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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106683/2020

Held on 15 November 2021 (By Cloud Video Platform)

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Employment Judge: P O'Donnell

15 **Mr J Davidson**

**Claimant
Represented by:
Mr R Davidson**

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Steven Anderson & Peter McGovern

**Respondent
Represented
by: Mr Foster
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal is that the Respondent's application for reconsideration is granted and the Judgment dated 28 June 2021 (sent to the parties on 30 June 2021) striking out the Response is hereby revoked.

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REASONS

Introduction

1. This hearing was listed to determine the Respondent's application for reconsideration of the judgment dated 28 June 2021 (sent to the parties on 30 June 2021) striking out the Response.
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2. The hearing was also listed to determine the Claimant's application for a preparation time order. During the course of submissions, the Respondent's agent suggested that it might be more appropriate for this application to be dealt with at the end of the proceedings. On reflection, the Claimant's representative agreed with this and explained that the Claimant did not insist on this application being determined at this hearing but reserved his position on this.
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3. The Tribunal has, therefore, made no determination of the application for a preparation time order and this is a matter to be reserved until there is a final determination of the proceedings.
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4. This was not a hearing where witness evidence was heard. There was reference to various pieces of correspondence between the Tribunal and parties (with the Claimant's representative producing the correspondence he referred to in his submissions in a bundle of documents).

20 Procedural history

5. The Tribunal considers that a short summary of the procedural history of this case would assist.
6. The ET1 was lodged on 23 October 2020. It sets out claims for unfair dismissal in circumstances where the Claimant alleges constructive dismissal, notice pay, holiday pay, arrears of pay and "other payments".
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7. The ET3 was lodged on 20 November 2020 and the Respondents resist all the claims with the exception of the claim relating to a failure to provide the Claimant with a written statement of main terms and conditions of employment.

8. A telephone case management hearing was listed for 12 February 2021 with the Notice of Hearing being sent to parties on 24 December 2020. The Notice of Hearing was sent to the parties by email as was all the subsequent correspondence outlined below.
- 5 9. The Respondent's agent did not attend the case management hearing on 12 February 2021. A letter was sent by email to the Respondent's agent on 16 February 2021 seeking an explanation for their failure to attend the hearing. There was no reply.
- 10 10. There was then a series of letters sent by the Tribunal to the Respondent's agent by email during March, April and May 2021 seeking an explanation for their failure to attend the hearing and respond to the correspondence being issued. The correspondence from the Tribunal included a strike-out warning. There was also correspondence from the Claimant's representative, which was copied to the Respondent's agent, drawing attention to the failure by the
15 Respondent to reply to the Tribunal correspondence.
11. There was no reply to any of this correspondence until 9 June 2021 when the Respondent's agent replied to an email from the Claimant's representative dated 8 June 2021. In the reply, the Respondent's agent indicated that he had not had sight of correspondence referred to in the email of 8 June 2021. The
20 correspondence was sent by the Tribunal to the Respondent's agent by email dated 11 June 2021 and a deadline of 18 June 2021 was given for a response.
12. No response was received and so a judgment striking out the response was issued. This was dated 28 June 2021 and sent to parties on 30 June 2021.
13. On 14 July 2021, the Respondent's agent made an application for
25 reconsideration of the strike-out judgment. The grounds for this are set out below where the Tribunal records the Respondent's submissions. This hearing was listed to determine that application.

Respondent's submissions

14. The Respondent's agent made the following submissions and drew attention to the terms of the application for reconsideration.
15. It was explained that the reason for the failures to respond to correspondence was ignorance of that correspondence on the part of the Respondent's agent. Mr Foster explained that his firm had moved their email system from a server-based one to a cloud-based system in 2019 which had caused a number of teething problems.
16. In the context of this case, in addition to his email Inbox and Junk folder, a third folder existed within Mr Foster's Microsoft Outlook of which he was not aware. The email correspondence from the Tribunal and the Claimant's representative had gone into this folder rather than the other two folders. Correspondence in relation to other matters had also gone into this folder.
17. Mr Foster explained that, because he had been unaware of this additional folder, he had not been aware of the need to check it for emails as he does with the Junk folder. Mr Foster was not aware of how this third folder came to be created nor why some correspondence went to it and not others.
18. It was only when he became aware of the correspondence in this case that he had no record of receiving that he discovered the existence of this third folder and identified that the correspondence set out above had gone into this folder.
19. It was submitted that the question for the Tribunal was whether the judgment should stand.
20. It is the Respondent's position that, with the exception of the claim related to the provision of a written statement of main terms and conditions of employment, the claims are without merit; the Claimant has received all payments due to him; if there is an issue regarding tax rebates then this is a matter for HMRC; there are issues of time bar; the averments by the Claimant are untrue; the sums sought are excessive.

21. Mr Foster submitted that the Respondent should not be liable for payments that are not due to the Claimant just because of a computer difficulty. The Claimant must be put to proof and the Respondent given the opportunity to rebut the allegations made in the ET1.
- 5 22. It was said that the overriding objective is not achieved by allowing the judgment to stand.
23. In rebuttal to points made in the submissions for the Claimant, it was submitted that the case was proceeding in the period when much litigation was delayed due to the pandemic. Mr Foster accepted that, in normal times, the passage
10 of time with no apparent correspondence from the Tribunal would ring alarm bells but submitted that these were not normal times.
24. The Respondents themselves were unaware of the correspondence.
25. The claim is defended on all grounds (except for the claim relating to the written statement) and the Claimant should not be given what he seeks due to the
15 default of the Respondent or its agents.

