EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107374/2020

Hearing heard by Cloud Video Platform (CVP) on 2 December 2021

Employment Judge R Mackay

Mr M Bentley	**Claimant** **Represented by:** **Mr Mayberry - Solicitor**
No Ordinary Designer Label Limited t/a Ted Baker	**Respondent** **Represented by:** **Mr Bhatt - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is (i) that the Respondent's application for reconsideration is allowed and (ii) that the Judgment sent to the parties on 29 April 2021 is revoked, and (iii) that the ET3 is accepted out of time. The case will be listed for a fresh two day hearing using CVP to cover liability and remedy.

REASONS

Introduction

1 This case previously came before the Employment Tribunal in circumstances where the Respondent had not defended the claim and did not participate in

the hearing. The Tribunal upheld the Claimant's claim for unfair dismissal and made an award of compensation.

2 The Judgment was sent to the Claimant and copied to the Respondent on 29 April 2021. By email of 11 May 2021, solicitors acting for the Respondent made a reconsideration application under Rules 70 and 71 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("**the ET Rules**"). The essence of the application was that the Respondent had not seen any papers relating to the claim until it received the Judgment on 6 May 2021.

3 The application was opposed by the Claimant. A number of other exchanges of correspondence took place, *inter alia* seeking confirmation as to whether the parties believed the application could be determined without a hearing.

4 It was determined that the application should be considered at a hearing.

5 In the course of the exchanges of correspondence, the Respondent requested a copy of the ET1. It was provided to the Respondent's solicitors by letter of 9 June 2021 for information pending a decision on the reconsideration application.

6 By email dated 18 June 2021, the Respondent submitted an ET3. If successful in its application for reconsideration, the Respondent invited the Tribunal to revoke the earlier judgment and allow the Respondent a retrospective extension of time to have the ET3 accepted pursuant to Rule 20 of the ET Rules.

7 The Tribunal heard evidence from the Respondent's Group Head of HR Operations, Ms Donna Davis. She produced a witness statement which was taken as her evidence in chief. In summary, she repeated the proposition that no correspondence relating to the claim was received until receipt of the Judgment. Ms Davis was aware of the potential of a claim as a result of there

having been participation in the ACAS Early Conciliation process. The Claimant and Ms Davis engaged by email in the course of that process.

8 She described the effect of the COVID pandemic on the Respondent's business and the closure of its head office in London (the address used for the purposes of the claim). Initially, there was no one in the building other than security guards who were tasked with opening post and scanning it to certain individuals within the organisation.

9 In December 2020, Ms Davis was made aware by ACAS of two claims against the Respondent for which it had not received any notice of claim or other documentation. These were unrelated to the present claim.

10 Later that month, Ms Davis asked the security personnel to ensure that any correspondence from Employment Tribunals be scanned and passed to her.

11 Around that time, Ms Davis was made aware by her solicitors of the option of registering with Employment Tribunals to have claims copied to a designated email address. That option was set out in an FAQ document prepared by the Presidents of the Employment Tribunals in Scotland and England answering questions arising from the impact of the COVID pandemic on Employment Tribunals ("**the FAQ Document**"). She submitted such a request to the London Central Employment Tribunal on 22 December 2020. She did not submit such a request for any other Tribunal.

12 Ms Davis stated in her witness statement that because of the Claimant's superiority, he was affiliated to the Respondent's Head Office and that she considered that her notification to the London Central Employment Tribunal would have covered his claim. On being questioned further on this point, however, Ms Davis accepted that she did not consider the position of the Claimant at all in limiting her notification to that Tribunal.

Submissions & Deliberations

13 For the Respondent, Mr Bhatt set out a helpful summary of the law as it relates to the present applications. It was not contested by Mr Mayberry and is considered by the Tribunal to be a fair assessment. For completeness, it is set out below:

14 A Tribunal may reconsider any judgment where "it is necessary in the interests of justice to do so": Rule 70 ET Rules 2013.

15 Under the previous version of the ET Rules (ET Rules 2004) there were five grounds upon which a Tribunal could review a judgment. Two are relevant to this case:

a. That a party did not receive notice of the proceedings leading to the decision;

b. That the decision was made in the absence of a party.

16 In Outasight VB Ltd v Brown [2015] ICR D11 EAT, HHJ Eady QC held that the specific grounds are now subsumed within the "interest of justice" test. In this case, HHJ Eady held that the "interest of justice" test provides Tribunals with a broad discretion but that decision 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 the public interest requirement that there should, so far as possible, be finality of litigation".

17 A Tribunal dealing with a reconsideration application must seek to give effect to the overriding objective of dealing with cases "fairly and justly" which includes:

a. Ensuring that the parties are on equal footing;

b. Dealing with cases in ways which are proportionate to the complexity and importance of the issues;

c. voiding unnecessary formality and seeking flexibility in proceedings;

d. Avoiding delay, so far as compatible with proper consideration of the issues; and

e. Saving expense.

Rule 2 ET Rules.

18 In Williams v Ferrosan Ltd [2004] IRLR 607, the EAT held that in light of the introduction of the overriding objective the "interest of justice" ground should not be read "as if inserted into it are the words "exceptional circumstances" – there is therefore no "exceptionality hurdle".

19 The interests of justice must be exercised consistently with the right to a fair trial under Article 6(1) European Convention of Human Rights ("ECHR"). Reference to Article 6 in the context of a reconsideration application were made in City and County of Swansea v Honey EAT 0030/08, albeit in the context of allegations of bias.

