Case No: 1306732/20

EMPLOYMENT TRIBUNALS

Claimant: Mr. J Easthope
Respondent: Nuffield Health

JUDGMENT ON AN APPLICATION FOR RECONSIDERATION

UPON considering on 4 January 2022 the respondent's application for reconsideration dated 6 October 2021:

The respondent's application for reconsideration is granted. The judgment dated 27 September 2021 is revoked.

REASONS

Background

1. The claimant lodged his ET1 claim form on 24 July 2020. He claimed unfair and wrongful dismissal. The claim was accepted by the Tribunal and the respondent was directed to provide a response. The response was due by 9 September 2020.

2. The respondent did not provide a response.

3. On 14 December 2020 the respondent's solicitor wrote to the Tribunal to say that the respondent had only just become aware of the proceedings and asking what stage they were at.

4. On 27 May 2021 EJ Perry wrote to the respondent pointing out that no response had been received. EJ Perry warned the respondent that a Rule 21 judgment may be issued. He also informed the respondent that *"any applications should be accompanied by a draft response and explanation, as the papers appear to have been correctly served".*

5. EJ Perry's indication that the papers were correctly served appears to be right because the tribunal's records demonstrate that the ET1 was sent to the respondent's registered office address on 12 August 2020. The respondent has not suggested that the papers were incorrectly served.

6. The respondent did not respond to EJ Perry's correspondence. However, the Tribunal received a delivery failure notification indicating that the email attaching the correspondence of 27 May was not received by the

respondent. It seems most likely that a mistake was made when entering the respondent solicitor's email address.

7. On 27 September 2021 I issued a judgment under Rule 21. That judgment provides that the claim succeeds and remedy will be determined at a remedy hearing (now listed on 25 February 2022).

8. When the file was referred to me in September it did not contain the delivery failure notification relating to 27 May. I was therefore unaware of that when I issued the Rule 21 judgment.

9. On 6 October 2021 the respondent made an application for reconsideration of the Rule 21 judgment. The application stated that the respondent had not received the ET1 until 10 December 2020. The respondent said it did not know why the ET1 had been received so late. The respondent said they had not received any other correspondence from the Tribunal (so they had not received the correspondence of 27 May). The respondent submitted it would be in the interests of justice to revoke the Rule 21 judgment as they had not had the opportunity to present a defence.

10. On 22 October 2021 the claimant objected to the respondent's application. The claimant pointed out that the respondent was professionally represented and they could have presented a response on or shortly after 14 December 2020. The respondent had failed to present any response, even in outline form. The respondent had failed to take advantage of the time to present a response prior to the Rule 21 judgment being issued in September. The claimant also suggested there was prejudice to the claimant in allowing the application as it would involve delay.

11. The parties both agreed that the respondent's application should be dealt with by me on the papers and I agreed to do so. I invited final written submissions. I specifically asked the respondent to address the point about them not submitting a response.

12. The respondent provided final submissions on 23 November 2021. The respondent submitted it had been reasonable not to provide a response on 14 December as they were unsure whether default judgment had already been issued and therefore providing a response may have been a waste of time and cost. The respondent reiterated that it had not had any response to that correspondence from the Tribunal until it received the Rule 21 judgment in September (and so they did not know whether a judgment had been issued or not). The respondent maintained it had still not seen the Tribunal's correspondence of 27 May. The respondent also emphasised the point that it had not been a given a fair opportunity to defend the claim and a fair hearing was still possible.

13. The claimant provided final submissions on 24 November 2021. Four points were made. In summary:

i. The claimant had made reference to the correspondence of 27 May in letters copied to the respondent on 8 June, 7 July and 14 September yet the respondent had not requested a copy.

ii. The claimant wrote on 14 January referencing the fact that no Rule 21 judgment had been received and the respondent would therefore have been aware of that and had the opportunity to provide a response.

iii. The respondent had still not provided a draft response.

iv. The respondent had not provided any evidence to show the ET1 had not been correctly served.