Claimant's submissions

26. The Claimant's representative made the following submissions.
27. He set out the history of the correspondence from the Tribunal and himself to the Respondent's agent. For the sake of brevity, the Tribunal does not intend
20 to set the sequence of events as it repeats the Tribunal's description of the procedural history of the case set out above.
28. It was submitted that the history of the correspondence showed a failure by the Respondent and its agent to reply to the Tribunal. It was said that this showed "contempt" (this was not being used in the strict legal sense) and disrespect for
25 the Tribunal process.
29. The Respondent had had significant opportunity to defend the claim. It was difficult to believe that they had not contacted their solicitor for an update given

the passage of time which would have prompted their representative to chase up the Tribunal.

30. Whilst the Claimant's representative had some sympathy for the reasons why there had been no reply to the correspondence, it was submitted that these were not issues for the Claimant or the Tribunal and did not provide valid reasons for a failure to reply.

31. It was a matter of dispute that the Claimant had been paid all that he was due.

Relevant Law

32. The Tribunal's power to reconsider a judgment is set out at Rule 70 of the Rules of Procedure:-

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.

33. The Tribunal is given a wide discretion under Rule 70 but it is not unlimited. The Tribunal must exercise this power justly having regard to the interests of all parties as well as the public interest that arises from the principle that there should be finality to litigation (*Flint v Eastern Electricity Board* [1975] ICR 395).

The Tribunal should act in accordance with the overriding objective.

Decision

34. The Tribunal notes that this is not a case where the Respondent did not engage with the proceedings at all. They timeously lodged a full ET3 resisting the claim (for the most part) and so clearly intended to defend the claim.

35. They also lodged the application for reconsideration without delay setting out a full and frank explanation for the failure to engage with the Tribunal process.

36. The Tribunal can well understand why the Claimant, during the period when the Respondent was apparently not engaging with the process, came to the

view that the Respondent was ignoring the case and not respecting the Tribunal's directions. It is entirely understandable that he sought strike-out of the Response in such circumstances.

5 37. However, the Tribunal has to address the reconsideration application in the context of what is known at the present time and that includes the explanation for the failure to reply to the Tribunal correspondence. If a party is entirely unaware of correspondence then they cannot be said to be ignoring it.

10 38. There was no challenge to this explanation and the Tribunal is prepared to accept this explanation; it is given by an officer of the court (that is, a solicitor) and there would need to be very compelling evidence to the contrary before the Tribunal would be prepared to find that this was not a credible and reliable explanation.

15 39. The Tribunal considers the explanation given by the Respondent's agent to be an adequate and satisfactory explanation for the failure to reply to correspondence. The problems arose from a technical issue that was not the fault of either party.

20 40. In other times, the Tribunal would have made some criticism of the Respondent or their agent in circumstances where several months with no correspondence had passed and no-one had thought that this was unusual with a need to investigate further.

25 41. However, it is a well-reported fact that the pandemic has caused serious delays in the court systems across the whole of the UK. Although this has varied across the different courts and tribunals, and even across different regions in the same courts and tribunals, it is still the case that there have been delays which members of the legal profession would have been aware and which have been reported in the media so that it was within general public knowledge. In these circumstances, the fact that a party has not received correspondence from the Tribunal would not have the same significance that it would before the pandemic.

42. The Tribunal is, therefore, satisfied that there is an adequate explanation for the Respondent's lack of engagement with the Tribunal process as set out above.
43. The Tribunal agrees with the submission made on behalf of the Respondent that they should not face a liability simply because of a computer issue. In circumstances where the Respondent clearly seeks to defend the claims and has set out a stateable defence then they should not be denied access to justice simply because correspondence sent to their solicitor was not seen by that solicitor.
44. The Claimant is not significantly prejudiced if the strike-out judgment is revoked. He still has an opportunity to advance his claims at a final hearing. In this regard, the Tribunal notes that the claims being pursued are all ones where the burden of proof is on the Claimant and so the Tribunal would not have granted a default judgment in respect of all of the claims. The Claimant would still have required to lead evidence in support of his assertion that, for example, he had been constructively dismissed.
45. The only prejudice to the Claimant is that there has been a delay in any final hearing being listed but that does not outweigh the potential prejudice to the Respondent in having a judgment against them in circumstances where they have been denied the opportunity to defend that claim due to events beyond their control.
46. For all these reasons, the Tribunal considers that it is in the interests of justice for the Respondent's application for reconsideration to be granted and for the Judgment dated 28 June 2021 (sent to the parties on 30 June 2021) striking out the Response to be revoked.
47. In light of that decision, the Tribunal considers that the case management hearing which had been listed in February 2021 should now be re-listed to address the same issues as set out in the Notice of Hearing for the February hearing with a view to confirming the basis of the claims being advanced and to make arrangements for listing a final hearing in this case. A Notice of

Hearing confirming the date of this case management hearing will follow in due course.

Employment Judge: P O'Donnell
Date of Judgment: 19 November 2021
Entered in register: 22 November 2021
and copied to parties

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