



EMPLOYMENT TRIBUNALS

Claimant: Mr. D. Lindley (C1)
Ms A Lindsey (C2)

Respondent: SED Conveyors Ltd (R1)
RTI UK Services Ltd (R2)

HELD BY: CVP **ON:** 19th July 2021

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Ms C. Collins, Counsel

Respondent: Ms R. Heaney, Company Secretary

RESERVED PRELIMINARY HEARING JUDGMENT

The judgment of the Tribunal is:

1. The respondents' application for an extension of time to present responses to these claims to 27th May 2021 is granted (and those responses are accepted).
2. The Rule 21 liability judgment made on 15th January 2021 and sent to the parties on 18th January 2021 ("the R21 Judgment") is set aside in consequence of the said extension.
3. Further and in the alternative, if the above judgment is found to be in error, the Rule 21 judgment is revoked on reconsideration in the interests of justice.

REASONS

1. **The Issues:** In a situation where I made a default judgment under Rule 21 Employment Tribunals Rules of Procedure 2013 (to which all references to Rules relate), the issues arise as to whether the respondents have properly applied for an extension of time for presenting their response, subject to which I have to

decide whether to extend the time and set aside the said judgements, or alternatively whether to reconsider my judgment in the interests of justice.

2. **The Facts:** The respondents did not prepare witness statements for this hearing to explain the reason for their delay in presenting a response, its duration, or how the balance of prejudice might be against them. I asked Ms. Heaney whether she would be giving evidence under oath/affirmation and subject to cross-examination but initially she said that she would not. Ms Heaney made oral submissions and eventually said that if required she would give evidence formally. As the respondents had raised new matters in oral submissions, Ms Collins had not had an opportunity to prepare in response to written statements, and would need instructions, she objected on behalf of the claimants to the late presentation of formal oral evidence. In these circumstances my findings of fact are based on the chronology apparent from the documents contained in the hearing bundle and consideration of their contents, supported by respective submissions.

2.1. **17 November 2020:** the claimants presented ET 1 claim forms with particulars of claim.

2.2. **27 November 2020:** the tribunal issued formal acknowledgements of the claims and notices of claim. The claims were served upon the respondents at their registered office, which it turns out was the principal dwelling of their company secretary, Ms Heaney.

2.3. **29 December 2020:** by extension of time owing to public holidays, the respondents were to present responses to the claims on or before 29th December 2020 or risk judgment in default.

2.4. **15 January 2021:** the tribunal did not receive a response from either respondent by the due date and on 15 January 2021 I entered a liability judgment under Rule 21. That judgment is in the hearing bundle at pages 63 to 64. Based on the available information I made judgments in favour of both claimants in respect of each of their claims against R 1 and stayed proceedings against R 2.

2.5. **18 January 2021:** the R 21 judgment was promulgated (page 61).

2.6. **15 February 2021:** a notice of hearing was sent to the parties for a remedy hearing to be held on 1 July 2021.

2.7. **23 February 2021:** the respondents wrote to the tribunal requesting a reconsideration of the judgment stating that the formal documentation relating to the claim had not been received, that Ms Heaney was not in good health and was no longer residing at the registered office and that had the respondents received the paperwork they would have defended the claims. On the same date the respondents requested copies of all of the formal documentation and provided an alternative business address for service. The respondents stated that they wished to comply with the rules relating to reconsideration of judgments, specifically Rule 71; they stated that they had been incorrectly served and that they wanted to defend the claims which they

believed would be in the interests of justice. In context I interpret this as an application for time and opportunity to defend the claims, effectively an extension of time although those words were not used. According to the respondents by this stage they had not received the particulars of claims or claim forms; it follows that they could not draft any response.

2.8. **26 February 2021:** the claimants wrote to the tribunal indicating opposition to the respondents' application.

2.9. **4 March 2021:** the claimants set out in detail their objection to the respondent's application (p112) including that there had been no application for an extension of time and no draft response, stating that the application for reconsideration was 15 days out of time, that it would not be in the interests of justice for the judgment to be set aside/reconsidered, proceedings had been served on them at their registered office and referring to the respondents' history in litigation of failing to comply with the requirements of rules or of orders.

2.10. **15 March 2021:** the respondents reissued their request for copies of the claims and particulars of claim. They had not been received by this date from the tribunal at the alternative address provided.

2.11. **22 March 2021:** the tribunal notified the respondents that they must apply for an extension of time and provide draft responses. They were sent the claim forms, but not the particulars of claim; this was an error.

2.12. **29th March 2021:** the respondents made a formal application for extension of time.

2.13. **6 May 2021:**

2.13.1. Realising the earlier error on the part of the tribunal, the claimants kindly sent to the respondent copies of the particulars of claim;

2.13.2. In all the circumstances then known to me and in the interests of justice I extended the time for the respondents to present ET3s to support their extant application for extension of time to 27th of May 2021.

