EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4101168/2018

Held in Glasgow on 15 May 2018

Employment Judge: F Jane Garvie

Mr B Meechan	**Claimant** **Represented by:-** **Mr W McPartland – Solicitor**
British Car Auctions Limited	**Respondent** **Represented by:-** **Mr P Crowe – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

(1) The application under Rules 70-72 of the Employment Tribunals (Constitution and Rules of Procedure) Regulation 2013 for reconsideration of the Judgment issued by the Tribunal dated 15 March 2018 and issued to the parties on 26 March 2018 is granted.

(2) The application by the respondent in terms of Rules 19 and 20 of the Employment Tribunals (Constitution and Rules of Procedure) Regulation 2013 for an extension of time to be allowed to present a response, (the ET3) is granted.

(3) The case is now defended and will be set down for a Hearing on a date(s) to be agreed. Date listing letters will be issued.

REASONS

Background

1. In this case the claim, (the ET1) was presented on 26 January 2018. The claimant asserts that he was unfairly dismissed and he also seeks arrears of pay (wages). The claim was acknowledged on 30 January 2018. On the same date it was sent to the respondent directing that a response, (the ET1) must be received by 27 February 2018.

2. The file was referred to me on the basis that no response had been received by that date. Accordingly, I directed that a Default Judgment in terms of Rule 21 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") should be issued and that there should be a Remedy Hearing arranged.

3. That Judgment was then issued to the parties under cover of letters dated 26 March 2018.

4. Separately, Notices for the Remedy Hearing were issued dated 27 March 2018 to be held on 15 May 2018.

5. An e-mail was received from the respondent's representative dated 28 March 2018 which attached an e-mail of 1 March 2018 timed at 12:09 hours, acknowledging receipt of the e-mail. The e-mail of 28 March 2018 attached a letter of the same date advising that the respondent's agents had been provided with a copy of the ET1 and the respondent's themselves prepared and presented a response on 1 March 2018, together with copy of the Judgment dated 26 March 2018.

6. The respondent's agents applied for reconsideration under Rule 71 of that Judgment.

7. It was suggested that the Rule 21 judgment had been issued following rejection of the respondent's response. It was accepted that the respondent's response was presented outside the time limit set under Rule 16 and the explanation for this was as set out in the letter of 28 March 2018. It was suggested that no notice of rejection was served on the respondent as required under Rule 18 and therefore the Rule 21 Judgment should be reconsidered.

8. The respondent's request was that the Rule 21 Judgment be reconsidered, set aside and either a Notice of rejection served so that the respondent could make an application for that Notice of rejection to be reconsidered and for its response to be accepted out of time or that the Judgment be reconsidered and the response accepted out of time without the need for a Notice of rejection and to be reconsidered.

9. The letter went on to explain that the respondent's response was presented on 1 March 2018 and a copy of that response as previously presented and the receipt from the Employment Tribunal was attached.

10. It was accepted by the respondent's agents that when the ET1 was served on the respondent on 1 February 2018 the Notice specifically stated that the response should be presented by no later than 27 February 2018. However, when dealing with the presentation of the response the respondent's HR administrator by reason of a genuine mistake believed when reading the covering Notice that the appropriate time limit for presenting a response was 28 days from the date the Notice of claim being received and had therefore calculated this as being 1 March 2018 rather than the date specified on the Notice of 27 February 2018.

11. It was submitted that, by reason of this genuine internal mistake, the respondent's response was presented one day of out of time.

12. As a result of this genuine mistake and without issue of a Notice of rejection the Rule 21 had been issued against the respondent.

13. Since no Notice of rejection was served on the respondent prior to the Rule 21 Judgment being issued, the respondent did not have the opportunity to ask for a reconsideration of the response having been rejected as out of time and for an extension of time so that the respondent's response could be accepted albeit out of time.

14. It was submitted the respondent has suffered substantial prejudice in having a Judgment for unfair dismissal and unpaid wages entered against it, particularly in circumstances where the respondent denies the claim as alleged against it, in full.

15. It was suggested that the interests of justice and equity require that a reconsideration of the Rule 21 Judgment take place and that the response be accepted out of time.

16. Both agents were content that the application be dealt with by way of written representation but, if necessary, the respondent would be prepared to attend a Hearing. The letter was copied to the claimant's representative.

17. By e-mail of 29 March 2018 Mr McParland objected to the application.

18. His e-mail continued as follows:-

> "Our primary position is that the reconsideration application is bound to fail because there is no request for extension of time. Our second position is that it is not commensurate with the overriding objective to extend time where the respondent received correspondence expressly stating the time limit and failed to act; where the respondent could have taken legal advice and failed to do so; and where the respondent (at best, if there is an application to extend time) waited a month after the expiry of the time limit to seek an extension of time. The fact that the respondent

> lodged the ET1 on 1 March 2018 is irrelevant because the Tribunal was bound to reject it in terms of Rule 18(1) so the date that matters (i.e. the first date in which the Tribunal could consider exercising discretion to receive it) is 28 March 2018 and well out of time."

