapel Bar, Nottingham NG1 6JQ. The claim was accepted and served on that address and the Respondent was informed that it should file a response by 4 March 2021.
3. A hearing date of 9 June 2021 was arranged, and Case Management Orders made.
4. A response was not received and on referral an Employment Judge directed that the claim should be re-served on the Respondent's registered office address, which was 6 Cedar Grove, Rectory Gardens, Wollaton, Nottingham NG8 2AS. That is the home address of Mr Man who is the owner and Managing Director of the Respondents.
5. No response was received and after obtaining details of the Claimant's losses my colleague Regional Employment Judge Swann issued a Judgment in default on 10 June 2021. He ordered that the Respondent should pay to the Claimant; -
 1. Damages for breach of contract in the sum of £500.
 2. Compensation for unfair dismissal of £15,814.44.
 3. Holiday pay of £735.00.
6. On 24 June 2021 a letter was received from Solicitors acting for the Respondent. They applied for reconsideration of the Judgment saying that it was in the interest of justice as the Respondent had not had an opportunity to defend the claim or make representations in relation to the amount to be awarded to the Claimant.
7. They said that the Respondent first became aware of the claim around 12 May 2021 and that there had been a misunderstanding between the Respondent and his Solicitors which had led to the Judgment being issued without representations being presented by the Respondents.
8. An ET3 was presented with that application which amongst other things claimed that the Claimant did not have sufficient service to claim unfair dismissal as there had been a break in his employment between 8 February 2019 and 15 March 2019.
9. It was said that even if the Claimant did have service and the Tribunal found that he had been unfairly dismissed that any award should be reduced because of his contributory conduct and because of the principles set out in the case ***Polkey v Dayton Services***.
10. The Claimant objected to this application saying; -
 1. That the Respondent should have reasonably been aware of the claim.
 2. He had had time since 12 May 2021 to take such steps to prevent the Judgment being issued but had done nothing.

11. The Claimant said it would not be in the interests of justice to revoke the Judgment because the Respondent had in effect “chosen not to defend the claim where they have had all reasonable opportunity to do the defend a claim and has not done so, which is the case here.”
12. It was said in respect of the jurisdictional issues the Claimant did not accept the Respondent’s narrative in terms of any break in service.

The Hearing Today

13. I heard evidence from Richard Man the Respondent, Owner and Managing Director and I heard submissions from Mr Lyons on his behalf and from Mr Game for the Claimant. There was an agreed bundle of documents and where I refer to page numbers it is from that bundle.

The Facts Relevant to the Issues

14. Richard Man is the owner of and Director of Mans Catering Ltd which operates his restaurant “Mans Restaurant” at Unit B4, Chapel Bar, Nottingham. His residential address is 6 Cedar Grove, Rectory Gardens, Wollaton which is also the registered office address of the Company.
15. On 28 February 2020 he travelled to Hong Kong where he also lived with the intention of returning to the UK 10 weeks later. He normally divides his time between Hong Kong and England.
16. Because of the Covid pandemic and travel restrictions he was unable to return to the UK as anticipated. He still has not done so and his residential address has been unoccupied since 28 February 2020.
17. Due to Covid restrictions the restaurant closed in December 2020 and did not reopen until 20 May 2021. There is no post box at this address and in normal times the post is delivered by a post office worker opening the restaurant door and coming into the restaurant and handing it to the staff. If the restaurant is closed, then they cannot have post delivered to them.
18. During the lockdown period there was a sign saying “closed until further notice” which had been placed on the restaurant window.
19. When Mr Man is in the UK, he has an employee Geoff Cook who acts as his driver and carries out duties in relation to the restaurant. When Mr Man is abroad, he would periodically check in on his residential address for security reasons and put post to one side.
20. Mr Cook was furloughed, and Mr Man had not asked him to check on his residential address whilst he was on furlough. During this period no one checked his residential address for post.

21. I am satisfied that Mr Cook visited the residential address in early May 2021 and opened the letter from the Tribunal dated 12 May 2021. This is in the bundle of documents at page 45. The letter indicated that no response had been received to the claim and the Judgment may be entered.
22. That document was scanned and sent to Mr Man on 21 May 2021 (page 56-57).
23. Also, on 21 May the Claimant's representatives sent an email to the restaurants email address with a schedule of loss (page 53). The email did not refer to a hearing date. This email was also forwarded to Mr Man.
24. On that same day Mr Man contacted Graham Greenfield at Freeths LLP seeking advice (page 56).
25. Mr Man received a response on 26 May 2021 (page 56). Mr Man was put in touch with Mr McBride and told that swift action was necessary.
26. Mr Man then spoke to Mr McBride on 28 May 2021. On that day Mr McBride sent an email to Mr Man on 28 May 2021 (page 55). That letter sought instructions about submitting a response on his behalf. I am satisfied that Mr Man did not receive that email.
27. Mr McBride sent a further email on 2 June 2021 (page 55) and left a voice mail chasing a response and Mr Greenfield sent another email on 5 June 2021 also chasing a response (page 58). Mr Man did not receive any of these emails.
28. I am satisfied that Mr Man mistakenly thought that Mr McBride was pursuing matters on his behalf and he did not make contact with him to chase progress. It is surprising that he did not chase Mr McBride but am satisfied that Mr Man was telling me the truth although he should, of course, have done something about it. On 8 June 2021 the restaurant received a schedule of loss from Mr Tan's representative in relation to the hearing that was due to take place the following day. This was forwarded to Mr Man (page 60). This was the first time that Mr Mann was aware of the hearing date of 9 June 2021 and he send an email to Mr McBride on that date (page 60).
29. Mr McBride then sent further emails on 9 June 2021 to Mr Man (page 59) but again Mr Man did not receive these emails.
30. There is no real satisfactory explanation as to why he was not receiving these emails, but I am satisfied that he did not.
31. On Sunday 20 June 2021 Mr Man saw the Judgment that had been issued and received by the restaurant and sent that to Mr McBride and instructed him in relation to the matter. He provided information to Mr McBride who made the application for reconsideration on 24 June 2021.