2.14. **27th May 2021:** the respondents presented their responses (page 148 – 167).

2.15. **17 June 2021:** the claimants reiterated opposition to the respondents' applications.

2.16. **1 July 2021:** the remedy hearing listed for this date was postponed and today's hearing substituted.

3. The Law:

- 3.1. Rule 5 says that the tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these rules or in any decision, whether or not (in the case of an extension) it has expired.
- 3.2. Rule 15 provides that unless a claim is rejected the tribunal shall send a copy of the claim form, together with a prescribed response form, to each respondent with a notice including specific information on the submission of a response and what will happen if a response is not received within the time limit stated.
- 3.3. Rule 16 provides that a response shall be on a prescribed form and presented to the tribunal office within 28 days of the date the copy of the claim form was sent by the tribunal.
- 3.4. Rule 18 provides that a response shall be rejected by the tribunal if it is received outside the time limit in Rule 16 unless an application for extension has already been made under rule 20 or the response includes or is accompanied by such an application (in which case the response shall not be rejected pending the outcome of the application); upon rejection the respondent shall be notified of the reason and how to rectify it.
- 3.5. Rule 19 covers reconsideration of a rejection on the basis either that the rejection was wrong or that the defect can be rectified. Such an application shall be made within 14 days of the date of the notice of rejection and an Employment Judge may determine the application and accept the response without a hearing unless one is requested, or arrange for a hearing (to be attended only by the respondent).
- 3.6. Rule 20 concerns applications for extension of time for presenting a response. Such an application shall set out the reason that the extension is sought and shall, where the time limit has already expired, be accompanied by a draft of the response which the respondent wishes to present, or an explanation of why that is not possible. The respondent may request a hearing. The claimant may give written reasons for its opposition within seven days of receipt of the application. A judge may determine the application without a hearing, granting the extension. If the extension is refused the prior rejection shall stand. If the extension is allowed a judgment issued under rule 21 shall be set aside.
- 3.7. The effect of non-presentation or rejection of a response or where the case is not contested is provided for by Rule 21. A judgment in default may be entered where a judge considers that on the available material a determination can properly be made of the claim or part of it. To the extent that such a determination can be made, the judge shall issue a judgment accordingly otherwise a hearing shall be fixed before a judge sitting alone. The respondent shall be entitled to notice of any hearings and decisions, but unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the judge.

3.8. Kwik Save Stores Ltd v Swain & others [1977] ICR 49 gave guidance as to the factors to be considered in relation to an application for an extension of time including:

- 3.8.1. the explanation for the delay,
- 3.8.2. the balance of prejudice, and
- 3.8.3. the merits of any defence.

3.9. There is Presidential Guidance on the making of Rule 21 judgments. A judge considering whether to make such a judgment should consider all available material and whether more information is required but if sufficient material is available then a judgment may be made. If a judge has reasonable doubts about making a judgment, the matter should be listed for a hearing. This guidance was emphasised in *Limoine v Sharma* [2020] ICR 389 (EAT) suggesting that the procedure was intended for straightforward cases and in particular undefended money claims for wages, holiday pay and/or notice monies; the procedure is not intended to permit a judge to enter judgment simply because the claim is undefended and without further consideration.

3.10. *Mr C Bone v Fabcon Projects Ltd* UKEAT/0079/06/ZT: this is authority emphasising that time for presentation of a response to a claim runs from the date on which it is sent and not from its receipt but that where the respondent did not receive the tribunal papers, the respondent would be entitled to seek relief from a default judgment.

3.11. *Costellow v Somerset County Council* (The Weekly Law Reports 26 February 1993): this authority was relied upon in relation to the Kwik Save factor on balance of prejudice. A court or tribunal would have to consider whether delays complained of caused a real risk of prejudice but that in deciding whether a claim should be allowed to proceed “overall justice” was paramount.

3.12. Rule 2 confirms that the overriding objective of the tribunal is to deal with cases fairly and justly and states that in dealing with a case fairly and justly it includes, so far as practicable, ensuring that the parties are on equal footing, dealing with cases in ways that are proportionate to the complexity and importance of the rules, avoiding unnecessary informality and seeking flexibility in the proceedings, avoiding delay, so far as compatible with proper consideration of the issues and saving expense.

4. **Submissions:**

4.1. The respondent submitted that Ms Heaney moved out of her residential address, which was also the respondents’ registered offices, at short notice as an emergency around the time of service of the claimants’ claims and that she did so for personal reasons which meant that she could not check on postal deliveries. She was also seriously unwell, requiring surgery, and this impacted on proceedings in other courts and tribunals where she was given the benefit of any doubt and due extensions of time were granted setting aside judgments or varying orders made. The respondents have had the

benefit of some legal advice and assistance at various stages of these proceedings, and in other such proceedings.

