Case No: 3302296/2020

EMPLOYMENT TRIBUNALS

Claimant: Mrs A Adeniran-Driver

Respondent: Vocalink Ltd

Heard at: Watford Employment Tribunal (in public; by video)

On: **2 December 2021**

Before: Employment Judge Quill

Appearances
For the Claimant: Mr S Liberadzki, counsel
For the respondent: Mr M Sethi QC

UPON APPLICATION made by letter dated 14 May 2021 to reconsider the Judgment under rule 71 Employment Tribunals Rules of Procedure 2013 dated 13 January 2021 which was sent to the parties on 21 January 2021, and **UPON APPLICATION** made by letter dated 25 August 2021 for an extension of time to present a response.

JUDGMENT

1. The response is accepted following an extension of time.
2. The Judgment is revoked in its entirety.
3. Case management directions including the dates of hearings will be sent in a separate document.

REASONS

Introduction

1. This was a reconsideration hearing following my Judgment sent to the parties on 21 January 2021 ("the Judgment"). The Judgment had been issued in accordance with rule 21 following a hearing which took place on 15 December 2020, attended by the claimant side only.

2. The Judgment contained a typographical error in that Mr Liberadzki was listed as representing the respondent. As I made clear to both sides during today's hearing that was simply an error in the written document and it had been clear to me throughout that the respondent was not present and that Mr Liberadzki was representing the claimant.

3. Slightly more than an hour before the 15 December 2020 hearing had been due to start, I had not received any documents from the claimant's side for that rule 21 hearing. An email was therefore sent, at 12:49pm, to the claimant's solicitors stating that documents had not been received, and asking for any documents which had been sent into the tribunal to be sent by replying to the 12:49 email. The email also went on to list some items that I would like to see. This was not a formal order that the document had to be supplied, but rather an attempt to make clear which items would be most useful in the event that no bundle had already been prepared. The email made clear that I was asking for those documents to be sent before the start of the hearing if possible.

4. About 20 minutes later a reply attached the 11 MB bundle for the hearing which the claimant's solicitors stated had previously been submitted to the tribunal on 4 December 2020. About 30 minutes after that, a further reply contained additional attachments. Of the items mentioned at 12:49, some were supplied but the appeal outcome letter was not.

5. The 15 December 2020 hearing went on from 2pm to 4pm. At the end of the hearing. I ordered the claimant to supply copies of her payslips. These were received and the Judgment was issued.

6. The whole of the reasons speak for themselves. Of particular note, I decided that the claimant had satisfied me that she had an impairment which met the definition of disability within the Equality Act 2010 ("EQA"), and that there had been contraventions of that EQA. On time limits, I decided they formed part of a continuing act. In reaching the decisions that discrimination was proven, I decided that the claimant's evidence was sufficient to shift the burden of proof in accordance with section 136 EQA and that the respondent had not discharged its burden. In terms of the latter, it was, of course, particularly significant that the respondent had not filed a response and had not taken part in the hearing or in the litigation at all.

The applications

7. The respondent wrote to the tribunal on 30 April 2021 and again on 14 May 2021. The former stated (amongst other things) that the Respondent had been unaware of the claim or the Judgment until recently and requested information. The latter described itself as the formal application for reconsideration. An application on either date (30 April or 14 May) was out of time. I decided that, although the reconsideration request was received outside the 14 day time limit, it was in the interests of justice for that time limit to be extended and, furthermore, I did not dismiss the application at the initial stage on the basis of having no reasonable prospects of success. The tribunal's letter of 26 May 2021 gives details of my instructions to the parties to comment further. Each party complied with those instructions. The Claimant's responses to the application are in the bundle at pages 170-172 and to my initial letter at 174-177.

8. On 25 August 2021, the Respondent's representatives submitted an application for extension of time to submit a response. As required by Rule 20, that was accompanied by a draft response. (Pages 243 to 267 of the hearing bundle).

The reconsideration/extension of time hearing

9. At this hearing, I had a bundle of 284 pages. There were two witnesses for the respondent who had each prepared written witness statements. Each of them gave evidence on oath and were cross-examined by the claimant's counsel, and answered such questions as I had for them.

