



EMPLOYMENT TRIBUNALS

Claimant: Mrs V Bosworth

Respondent: Phoenix Pet Food Limited

Heard at: Nottingham (on the papers) **On:** 28 March 2022

Before: Employment Judge M Butler (sitting alone)

JUDGMENT

The Judgment of the Employment Judge is that the Respondent's application for an extension of time in which to submit its response is refused and the Judgment dated 4 November 2021 stands. The application for a reconsideration of that Judgment is also refused.

REASONS

Background

1. By a claim form submitted on 7 September 2021, after a period of early conciliation from 11 June 2021 to 23 July 2021, the Claimant brought claims of unfair dismissal, breach of contract (notice pay), for a redundancy payment and suffering a detriment and/or dismissal from a failure to allow her to be accompanied to a disciplinary hearing.

2. The Tribunal office sent the claim form quoting the correct address to the Respondent on 13 September 2021 advising that a response should be submitted by 11 October 2021. Enclosed with the claim form was the Tribunal's standard orders which included an order that the Claimant forward a schedule of loss to the Respondent and with which the Claimant complied on 22 October 2021

3. The Respondent did not submit a response and a Rule 21 Judgment in default of a response was issued and sent to the Respondent on 4 November 2021. A response was received by the Tribunal by email on 13 December 2021 with an explanation as to why it was not submitted in time. This hearing was

listed to determine the Respondent's application for an extension of time in which to file their response and for a reconsideration of the Judgment dated 4 November 2021. Both parties consented to this hearing being determined on the papers.

The law

4. Rule 20 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") provides:

(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 the extension, any judgment issued under rule 21 shall be set aside.

5. Under rules 70-72, the Tribunal may reconsider a judgment where it is in the interests of justice to do so (rule 70).

6. Rule 2 provides that the overriding objective is to deal with cases fairly and justly.

7. I have a discretion as to whether or not to grant the Respondent's application. In **Kwik Save Stores Limited v Swain and others 1997 ICR 49 EAT**, the Employment Appeal Tribunal held 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". Further, when exercising my discretion, I must consider:

(i) the Respondent's explanation for the delay and form a view as to the merits of that explanation;

(ii) the balance of prejudice, i.e. would the Respondent suffer a greater prejudice if the application is refused than the Claimant would if it was granted; and

(iii) the merits of the response.

The evidence

8. The parties submitted witness statements and the Claimant also submitted copy correspondence from ACAS. This correspondence detailed the case no. of

the claim after it was submitted but before the time limit for submitting a response ran out. Both parties also submitted witness statements.

The factual background

9. The Claimant's opposition to the application is based on her assumption that the Respondent knew full well that a claim had been submitted. This, in turn, is based on the fact that the claim form was sent to the Respondent's correct address and that, after early conciliation ended without any offer being made, the Respondent then made an offer to settle after learning a claim had been issued and their correspondence with ACAS, like her own, would clearly have noted the case number in the subject of the emails. The Claimant has produced her own correspondence noting that ACAS included the case number. The Respondent has not included their own ACAS correspondence despite requests from the Claimant to do so. It is clear that early conciliation was unable to promote any agreement between the parties but the position changed after the claim was submitted. It seems to me that it would have been most unlikely that the ACAS conciliator would not have told the Respondent a claim had been submitted otherwise there would have been no mention by the conciliator of the merits of settling before costs escalated further.

10. I note the Respondent's evidence as set out in the witness statement of Ms Becky Pallas, of the Respondent. Of significance is the fact that at paragraph 6 of her statement, Ms Pallas admits she received an email from the ACAS conciliator statement "we have now received the Employment Tribunal claim from the Tribunal Service" Ms Pallas seems to suggest that the use of "we" did not alert her to the fact that the claim was against the Respondent. I am at a loss to understand who else the claim could have been made against. Further, it was only then that the Respondent made any offer to settle the claim. Ms Pallas says she tried unsuccessfully to call the conciliator on one occasion that day but apparently did not try by email (of which there would have been a record).

11. It seems Ms Pallas then did nothing until she received a settlement proposal from the Claimant through ACAS on 25 October 2021. She responded to that email and chased the conciliator for a response on 8 November 2021. The Claimant, by her own admission, had by then withdrawn from any settlement negotiations having been made aware that the Respondent had not submitted a response. Ms Pallas was notified by ACAS that a Judgment had been issued on 1 December 2021 and says she received that Judgment on 3 December 2021 notwithstanding the fact that it had been sent a full month earlier. She says she received it in the post but then waited until the next working day, 6 December, before contacting the Tribunal office. She then submitted a response to the Tribunal on 13 December 2021, a full week later.

12. Considering the Respondent's explanation for not filing a response in time, I note that the claim form and Rule 21 Judgment were sent to the correct address. Ms Pallas says she did not receive the claim form and that the Rule 21 Judgment took a month to arrive. I find this difficult to understand or accept. The claim form was not returned to the Tribunal as being not delivered. I suspect the reality of the situation can be better deduced from paragraph 15 of Ms Pallas' statement where she expresses surprise that a Judgment had been issued while negotiations were still ongoing. I consider it likely, therefore, that she thought no Judgment would be made during that time. I also consider it likely that the

Respondent received the claim form and that the Judgment was delivered much earlier than she suggests.

13. I must also have regard to the balance of prejudice between the parties. The Respondent will be denied their day in court and the opportunity to resist the claim if I refuse the application for an extension of time and the Claimant might receive a windfall as a consequence. On the other hand, the Claimant has done everything correctly in accordance with the rules and may have what she rightly considers to be her entitlement taken away from her in whole or part. I find the potential prejudice falls equally between the parties when considering the financial element of the Judgment.

14. The merits of the response are more readily assessed. The Respondent seems to accept that the Claimant was summoned to an investigation meeting as a result of which she was dismissed for gross misconduct. The response refers to an investigation/disciplinary hearing but it cannot be both. It is silent as to whether, as claimed, the Claimant was denied the right to be accompanied. Either way, it appears the dismissal was procedurally flawed.

15. I further note from the chronology above that the Respondent does not seem to have acted with any degree of urgency after discovering a claim had been made; and it is not credible that there could have been any confusion on the part of the Respondent as to who had submitted that claim and that it was against the Respondent.

16. The burden of proof in this application rests with the Respondent who I do not consider, on the balance of probabilities, has met that burden. I find that the claim form was delivered to the Respondent and that the Rule 21 Judgment was delivered much earlier than the Respondent suggests. I also find that the Respondent failed to act with any degree of urgency in dealing with the claim and unreasonably took the view that nothing would happen whilst settlement negotiations were continuing. The Respondent has not produced any documentation or challenged the Claimant's schedule of loss.

17. Accordingly, taking all of the circumstances into account, I dismiss the application for an extension of time in which to submit the response and the Judgment stands.

18. As regards the application for a reconsideration of the Rule 21 Judgment, the test under Rule 70 is slightly different to that under Rule 20. However, I must consider all of the circumstances which I have set out above. Given my findings in relation to those circumstances as they apply to the application for a reconsideration, I find that it is not in the interests of justice to reconsider the judgment and the application is refused.

Employment Judge Butler

Date 28 March 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

31 March 2022
FOR THE TRIBUNAL OFFICE