The Law

32. The application for reconsideration of the Judgment is made under Rule 70 of the Employment Tribunal Rules of Procedure 2013. That says; -

“A Tribunal may, either on its own initiative (bracket which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, consider any Judgment where it is necessary in the interest of justice to do so. On reconsideration, the decision (“the original decision”) maybe confirmed, varied or revoked. If it is revoked it may be taken again”.

Conclusions

33. I take into consideration that the Respondents have paid the sum of £735.00 for the Claimant’s outstanding holiday pay and the Claimant has withdrawn that part of his claim.
34. That leaves the notice pay and compensation for unfair dismissal.
35. The notice pay is only 2 weeks pay but the compensation for unfair dismissal is £15,814.44 which is well over 12 months pay. I have not heard legal argument, but it may well exceed the maximum sum that is payable under the Employment Rights Act 1996.
36. The Judgment was made without a hearing and so the jurisdictional arguments made in the Respondent’s ET3, the reason for the dismissal, the fairness of the dismissal and whether any compensation should be reduced for contributory conduct or under the principles of Polkey had not been considered at all.
37. I am satisfied that it is in the interest of justice to revoke the Judgment and set the matter down for a hearing.
38. Whilst the Claimant will suffer some prejudice from the delay in having his case heard that is outweighed by the prejudice to the Respondents who have not been heard in respect of the case at all.
39. I am satisfied that Mr Man did not become aware of these proceedings at all until 12 May 2021 and the delay between the 12 May 2021 and 24 June 2021 when his Solicitors made an application was caused by a misunderstanding between him and his Solicitors and a breakdown in communication.
40. I also have to take into account the unusual circumstances of this matter having arisen during the Covid 19 pandemic when both the Respondents restaurant was closed, and he was not at home and therefore not aware of these proceedings.
41. I made the point that as a businessman of 40 years he should have had systems in place to collect his post during the pandemic particularly bearing in mind that

his home address is also the registered office of the business. Be that as it may it does not outweigh the issue of prejudice and I am satisfied that the Judgment should be revoked in all the circumstances of this case.

Listing a Hearing

42. The claim will be heard by an Employment Judge sitting alone at the **Tribunal Hearing Centre, 50 Carrington Street, Nottingham NG1 7FG on Wednesday 4 May 2022 and Thursday 5 May 2022 at 10.00am on each day. The parties must arrive 30 minutes before the start of the hearing.**

CASE MANAGEMENT ORDERS Made pursuant to the Employment Tribunal Rules 2013

1. The parties must send each other a list and copies of all the documents they have relevant to the claim **by 14 January 2022**. This includes documents relevant to financial issues and what the Claimant has done to find another job. Documents include recordings, emails, text messages, social media and other electronic information. The parties must send all relevant documents that they have in their possession or control even if they do not support their case.
2. The parties must agree which documents are going to be used at the hearing and the Respondent must prepare a file of those documents and send a hard copy to the Claimant **by 28 January 2022**. The file must have an index and page numbers. It must contain the claim and response forms at the front of the file and the other documents or parts of documents that are going to be used at the hearing in date order.
3. The Claimant and Respondent will send each other copies of all their witness statements **on 25 February 2022**. The witness statement is a document containing everything relevant that the witness can tell the Tribunal. Everybody who is going to be a witness at the hearing including the Claimant needs a witness statement. Witness statements should be typed. They must have paragraph numbers and page numbers. They must set out events usually in the order that they happen. They must also include any evidence about financial losses and any other remedy the Claimant is asking for. If the witness statement refers to a document in the file it should give the page number.
4. The Claimant and Respondent must bring copies of the file and witness statements to the hearing for their own use. The Respondent must also bring two spare copies of the file and witness statements for the Tribunal to use.

Employment Judge Hutchinson

Date: 24 November 2021

JUDGMENT SENT TO THE PARTIES ON

26 November 2021
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FOR THE TRIBUNAL OFFICE

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