CE

EMPLOYMENT TRIBUNALS

Claimant: **Mr L Stuart**

Respondent: **Greenrod Limited**

Heard at: **East London Hearing Centre**

On: **21 January 2022**

Before: **Employment Judge Russell**

Representation:
For the Claimant: **In person**
For the Respondent: **Ms SJ Wood (Representative)**

JUDGMENT

The application for reconsideration of Judgment entered on 3 July 2020, is refused. It is not in the interest of justice to extend time to accept the Response.

REASONS

1 This otherwise straightforward unfair dismissal case has a long and complicated history. The Claimant was summarily dismissed for alleged gross misconduct on 13 November 2019. ACAS Early Conciliation took place between 5 December 2019 and 2 January 2020. The claim form was presented by the Claimant on 2 February 2020.

2 The complaints brought were unfair dismissal and disability discrimination. In summary, the Claimant's case was that he was called to a disciplinary hearing without prior notice of the allegations that he had been uncontactable/absent without leave on 1 and 2 November 2019 and had caused damage to the rear of a company vehicle. This caused him disadvantage as he had no opportunity to prepare. In his letter of appeal against dismissal, he provided an explanation for his conduct which relied upon the fact that he had suffered a serious mental health episode which had resulted in him requiring specialist mental health treatment. He relies upon his mental health as a disability.

3 The claim form was acknowledged and served on the Respondent with a copy of the prescribed ET3 form provided. The covering letter expressly stated that if the Respondent wished to defend the claim, the Response must be received by the Tribunal by 23 March 2020. It warned in clear terms that if a Response were not received by that

date and no extension of time had been applied for, then Judgment may be issued and the Respondent would only be entitled to participate in any hearing to the extent permitted by an Employment Judge.

4 The notice of claim was served at the Respondent's address at 13-17 High Beech Road, Loughton, IG10 4BN. This is the company's registered address and I am satisfied that it was a proper address for service. It is not in dispute that the Respondent received notice of the claim and was aware of the requirement to provide an ET3 by 20 March 2020 as it made an application for an extension of time in an email sent on 20 March 2020. The email was sent by Ms Karen Harris, from a business email address of Southeastanglia@metrorod.co.uk. The reason for the extension was given as follows:

> "**Our response reply has been delayed for a due [sic] to our HR having to deal with staff and the COVID-19. A draft of our response is with our HR department and they have assured me they will look at it ASAP as most staff are working from home with limited access to all files.**"

5 The application was referred to me as a matter of urgency and by email dated 27 March 2020, the parties were notified that an extension had been granted until the 20 April 2020. No Response or further correspondence was received by 20 April 2020.

6 A Notice of Hearing had been sent to the parties on 22 February 2020 for a Preliminary Hearing to consider case management to take place on 13 July 2020. Such a hearing is routinely listed in discrimination claims. The file was referred to me as Duty Judge on 26 June 2020 as no ET3 had been received.

7 Rule 21 of the Employment Tribunal Rules of Procedure 2013 provides that where on the expiry of the time limit in rule 16 no response has been presented, an Employment Judge *shall* decide whether on the available material, a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment. Otherwise, a hearing should be fixed before a judge alone.

8 Upon reading the material contained on the file, I was satisfied that liability could be determined on the papers. Accordingly, Judgment was sent to the parties stating that the claim of unfair dismissal and the claim of disability discrimination both succeed. I required the Claimant to provide a schedule of loss and evidence in support of remedy including a witness statement and converted the hearing on 13 July 2020 to a remedy hearing.

9 The Judgment was sent on 3 July 2020 both to the Claimant by the email address included on the claim form and to the Respondent at its Companies House registered office address. At no stage prior to 3 July 2020 had the Respondent, or anybody acting on its behalf, notified the Tribunal that this was not a proper address for service, or that its use may result in delay, or provided alternative details for correspondence.

10 On 10 July 2020, the Claimant and Respondent were notified by letter that because of COVID-19 restrictions, the hearing on 13 July 2020 would take place by telephone, specifically BT MeetMe. The letter required the parties to provide contact numbers to the Tribunal. And gave information about how the hearing would proceed. This letter was sent to the Respondent's registered office address and therefore was properly served upon it.

11 The Remedy Hearing took place as listed on 13 July 2020 before Employment Judge Burgher. The Respondent did not attend and was not represented. Judge Burgher considered the evidence given on oath by the Claimant and decided that the Respondent must pay to the Claimant the total sum of £14,991.27, setting out his Reasons in writing. A copy of the Judgment and Reasons was sent by email to the parties on 14 July 2020.

12 On 15 July 2020, an email was received from Mr Green from his personal Yahoo email address stating that he had received the liability Judgment by post on 13 July 2020 and the Remedy Judgment by email on 14 July 2020. Mr Green said that these had been passed to him by his office manager as he was currently on furlough and not engaging in the business. Mr Green requested a reconsideration as he did not know that the hearing was taking place on 13 July 2020 but had erroneously believed that there was an in-person hearing on 20 July 2020. The basis of the application was that the Judgment was not fair in the interest of justice, the Claimant had been treated more than fairly over the past years and had been dismissed fairly and lawfully following HR input. The reason for dismissal was gross misconduct for failing to attend work or answer telephone messages.