20 On the secondary application of an extension under Rule 20 of the ET Rules, Mr Bhatt submitted that the exercise was a very similar one and referred to the case decided under the previous Employment Tribunal Rules of Kwik Save Stores Ltd v Swain [1997] ICR 49. In that case, the EAT held that the Tribunal should always consider the following factors:

a The employer's explanation as to why an extension of time is required – the more serious delay the more important it is for the employer to provide a satisfactory explanation;

b The balance of prejudice; and

c Other merits of the defence.

21 Against that legal framework, Mr Bhatt submitted that the situation prevailing at the time of the COVID pandemic and the lockdown affecting businesses such as the Respondent meant that there were cogent reasons behind the Respondent's non-participation in the claim. He invited the Tribunal to find that the Respondent satisfied the burden that it did not receive the ET1. He pointed to the systems which were in place and described them as being proportionate.

22 Considering the interests of justice and the balance of prejudice, Mr Bhatt submitted that the Respondent had acted expeditiously as soon as it became aware of the claim including filing the ET3 in circumstances where it had not been ordered to do so. He went on to submit that the Respondent has a good defence to the claim and even if the Respondent loses on liability, there are proper arguments which may be made to address reductions in the level of compensation.

23 Mr Bhatt sought to present the Claimant's approach in the case as "opportunistic game playing". The issues of criticism appeared to centre around the Claimant having failed to copy the Respondent into a piece of correspondence with the Employment Tribunal as well as its failure to follow the suggestion in Question 21 of the FAQ Document that claimants may provide an email address if they are concerned that their claim will not be received at a closed office.

24 On behalf of the Claimant, Mr Mayberry submitted that it was not necessary in the interests of justice for the reconsideration application to be allowed. He pointed to what he saw as the exceptional lack of likelihood that the only document received was the Judgment in circumstances where other correspondence relating to the claim had been sent to the correct address. He did not suggest any wilful disregard for correspondence but pointed to the

inadequacy of the internal processes put in place by the Respondent – a large employer.

25 He also submitted that the Respondent had failed to act appropriately on being made aware of the Judgment and in particular had failed to comply with Rule 20 in providing the ET3 at the earliest possible opportunity. Although he accepted that the Respondent did not have the ET1, it did have a Judgment and was permitted under the FAQ Document to submit at least a skeletal defence.

26 Focussing again on the Respondent's internal failures, he pointed to the Respondent's awareness of a likely claim, there having been extensive discussions with ACAS during the Early Conciliation period. It was a matter of agreement that no resolution had been reached. He also highlighted the failure to follow the suggested approach in the FAQ Document as it related to providing email details to each Tribunal region where claims might arise.

27 He highlighted the benefit in the finality of litigation and the six months which have passed since the decision. He advised that the Claimant remained out of work and had been adversely affected by press coverage of his claim.

28 In response to the suggestion of opportunistic game playing, Mr Mayberry strongly rejected the suggestion of any such behaviour. He highlighted the limited basis on which a respondent who does not enter appearance may participate in proceedings without the express approval of the Employment Judge.

Decision

29 Having regard to the evidence before it, the Tribunal was satisfied that the Respondent met the burden of proof that it did not receive the ET1 at the relevant time. Whilst certain steps were taken by the Respondent to seek to ensure that correspondence was properly dealt with, their internal processes were deficient. The Tribunal had some sympathy with the Claimant's position that a company of the scale of the Respondent ought to have done more, but

it also had regard to the considerable disruption caused by the COVID pandemic at that time, particularly as offices were closed, and concluded that the Respondent's actions had been proportionate.

30 Although much time was spent debating the relative non-compliance by both parties with the guidance in the FAQ Document, the Tribunal was mindful that the guidance had no statutory effect and parties had choices as to whether to avail themselves of the options set out there. Both parties could, conceivably, have done more to ensure that the current situation did not arise, but there was no obligation to do so.

31 The Tribunal was not satisfied that there was any "opportunistic game playing" on the part of the Claimant. A failure to copy the Respondent (who had not entered appearance) into a response to a request for information from the Tribunal was not opportunistic; nor is there any evidence that it would have made any difference given the Respondent's failure to receive other pieces of correspondence.

32 Having not received the ET1 and the decision having been made in the absence of the Respondent, there was clear prejudice in that Respondent was not able to put forward its defence to the claim, both in terms of the merits and compensation. Whilst any future hearing will inevitably be considered on the basis of the evidence heard, the ET3 lodged does present arguments on liability and remedy which if successful, may well affect the outcome. It is quite possible, however, having regard to the fact that the Claimant remains out of work that, if successful, he could achieve a higher award than that awarded initially. Whilst mindful of the benefit of the finality of litigation, in this case, with a view to ensuring that the issues can be addressed with the parties being on an equal footing in a case where the financial value is relatively high, the Tribunal allows the Respondent's application for consideration.

33 Having regard to the secondary application, the Tribunal was satisfied that the Respondent acted swiftly upon becoming aware of the Judgment. The Claimant's criticism that no ET3 was submitted at the time of the reconsideration application is unwarranted in circumstances where the Respondent did not have a copy of the ET1 and was not provided with a copy until some time later. Thereafter, despite not having been ordered to do so, the Respondent submitted a full ET3 within a short period of time of receipt of the ET1. The balance or prejudice and the wider consideration of the merits of the defence mean that the application under Rule 20 is granted.

34 The case will be listed for a fresh hearing using CVP. Two days will be allocated. Parties are asked to liaise in the exchange of documents and the preparation of a joint bundle for use at the hearing. Witness statements will not be permitted.

Employment Judge: **R Mackay**
Date of Judgment: **5 January 2022**
Entered in register: **28 January 2022**
and copied to parties