10. I made clear to the claimant's counsel that there was no need to cross-examine Ms Saunders as to the parts of her statement which asserted that the respondent potentially had good grounds for succeeding in its defence, and that I would take it as read that the claimant reserves the right to challenge the respondent on all of the matters raised in that part of the statement. The cross-examination was therefore to be addressed to the parts of the statements that gave a purported explanation for the lack of response.

Facts.

11. The address for the respondent used in both the early conciliation and on the claim form was: Vocalink Limited, 1 Angel Lane, London EC4R 3AB.

12. That was the address held by the tribunal service in its computer records at all relevant times. To the extent (if at all) that the Respondent still argues that any correspondence which was supposed to have been sent to it was, in fact, sent to Mr Liberadzki, my finding is that that is not what happened. Regardless of what the Respondent's representatives think that they were told by phone, the tribunal service records have never held Mr Liberadzki's details as the Respondent's representative.

13. There were five items of correspondence apparently sent by the tribunal to the respondents.
    13.1. Notice of Claim – 17 February 2020
    13.2. "No Response Received" letter – 13 August 2020
    13.3. Notice of Hearing (in person) – 08 November 2020
    13.4. Notice of Hearing (by video) – 11 December 2020
    13.5. Judgment – 21 January 2021

14. The respondent admits that it received the three later items but denies receipt of the first two, namely the notice of claim (which included copy of claim form, and specified date for response of 16 March 2020) and the letter dated 13 August 2020 (which explained that, no response having been received, a judgment might now be issued against the respondent.)

15. The address on each of the 5 items is the same, and is the one mentioned above, taken from the claim form. The tribunal service did not hold an email address for the respondent and so correspondence was sent via post.

16. The process for a letter/document to be sent by the tribunal by post to the Respondent, if working correctly, is as follows. The hard copy document is placed in an envelope by tribunal staff and then sent via Royal mail. On arrival at the Respondent's building, the envelope is handled in the first instance by the landlord of the been building, N. N places items, unopened, into each tenant's respective cage. In the case of the respondent its cage

was shared with other companies within the same group and the subcontractor for the group emptied the cage and redirected the post internally to the relevant section of the relevant group company.

17. The Respondent, Vocalink Limited, is a subsidiary of Mastercard. Ms Saunders is Vice President Employee Relations for Mastercard. Mr Hicks is Director, Real Estate Services for Mastercard.

18. It is not necessary for me to set out in full what the witnesses say is supposed to happen to correspondence. Suffice it to say that I accept the evidence about was supposed to happen, including in relation to items which just has company name on it and does not identify a particular individual or department within the relevant company.

19. In April 2021, it came to the respondent's attention that the Judgment had been issued. They were put on notice by the claimant solicitors and then found the Judgment published on the register. These events caused them to carry out a search for relevant correspondence and they discovered that instead of being delivered to Rickmansworth or anywhere else, the two notices of hearing and the Judgment itself dated were still in the cages and had been there since what Mr Hicks describes as the “winter lockdown”.

20. The respondent invites me to infer from the fact that those three items could be located in May 2021 that the first two items had not been received.

21. It is not clearly explained by the Respondent why items from what it describes as the “winter lockdown” were still in cages in April or May 2021. In any event, Mr Hicks evidence was:
    21.1. In early March 2020, staff were encouraged to work from home.
    21.2. From 17 March to 17 August 2020, the building was officially closed
    21.3. In or around July or early August 2020 mail received from 17 March onwards was all collected from the cage, sorted and distributed to what was believed by the subcontractor to be the correct pigeon holes.
    21.4. The building fully reopened on 18 August, but many staff continued to work from home
    21.5. The “winter lockdown” began in November 2020

22. The Respondent’s argument for the first two items having not been received is that items sent around 17 February would have either been distributed internally before the first lockdown, or, at the latest by around August. Similarly, an item sent in August should have been processed at the time, and, at the latest, soon after 18 August. Since the items have not been found to be with an internal recipient, and are not still in the cages, I should therefore find that the items were not received by the Respondent.