4.2. Ms Collins, for the claimants, explained with appropriate clarity and detail the reasoned objections to the respondents' applications amplifying the written objections referred to above. She did not consider that a proper application had been made for extension of time and, given the respondent's track record in this and other proceedings, did not consider that the interests of justice required that the judgment be set aside or revoked. The claimants consider that the respondents, specifically R 1, have no merit in their defence as the dismissal was prejudged and was a recrimination for C 1's legitimate actions in seeking company information.

5. Application of law to facts:

5.1. It appears that the respondents have failed to act diligently, both in these and possibly other proceedings. This conduct may be attributable to Ms Heaney's personal circumstances which, according to her submission, includes concerning personal circumstances and a grave health situation. That said, the respondents ought to have made arrangements in her absence from the registered office for mail to be dealt with appropriately and they failed to do so. I take judicial notice of the resolution of matters in the County Court and other tribunal proceedings.

5.2. The respondents failed to respond to the claimant's claims in time. They failed to make a timely application for an extension of time for the presentation of any response. They appear to have reacted to a notice of remedy hearing, albeit in submissions I was told that the judgment was brought to their attention by an employee and that they then checked online. It is likely that any urgency was provided by the notice of hearing, at least that is my suspicion.

5.3. Whilst not using the express words usually associated with an application for extension time, it is obvious from the respondents' correspondence that they were asking for time and the opportunity to defend the claims following receipt of the particulars of claim and claim forms. They requested the same. At that stage they were unable to prepare a draft response.

5.4. Unfortunately when the tribunal sent the claim forms to the respondents it appears that the particulars of claim, referred to but which were in a separate document, were not sent to the respondents. The respondents were still unable to prepare meaningful responses to support their earlier application for an extension of time.

5.5. All things considered, whilst I have very grave concerns and reservations about the respondents' inefficient and piecemeal approach to these proceedings, I have also to take into account the real risk that the respondents did not receive the necessary paperwork until it was sent to them by the claimants on 6 May 2021. On that day, at my direction, the

respondents were notified that they had until 27th of May 2021 to backup their extant application for an extension of time with a draft ET 3. They did so.

- 5.6. The respondents' given reason for delay is plausible, albeit the respondents were inefficient in making alternative arrangements with regards to postal deliveries when Ms Heaney left the registered office. The delay in making even a badly worded application for an extension of time (until either notice of remedy hearing or checking the register having heard a rumour) is consistent with ignorance until that date on. The respondents were then not assisted by the piecemeal way in which they received the claim forms and particulars of claim. At my direction they were then given until 27th May 2021 to perfect matters. Despite any misgivings, I to give the benefit of doubt to the respondents that in all the circumstances the delay was understandable until 27th May 2021.
- 5.7. I am not able to carry out a detailed analysis of the claims and responses to foresee the most likely outcome of proceedings following evidence under cross-examination. I am required to consider whether any response has merit and not whether it is likely to succeed. On the face of it the respondents have an arguable defence to the claimants' claims but I am not able to judge whether the claimants or the respondents have any more than reasonable prospects of success respectively. Nothing said to me or that I have read leads me to find that there is no, or only little, reasonable prospect of success for the respondent's formal response.
- 5.8. If the Rule 21 judgment were confirmed and not set aside the respondents would only be able to participate in a remedy hearing and only to the extent that a Judge allowed them. The claims are many and serious; they are not straightforward. The financial and reputational risks to all parties are significant. These proceedings are only part of a suite of proceedings involving these claimants (and I believe maybe others including their son). A defeat by default in these proceedings may have repercussions more generally. On the other hand, if the judgment is set aside the claimants will be in the position, albeit delayed a relatively short time which may have occurred anyway, that they would have been otherwise, that is with arguable claims; they will be able to have their claims heard; nothing before me today leads me to consider that a fair hearing is impossible or prejudiced. I find that the balance of prejudice in refusing the respondents' applications is heavily against them and that the interests of justice require that the judgment be set aside or revoked, as appropriate.
- 5.9. All that said I expect that the respondents' conduct of these proceedings henceforth will be more efficient than to date, and that henceforth they remain compliant with the Rules, and any Orders, directions and relevant time limits specified. They have had the benefit of some doubts on this occasion; they ought not expect that this will always be the case. Parties to litigation are entitled to certainty in proceedings. Delay, and its additional cost, is to be avoided. I have cited the tribunal's overriding objective above and it is worth emphasising that Rule 2 goes on to say that while a tribunal shall seek to

give effect to this objective in interpreting or exercising any power under the rules, the parties and their representatives shall assist the Tribunal to further the objective, and in particular shall cooperate generally with each other and with the tribunal.

- 5.10. The matter will now be listed for a case management preliminary hearing by CVP.

Employment Judge T.V. Ryan

Date: 20.07.21

JUDGMENT SENT TO THE PARTIES ON

21 July 2021

FOR THE TRIBUNAL OFFICE