That was copied to the respondent. It is also relevant to note that the respondent provided under cover of 28 March 2018 the proposed response.

19. By letter dated 10 April 2018 I directed that the claimant's representative should confirm if he was agreeable to the application being dealt with on paper and comments were sought by 17 April 2018.

20. A letter in the same terms was sent to the respondent.

21. By e-mail of 16 April 2018 Mr McParland confirmed that he was agreeable to this being dealt with in writing without the need for a Preliminary Hearing in person.

22. His e-mail of 16 April reiterated his position as set out previously in the e-mail of 29 March 2018.

23. By e-mail of 2 May 2018 Mr Crow enquired what was to happen regarding the Remedy Hearing already listed for 15 May. I directed that the Remedy Hearing should be postponed and the reconsideration application would proceed on the basis of written submissions. This was sent out to the parties in letters of 8 May 2018. Notices were then sent to the parties on 9 May 2018 confirming the Reconsideration Hearing would be dealt with on 15 May by way of written submissions.

The Reconsideration by way of written submissions

24. It is relevant to note first of all that when this file was referred to me for consideration as to whether a Rule 21 Judgment should be issued I was not

aware that an ET1 had been submitted under cover of the e-mail of 1 March 2018.

25. The information which was then later provided by HMCTS staff was that the response was sent by e-mail on 1 March 2018 and was held in the Employment Tribunal inbox on 1/03/2018 being received at 12:08 hours. It appears that either this was not printed out and passed to the relevant team or it was suggested to me that it went missing within the Tribunal office.

26. I was reminded that the Rule 21 Default Judgment was issued on 24 March 2018 dealing with liability only and the Remedy Hearing was fixed for 15 May 2018.

27. As indicated above, it was not within my knowledge when I drafted the Default Rule 21 Judgment that a response had, in fact, been submitted to the Tribunal office on 1 March 2018 which was due to an error in the administrative system failing to note this response had been provided. Had it been before me, then I would not have drafted a Rule 21 Default Judgement which was only done on the basis that no response, so far as I understood it, had been presented.

28. I note that Mr McParland's e-mail maintains that the reconsideration application was bound to fail because there was no request for an extension of time and that it would not be commensurate with the overriding objective to extend time where the correspondence expressly stated the time limit and the respondent failed to act within that time scale. I note that it is indicated that the respondent when dealing with the completion of the ET3 had incorrectly thought that the 27 days ran from 28 days from the date of the Notice being received rather than the date specified for returning the ET3 which was 27 February 2018 as set out in the Notice enclosing the ET1.

29. Had the proposed response been before me on 15 March 2018 it would have been apparent to me that it was submitted out of time and, at that stage, it would have been necessary for to direct that the respondent provide an explanation as to why it was presented out of time. I also note that Mr

McParland suggests that there was delay in that it took the respondent's agents until 28 March 2018 to apply for an extension of time and that, in his submission, the lodging of the ET3 on 1 March 2018 is irrelevant because the Tribunal was bound to reject it in terms of Rule 18(1) but that the first date on which discretion could be considered would be 28 March which was well out of time.

30. Against this, I have noted the explanation provided by the respondent as set out above.

31. I have narrated the background in some detail as it necessary to do so given the decision I have to make.

Deliberation and Determination

32. Having regard to the judgment in ***Kwik Save Stores Limited v Swain and Others [1997] ICR49*** I have to take into account all relevant factors in reaching my decision in relation to the reconsideration application. I have to weigh and balance them one against the other and to reach a conclusion which is objectively justified on the grounds of reason and justice.

33. In particular, it is appropriate to have regard to the explanation as to why an extension of time is required. Account should properly be taken by a tribunal of the length of the delay by a respondent in seeking to defend a claim.

34. I also have to have regard to the balance of prejudice. What prejudice is there on the one hand if the respondent is permitted to defend the claim by their being allowed an extension of time for the ET3 to be lodged? What prejudice is there on the other hand if it is not permitted to be presented as late?

35. It is appropriate to have some regard to the merits of the defence, taking a view as to whether there is some merit, broadly put, in the proposed defence. Is there a stateable defence?

36. An employment tribunal is given wide discretion in the determination of an application such as this before me. It is appropriate that I keep in mind the overriding objective to deal with cases fairly and justly.