23. However, that is not the inference which I draw from the evidence.
    23.1. Mr Hicks evidence was that he had never known post to go missing and he invites me to infer that, therefore, the earlier two items had not been received. What I do infer is that N must have had a good track record of placing items that were received in the building into the correct cage. Had that not been the case, then the respondent would have been able to tell me that and/or produce documentary evidence of complaints having been made to N about past errors.

23.2. It is, of course, hypothetically possible that either the tribunal service or the Royal mail made an error which resulted in non-delivery to the building. Such errors - while statistically rare, making up a small percentage of the large number of items that each organisation processes - are not unheard of.

23.3. However, we are not considering a single stray item here. There are two items allegedly not received. In other words, the Respondent is asking me to find that either the Royal Mail or HMCTS made one error in February 2020 and then independently either the Royal Mail or HMCTS made another error in August 2020. The chances of two independent errors happening on the same case to the same respondent are significantly lower than the chances of a single error.

23.4. As against the possibility of an error having been made by the tribunal service or by the Royal Mail, I have the certain knowledge that the December 2020 and January 2021 items were not distributed internally by the respondent. They were left lying in cages for several months, and only found (in May 2021), because the Respondent had been contacted by the Claimant's solicitors in April 2021.

23.5. Against these background circumstances, I am satisfied on the balance of probabilities that both the notice of claim and the 13 August letter were correctly delivered to the respondent. That is, the items reached (at least) the cages which were in the control of the group's agent, the subcontractor responsible for internal mail distribution.

24. Mr Hicks assures me that items from the cage were not destroyed. I accept his evidence on that point and also his evidence that a thorough search of the cage has not revealed the two earlier items. My finding, on the balance of probabilities, is that, after the items were received they were forwarded internally to some person or department within the Respondent, Vocalink Ltd.

24.1. There was no evidence put forward by the respondent that it was in the habit of destroying items unopened. I acknowledge the hypothetical possibility that the items might have been destroyed unopened either by an individual making a conscious decision to do that, or else accidentally by unopened items being mixed up with a pile of discarded material. However, on the balance of probabilities, I think it is more likely than not that both envelopes were opened and the contents examined by someone working for the Respondent.

24.2. In relation to the notice of claim itself, it would have been received by the respondent within a few days after 17 February 2020 even making allowance for the fact that there could hypothetically have been small delays in positing &/or in transit. I infer that it was, more likely than not, opened before staff levels were (significantly) reduced by the pandemic.

24.3. In relation to the August item, there may have been a delay from 13 August to the date on which the item was opened and furthermore, it arrived when many of the respondent's staff were working from home.

25. I accept Ms Saunders' evidence about the efforts the respondent made to try and find out if anybody in human resources (or certain other seemingly plausible destinations) had seen the item. I am satisfied that everyone who was asked denied having seen the items. It is hypothetically possible that one or more of those who were asked had actually seen the items and either forgot by the time they were asked and/or deliberately concealed the fact to avoid embarrassment and or disciplinary action. It is also possible that the

items simply got so lost internally within the respondent that none of the people who were asked had ever actually seen them. In fairness to the Claimant, I do acknowledge that the Respondent has not provided any satisfactory explanation for why it has been unable to find two important documents, sent 6 months apart. However, regardless of the specific trajectories of the missing items, I am satisfied that no senior person within the respondent made a deliberate and/or tactical decision to ignore the claim. The Respondent was not, for example, intending to sit on its hands, hoping that a judge would dismiss the claim without the Respondent having to respond to it, but with the intention of making an application for reconsideration should a judgment be issued.

26. Amongst other things, the fact that the respondent did not act upon the Judgment itself when it was sent to them, and the fact that (as I accept) they had not been expecting the Judgment sent to them, satisfies me that the relevant decision makers for the respondent had been genuinely unaware of the proceedings until April 2021, regardless of whether or not any junior members of staff had hypothetically ignored or disposed of the notice of claim and the 13 August "no response received" letter.