Law

14. Rule 70 of the Tribunal's rules of procedure provides as follows: *"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."*

15. When dealing with the question of reconsideration I must seek to give effect to the overriding objective to deal with cases 'fairly and justly' (Rule 2). This includes:

    a. ensuring that the parties are on an equal footing
    b. dealing with cases in ways which are proportionate to the complexity and importance of the issues
    c. avoiding unnecessary formality and seeking flexibility in the proceedings
    d. avoiding delay, so far as compatible with proper consideration of the issues; and
    e. saving expense.

16. I should also be guided by the common law principles of natural justice and fairness.

17. In Outasight VB Ltd v Brown 2015 ICR D11, EAT, Her Honour Judge Eady QC explained that the wording 'necessary in the interests of justice' in rule 70 allows employment tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, *'which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation'.*

18. A recognised category of case where there may be a legitimate basis for reconsideration is where a party does not receive notice of the proceedings. However, it is difficult to establish non-receipt of a notice in practice. This is

because the provision as to deemed service in Rule 90 applies. This stipulates that, once it is established that a document was properly addressed, stamped and posted, it will be presumed — unless the contrary is proved — that it was received by the party to which it was sent on the day on which the notice 'would be delivered in the ordinary course of post', unless the contrary is proved. This means on the second day after posting (excluding Sundays and bank holidays) in the case of first-class mail. The burden is on the party alleging that the document was not received to prove that this was so. It is difficult to prove the negative and rebut the presumption.

Conclusions

19. The respondent has not provided sufficient evidence to establish that notice of the proceedings was not received in accordance with Rule 90. They have not challenged the suggestion that the proceedings were correctly served, and no evidence was provided. There was just an unexplained assertion in the respondent solicitor's emails that the ET1 had not been received until 10 December.

20. I also agree with the claimant that the respondent could have provided a draft response at least in outline form.

21. These factors weigh against granting the reconsideration application. I also take into account the importance of maintaining finality of litigation and the need to avoid delay as further factors weighing against granting the application.

22. As against that the respondent did not receive any response from the Tribunal to its email of 14 December. Then, when he considered the case in May EJ Perry decided not to issue a Rule 21 judgment. Instead he sent the correspondence of 27 May which I think should fairly be read as implying or at least anticipating that the respondent could make an application to submit the response late. EJ Perry must have taken into account the respondent's correspondence of 14 December when he decided to write to the respondent in the terms that he did.

23. There is no doubt that the 27 May correspondence was not received by the respondent because the Tribunal received a delivery failure notification.

24. As I have said that notification was not on the file when it was referred to me in September. I have to say that had it been there I would not have issued the Rule 21 judgment. Instead, I would have directed that EJ Perry's letter be re-served on the correct email address so that the respondent could have the opportunity to respond before any Rule 21 judgment was issued as I believe EJ Perry anticipated.

25. Even now I still think that is the right thing to have done because it seems to me EJ Perry wished to give the respondent an opportunity to make an application. I think I should give effect to that intention rather than ignore it.

I think it was the right approach given the correspondence of 14 December and the fact there had been no response from the Tribunal to that.

26. I therefore cannot escape the conclusion that I have made a decision without all the relevant information having been put before me and had it been put before me I would have reached a different decision. The fact that the relevant information was not put before me is not the fault of either party or their representatives; it seems to be an oversight by the Tribunal staff. In those circumstances it seems to me that the interests of justice require a reconsideration of the Rule 21 judgment.

27. My conclusion is that the Rule 21 judgment should be revoked because I would not have issued it had I been aware of the delivery failure notification. In my judgement the interests of justice require revocation in those circumstances. The importance of maintaining finality of litigation is outweighed by the injustice to the respondent caused by the fact that, through no fault of their own, I was not aware of all relevant information and had I been aware of all relevant information I would have made a different decision.

28. I also considered the prejudicial effect of delay upon the claimant however I do not consider this is determinative because I agree with the respondent that a fair hearing is still possible and the injustice to the respondent outweighs the importance of avoiding delay. No specific issue was raised by the claimant regarding why delay would create injustice in this case; it was just a general point about the undesirability of delay generally. In respect of this issue my judgment is that the interests of the respondent outweigh the interests of the claimant and overall my view is that reconsideration and revocation is necessary in the interests of justice.

Next steps

29. I will issue a case management order separately, which will reflect the steps I would have taken had I been aware of the delivery failure notification in September.

Employment Judge Meichen

5 January 2022