37. Whilst I note all that is said by Mr McParland in relation to the application for the extension of time for the response being accepted late having only been provided under cover of the letter of 28 March 2018, I have to take into account that the respondent submitted the proposed ET3 under cover of an email of 1 March 2018. It is most unfortunate that, due to an administrative error, this response was not either printed out from the inbox or, alternatively it was, but then went missing within the office. I have no explanation about that beyond what I have narrated above as the information provided to me by HMCTS staff. I am aware that on 1 March 2018 the Employment Tribunal was closed early because of severe weather conditions and it may well be that, as a result of the backlog of e-mails which had to be dealt with the following week, this may be a possible explanation as to why the response was either not printed out or was printed out but went missing and was not linked with the office file for this case.

38. In any event, the proposed ET3 was not before me at the point when the file was referred to me at which stage I directed that the Default Rule 21 Judgment should be issued. It is self-evident that, had the ET3 been before me on 8 March when I was wrongly informed that there was no ET3, I would then have been in a position to enquire why the ET3 was late, albeit by 2 days having been presented by e-mail on 1 March 2018 rather than, as directed in terms of the Notice, by 27 February 2018. It is also appropriate to note that the file was referred to me on 8 March which is the date on which I drafted the wording for the Rule 21 Default Judgment but due to typing delays this was only returned to me on 15 March which was the date when I signed it and, as indicated above, it was then entered in the Register and copied to parties on 26 March 2018.

39. It is therefore clear to me that, had I been aware of the position, namely that there was an ET3 submitted on 1 March 2018 I would not have directed that

a Default Rule 21 Judgment be prepared at that stage but instead, I would have directed that the respondent provide an explanation as to why it had been submitted 2 days' late i.e. on 1 March rather than by the deadline of 27 February 2018.

40. Mr McParland suggests that the fact that the respondent did not provide an explanation until 28 March means that the lodging of the ET3 on 1 March is irrelevant because the Tribunal was bound to reject it in terms of Rule 18(1). As indicated above, I have explained that had I been aware that an ET3 had been presented on 1 March 2018 then rather than direct that a Default Judgment be issued, at that point I would have directed that the respondent provide an explanation as to why the ET3 was submitted late i.e. beyond 27 February and instead was submitted on 1 March 2018. I would also have had to reject the ET3 as late at that point and the respondent would then have been informed of this in writing by HMCTS staff.

41. I therefore note that the decision which I took to issue a Default Rule 21 Judgment was based on an error in that I was not aware of the presentation, albeit late, of the ET3. I have taken into account the suggestion that the explanation why the ET3 was late was provided only on 28 March 2018 and that was too late but it does not deal with the fact that, as indicated above, I have made it clear that, had I been aware that there had been an ET3 presented on 1 March 2018, it would not have been appropriate for me to issue a Default Rule 21 Judgment but rather I should have then directed that the respondent provide an explanation why the ET3 was late without an explanation being provided by them and so would have rejected the proposed ET3 in terms of Rule 18.

42. It is apparent from the letter of 28 March that the respondent's HR Advisor incorrectly understood that they had until 1 March to submit the ET3 but they would not have been in a position to know that the ET3 would at that point not have been accepted until it was brought to their attention that it should have been submitted by 27 February 2018. That, of course, did not happen

because I was not aware of the position when the paperwork was referred to me when I drafted the Default Judgment on 8 March 2018.

43. The further elements I have to consider are the balance of prejudice to the respondent if the ET3 is now not accepted on the basis that I refuse to grant an extension of time. It appears to me that there is a stateable defence as set out in the proposed ET3. It is also apparent to me from the paperwork that while the claimant considers that his case is sound and there is no defence to it, equally the respondent maintains that they have a good defence to the claim. This is not the stage at which the respective positions of the parties are weighed and determined. In assessing the position, I have to consider whether the respondent has set out a stateable defence. It seems to me that they have done so.

44. Turning next to the balance of prejudice, I accept that the claimant suffers a degree of prejudice through the case being defended. If the claim, however, is ultimately successful then there will have been some delay in achieving the result which is alleged to have been suffered by the claimant. However, if the claim is not defended as a result of the refusal to allow an extension of time for the ET3 to be lodged then the claim would simply proceed to a Remedy Hearing and the respondent would not have the opportunity to contest the quantification of any award made at the Remedy Hearing.

45. I have concluded that the balance of prejudice favours the respondent and that the ET3 should be accepted, albeit it is late. If that is not done then then the respondent may potentially have a substantial award made against them. I also note that, in the event the case does proceed as defended, there will then need to be a Final Hearing at which evidence will be led for both parties.

46. In all the circumstances, I have concluded that it is in the interests of justice to grant the application for reconsideration of the Judgment and on reconsideration that the Default Judgment is set aside. I further direct that the extension of time to allow the response which was 2 days late should be granted and that accordingly the case should now proceed as defended.

47. Date listing letters for the Final Hearing will now be sent out to the parties. If any further directions are required the parties are, of course, entitled to apply in writing for any Orders as directions and should comply with Rule 92 when doing so.

Employment Judge: Jane Garvie
Date of Judgment: 24 May 2018
Entered in register: 29 May 2018
and copied to parties