Law

27. Rules 70-72 of the Tribunal Rules provides as follows:

70. Principles
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.

71. Application
Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

72. Process
(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked(including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations. (3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a

full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

28. The Tribunal has discretion to reconsider a judgment if it considers it in the interests of justice to do so. Rule 72(1), requires the judge to dismiss the application if the judge decides that there is no reasonable prospect of the original decision being varied or revoked. Otherwise, the application is dealt with under the remainder of Rule 72.

29. In deciding whether or not to reconsider the judgment, the tribunal has a broad discretion, which must be exercised judicially, 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.

30. Under the current version of the rules, there is a single ground for reconsideration — namely, *"*where it is necessary in the interests of justice*"*. This contrasts with the position under the 2004 rules, where there were five grounds upon which a tribunal could review a judgment (not including a default judgment), which included: that a party did not receive notice of the proceedings leading to the decision; that the decision was made in the absence of a party.

31. In the case of a default judgment, the previous version of the rules required the party making the application to show good reason why the default judgment should be varied or revoked. I agree with the Claimant's counsel that in paragraph 32 (and 33) of its decision in Bournemouth Borough Council v Ms N Leadbeater 2011 WL 722286, the Employment Appeal Tribunal was specifically addressing the requirement under old rule 33(5) that the judge

> may revoke or vary all or part of a default judgment **if the respondent has a reasonable prospect of successfully responding to the claim or part of it**

(my emphasis). The comments in paragraph 35 have to be read against that background, and, in my opinion, the EAT was not seeking to say that whenever a respondent has a reasonable prospect of successfully responding to the claim then that is, itself, sufficient for a default judgment to be revoked. The EAT was merely acknowledging that the old rule 33(5) threshold had to be met (and that it was met, on the facts of that case) as well as there being consideration of old rule 33(6) and other relevant factors.

32. When deciding what is "necessary in the interests of justice", it is important to have regard to the overriding objective to deal with cases fairly and justly, which includes: ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.

33. In Outasight VB Ltd v Brown 2015 ICR D11, the EAT explained that the revision to the rules had not been intended to make it more easy or more difficult to succeed in a reconsideration application. The specific grounds were unnecessary because an application relying on any of those arguments

can still be made in reliance on the "interests of justice" grounds.

34. The situation remains, as it had been prior to the 2013 rules, that it is not necessary for the applicant to go as far as demonstrating that there were *exceptional* circumstances justifying reconsideration. There does, however, have to be a good enough justification to overcome the fact that, when issued, judgments are intended to be final (subject to appeal) and that there is therefore a significant difference between asking for a particular matter to be taken into account before judgment (even very late in the day) and after judgment.

35. Previous appellate decisions, even under the pre-2013 rules, can provide helpful guidance to a judge, but they are not intended as a checklist. The individual circumstances of the particular application have to be considered on their own merits. I have noted the examples cited to me, including those where an appellate court has decided that it was wrong to refuse reconsideration of a judgment given in given in the party's absence when the argument on reconsideration was non-receipt of the claim form (or accidental oversight of claim form or notice of hearing). I also acknowledge that, when reading some of the cases cited to me, a potentially distinguishing feature is that the judgment in this case was not issued simply by default, because the relevant time limit for the response had expired.

36. Rule 90 states, in part:

> 90. Date of delivery
> Where a document has been delivered in accordance with rule 85 or 86, it shall, unless the contrary is proved, be taken to have been received by the addressee—
> (a) if sent by post, on the day on which it would be delivered in the ordinary course of post; …

37. Rule 86 is the rule dealing with correspondence sent by the tribunal, and post addressed to the address in the claim form is an authorised method.

38. Rule 20 states:

> **20.— Applications for extension of time for presenting response**
> (1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reason why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and if the respondent wishes to request a hearing this shall be requested in the application.
> (2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.
> (3) An Employment Judge may determine the application without a hearing.
> (4) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside.

39. The last sentence of rule 20(4) is particularly significant in the facts of this case. At the very least, it shows that there is a close connection between reconsideration application and the rule 20 application, even though the rule 20 application came significantly later.

40. The Employment Appeal Tribunal's decision in Kwik Save Stores Ltd v Swain

and ors 1997 ICR 49 sets out the correct test for granting an extension of time for a response under version of the rules which was then in force. Although the new rule is worded differently, the case remains relevant to the question of whether, having regard to the overriding objective, an application for an extension of time to submit a response should be granted.

41. In Kwik Save, the employer's responses (in respect of claims from different claimants) had been entered between 14 and 26 days late. The employer applied for extensions of time. It submitted that its failure to comply with the time limits had been due to an oversight. The tribunal judge found the employer's explanation to be unsatisfactory and refused to grant the extensions of time. The employer appealed to the EAT, arguing that the judge had exercised his discretion incorrectly. The EAT stated that the process of exercising a discretion involves taking into account all relevant factors, weighing and balancing them one against the other and reaching a conclusion which is objectively justified on the grounds of reason and justice. In particular, the EAT held that, when exercising a discretion in respect of the time limit, a judge should always consider at least the following factors, though other factors might also be relevant:
    41.1. the employer's explanation as to why an extension of time is required;
    41.2. the balance of prejudice;
    41.3. the merits of the defence.

42. Commenting on these factors, the EAT's opinion was:
    42.1. the more serious the delay, the more important it is that the employer provide a satisfactory and honest explanation. A judge does not have to accept the explanation given. A judge is entitled to form a view as to the merits of the explanation.
    42.2. In relation to the balance of prejudice, it is necessary to consider whether the employer, if its request for an extension of time were to be refused, would suffer greater prejudice than the Claimant would suffer if the extension of time were to be granted.
    42.3. In relation to the merits of the defence, the Employment Appeal Tribunal suggested that if the employer's defence is shown to have some merit in it, justice will often favour the granting of an extension of time, or else the employer might be held liable for a wrong which it had not committed.

43. No matter how serious the failure of the Respondent, and no matter how inadequate its explanation, it is an error of law for a judge to fail to consider the other factors as well as part of the overall decision.

Analysis

44. I agree with the Claimant's counsel that the Respondent has not proved "the contrary" as per Rule 90. However, my findings of fact were that the Respondent received the items, and opened them. It is unnecessary to rely on the burden of proof. It is not particularly significant to my decisions which exact dates in February and August respectively the notice of claim and the "No Response Received" letter were received. Even without the deeming provisions of Rule 90, the letters were received (in the case of the notice of claim) significantly before the expiry of the time limit for response and (in the case of both items) a long time before judgment was issued.

45. I do not consider the fact that the claimant's solicitors failed to contact the respondent directly until after the Judgment had been issued, and until after the 42 day period, for appealing had elapsed to be particularly significant. Had they contacted the Respondent directly to seek to alert the Respondent to the proceedings and that correspondence had also failed to elicit a response, then that might have been something which weighed against revoking the Judgment. However, the rules do not oblige a claimant (legally represented or otherwise) to take that step.

46. When the Claimant's solicitors originally sent the hearing bundle to the tribunal (which, according to an email of 15 December 2020, they did on 4 December 2020, although I have not seen the 4 December item), it was a breach of Rule 92 to fail to send a copy to the Respondent. The same applies to the payslips which were submitted after the hearing date in response to my order. I agree with Mr Liberadzki that the fact that the tribunal's correspondence from December (and January) was left in the cage until May 2021 implies that it is unlikely that the Claimant's failure to supply a copy of the hearing bundle to the Respondent (around 4 December 2020) made any difference to the Respondent's non-appearance on 15 December 2020.

47. In the circumstances, I do not regard the failure to supply the Respondent contemporaneously with copies of the documents which were sent on 15 December 2020 to be a breach of Rule 92. In any event if such copies had been sent later by post, they were no more likely to have been removed from the cage before May 2021 than the items which were sent by the tribunal.

48. The respondent was on notice of the potential claim and it ought made significant efforts to look out for the claim. Ms Saunders' genuine belief (paragraph 2.6 of her statement) is that they actually were on the "look out", but if they did anything different at all (and she does not mention anything) because they were on the "look out", then they did not do enough. The notice of claim was not dealt with correctly after the envelope had been opened by the Respondent. In normal circumstances, I would not be of the opinion that a respondent, having received the ACAS certificate around 9 January 2020, needed to contact the claimant (or her solicitors) to find out whether claim had been issued. In these particular circumstances, it may well have been a sensible course of action for them given that, according to their evidence at this hearing, their staff started working from home before 17 March. If the Respondent knew that the office was significantly understaffed compared to normality and that (from 17 March) the post was not necessarily being processed, then to be "on look out" might have needed them to be a lot more proactive. Regardless of any tactical benefits from avoiding reminding the other side about the need to submit a claim, it might have been reasonable for the Respondent to have made enquiries rather than run the risk that (as turned out to be the case) a claim could have been served on them, with a deadline for a response. Ultimately, there would have been no need for the Respondent to contact the other party (or anyone else) to ask about a possible claim had it ensured that there were adequate measures in place to ensure that a Notice of Claim would go to the correct department promptly and be actioned promptly. The lack of response to either the notice of claim, or even the 13 August 2020 letter, shows that no such adequate measures were in place at the relevant times.

49. There is not a general principle that so long as the prospects of the response succeeding are greater than "no reasonable prospects", then the reconsideration and/or the extension of time should be granted. The strength or otherwise of the proposed defence is relevant, but is not the only factor. It would perhaps be unusual to revoke a liability judgment if the Respondent had no reasonable prospects of defending the claim; however, to obtain a revocation, the Respondent potentially has to do more than showing it has a non-zero chance of success at a defended final hearing.

50. The respondent has not satisfied me that it has any good explanation for failing to deal properly with the notice of claim within the 28 days or, failing to respond to the 13 August 2020, letter by for example asking for an extension of time promptly after that. Nor has it satisfied me that it has a good explanation for failing to attend the 15 December 2020 hearing, despite having received the notice of hearing. As mentioned in the Judgment, even if the notice that the hearing was remote was only received very close to, or even after, the hearing, the Respondent could have followed the instructions on the original notice and attended the hearing centre in person. Further, it could have responded to either notice of hearing by making urgent contact with the tribunal by – for example – email.

51. The Respondent has also not satisfied me that it has a reasonable explanation for why it took until 25 August 2021 to submit an application for an extension of time. I do not think that, in isolation, the delay from 30 April, or from 14 May 2021, to 25 August 2021 has caused prejudice to the Claimant, as the reconsideration application was going to have to be dealt with regardless of whether a Rule 20 application was made or not, and the Respondent's further delay did not affect the hearing date for the reconsideration. However, this further delay is a factor for me to take into account.

52. The prejudice to the claimant if either or both of the Respondent's applications are granted is that she loses the benefit of a Judgment that was granted lawfully following a hearing, which took place in compliance with the rules and at which she was required to prove her case, albeit in circumstances in which her evidence was uncontested. The Judgment was issued after the Claimant had properly complied with early conciliation and presented a claim form which used a correct and valid address for the Respondent. Further, the Respondent would have known from the early conciliation which address would be used. The prejudice to the claimant includes the fact that she already had to wait 15 months between the termination date and the rule 21 hearing and now a further 12 months have elapsed since that hearing. It is already 26 months since the end of her employment and a final hearing would be around 3 years (perhaps longer) from the end of employment if both applications are granted. The prejudice to the claimant includes the fact that she may have incurred legal fees for the process to date and has certainly spent time and effort.

53. In short, the Claimant has done nothing wrong in this litigation (bar her representatives' breach of Rule 92 which I mentioned above) but would lose the benefit of the judgment and suffer a delay. I do not agree with the respondent's position that the claimant was under a duty to disclose the

appeal outcome letter, either because of the email of 1249 on 15 December 2020, or otherwise. Had I wanted to pursue the suggestion that sight of that particular letter would be useful, I could have done so and ordered her to produce it when she was ordered to produce the payslips. As claimant's counsel points out, I was already aware, on 15 December 2020, that the claimant's employer had maintained that it had raised alleged poor performance with her much earlier than 10 September. 2020. Her uncontradicted evidence on that point was as set out in the Judgment.

54. It may or may not be possible for some of the prejudice to the claimant to be alleviated by an award of costs. No application has been made and I express no opinion one way or the other as to whether such an application would succeed if made. The mere possibility of some award of costs is not a particularly weighty factor in terms of whether the judgment should stand.

55. The prejudice to the respondent is that if the Judgment is not revoked, and no extension of time is that it will have a Judgment against it for both liability and remedy which will have reputational damage and it will have a significant financial cost. It was not suggested that either of those things would put the Respondent out of business, but I accept (and the Claimant did not argue to the contrary) that neither of these things are a trivial harm to the Respondent. It is the respondent's fault and not that of the claimant or of the tribunal that the Judgment was issued without my hearing the Respondent's arguments and evidence; however, that is, in fact, what happened.

56. The respondent's proposed defence contains certain factual claims and legal arguments which, if upheld by a tribunal would potentially be an answer to the claimant's claims. These include that it seeks to argue that there were genuine issues about the claimant's performance that were unrelated to disability or race and, importantly, that it has evidence that the performance issues had been specifically raised with the claimant before the respondent had any reason to believe that the claimant might have a disability. It is not necessary or appropriate for me to comment in detail on what I think about the respondent's chances of success, and I am aware the claimant disputes the Respondent's version of events. Her version might be the one which prevails even if she is cross-examined on it and/or if the Respondent discloses documents from its possession.

57. However, the respondent's defence is not a fanciful one, and to some extent at least, the claimant's own evidence was that remarks had been made to her about how to do her job which she thought were inappropriate.

58. Given the wording of Rule 20, it seems that it would be appropriate for me to consider the extension of time application first, and, if granted, that would oblige me to set aside the Judgment in accordance with Rule 20(4). I note that, unlike Rule 70, Rule 20(4) does not expressly authorise me to simply issue a different judgment. (The logical reason for that is obvious; the decision under Rule 20(4) only arises after it has already been determined that the respondent's proposed response is accepted, meaning there is no longer a basis for a Rule 21 judgment.)

59. However, in any event, even if I were taking the Rule 70 decision first, I agree with Mr Sethi, that, on the particular facts of this particular case, it would make

no sense to decide that the Respondent had put forward a good enough argument for reconsideration under Rules 70-72, but not a good enough argument for extension of time under Rule 20.

60. There are strong public interest arguments for the finality of litigation and, on the particular facts of this particular case, it is necessary for me to take into account that, if I grant the Respondent's application, there will not have been finality as a result of the Judgment issued 11 months ago (and around 4 months before the reconsideration application, and 8 months before the Rule 20 application). As mentioned, the claimant would be significantly disadvantaged. I do not regard the prejudice to her as being merely akin to removing a windfall benefit from someone to which they were not otherwise entitled; her circumstances are very different to someone who (for example) gets a rule 21 judgment in their favour by a decision made on the papers 5 or 6 weeks after the claim was presented.

61. Nonetheless, in all the circumstances, the public interest in the finality of litigation and the prejudice to the Claimant, do not outweigh the prejudice to the Respondent if the judgment stands and if it is not granted an extension of time and the chance to defend itself based on the evidence and the merits of its arguments.

62. It is in the interests of justice, and in accordance with the overriding objective, for the Respondent to be granted an extension of time for submission of the response.

63. I am making some case management orders and I am listing both a preliminary hearing and a full merits hearing those orders are being sent to the parties separately. I will not be the employment judge who sits on the panel taking account of, amongst other things, I had already made a decision both on the disability issue and on an injury to feelings award.

Employment Judge Quill

Date: 09.12.21

JUDGMENT SENT TO THE PARTIES ON

18 January 2022

FOR THE TRIBUNAL OFFICE