13 A further email was sent by Mr Green on 20 July 2020 chasing a response to the application for reconsideration and stating that the Notice of Hearing dated 10 July 2020 had only been received on 20 July 2020. The correspondence was referred to me (belatedly in September 2020), and on 19 September 2020, a letter was sent to Mr Green, copied to the Claimant, setting out the above procedural history and that whilst reconsideration was sought, there was still no draft Response albeit the content of Mr Green's emails seemed to indicate an intention to defend the claim. The letter clearly stated that:

> **" If the Respondent pursues its application to reconsider the Judgment in default dated 3 July 2020, it must within 14 days provide a draft Response on the prescribed ET3 form setting out its proposed defence to the claims and provide a covering letter explaining why the Response was not presented in time. If it is said to be due to furlough or other problems linked to the pandemic, the letter must set out the arrangements made by the Respondent to ensure that correspondence was collected and that the business operated efficiently in the relevant time, including the operation of the HR department.**
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> **If the Respondent applies only to reconsider the Remedy Judgment on grounds that it did not know that the Preliminary Hearing had been converted to a final hearing to decide remedy, it should state so clearly. It may be in the interests of justice to reconsider the Remedy Judgment and allow the Respondent to participate in a re-listed remedy hearing to the extent permitted by the Judge.**
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> **If no response to this letter is received within 14 days, the application for reconsideration will not be considered further."**

14 On 29 September 2020, Mr Green sent a further email to the Tribunal stating that he had only received the letter at his home address on 26 September 2020, giving him only seven days to respond. Mr Green suggested that the delay in receiving post was being caused because correspondence sent to the registered office address had then to be forwarded to his home address. Mr Green provided his personal Yahoo email address and, as he would be on absent on annual leave with limited Wi-Fi access, applied for an extension of time once he was back and had finalised the Response with his HR company in the week commencing 5 October 2020. The Tribunal provided a copy of the email to the Claimant who objected to any further extension of time on grounds that previous

extensions had not been complied with and that a draft Response was said to be with HR at the time of the first extension.

15 On 19 October 2020, Mr Green presented a draft Response. No extension of time had been granted and it was substantially later than the week commencing 5 October 2020. In his letter dated 15 October 2020, Mr Green said that the delay was due to a lack of support from the franchisor's HR department, the effects of the pandemic and furlough and a failure to received relevant Tribunal correspondence in a timely manner.

16 The contents of the draft Response are important when assessing the merits of the potential defence. The Respondent indicated that it intended to defend the claims. In summary, it had been unable to speak to the Claimant as he was not available for contact. When the Claimant telephoned the office, he was told about the planned disciplinary meeting; a letter was not posted as the Respondent did not know whether the Claimant was at home yet and the meeting was imminent. The letter setting out the allegations was given to the Claimant at the beginning of the disciplinary hearing with time for him and his mother-in-law time to read it. The Claimant's mother-in-law, who attended as his companion, expressly said that she did not know the nature of the meeting but indicated that she was happy to proceed. The draft Response rejects the explanation given by the Claimant, asserts that it was the Claimant's partner who was aggressive when asked to get a message to the Claimant before setting out examples of times when the Respondent went over and above its duty to support the Claimant. There is no reference to the Claimant's grounds of appeal and the relevance of his mental health to his conduct nor is there any suggestion that the Claimant was offered a right of appeal as required by the ACAS disciplinary code.

17 Based upon the contents of the draft Response and the covering letter, I considered that there was a reasonable prospect of the liability Judgment being revoked in the interests of justice. Unfortunately, the reconsideration hearing which was listed to take place on 13 July 2021 could not go ahead and it has taken some time for the matter to be re-listed such that it has only come before the Tribunal today.

18 The principles to be applied when considering an application for an extension of time to present a Response, and therefore on this application for reconsideration, are set out in **Kwik Save Stores Ltd v Swain** [1997] ICR 49. These were approved and applied by Eady J in **Office Equipment Systems v Hughes** UKEAT/0183/16/JOJ. All relevant documents to explain non-compliance and the basis of the defence of the claim on its merits must be put before the Tribunal. The Tribunal in exercising its discretion must take account of all relevant factors, including the explanation or lack of explanation for the delay and merits of the defence. It must reach a conclusion objectively justified on the grounds of reason and justice, taking into account and balancing the possible prejudice to each party. If a defence is shown to have some merit in it, justice will often favour granting an extension of time but it does not mean that a party has a right to an extension just because they would otherwise be denied a hearing.

19 In deciding the application for reconsideration, I took into account the contents of the claim form, the draft Response and the documents provided by each party. These included the Respondent's investigative file note dated 13 November 2019 and the Claimant's letter of appeal dated 18 November 2019 asserting procedural unfairness and addressing in detail essentially the mitigating circumstances.

20 I heard evidence from Mr Green as to the reasons for delay and why it would be in the interests of justice to revoke the liability Judgment. In essence, the explanation provided is that the Respondent is a franchise in receipt of professional HR services from the franchisor. Ms Karren Harris, the company secretary, was initially dealing with the case with an HR consultant but, due to pandemic related reasons, the HR consultant failed to return correspondence. Mr Green contacted the Tribunal to request more time but did not hear back. He relies upon severe delays caused by correspondence from the Tribunal being sent to his accountants (the company registered office) and having to be forwarded. Mr Green suggests that he was confused following conciliation discussion with ACAS. Once the COVID pandemic lockdown hit, the business had to run on skeleton staff with Mr Green and many others furloughed. This caused considerable problems for many weeks and they worked very hard during that time to keep the business afloat.

21 Mr Green relied upon delayed receipt of Tribunal correspondence: the liability Judgment was received on 13 July 2020 (10 days after it was sent), the amended Notice of Hearing was received on 20 July 2020 (10 days after it was sent), the remedy Judgment was received on 15 July 2020 and the Tribunal letter dated 19 September 2020 was received seven days later. His evidence was that it was only then that he discovered that the preliminary hearing had been converted into a remedy hearing and proceeded in his absence. In dealing with the draft Response and the merits of any defence to the claims, Mr Green did not address the assertion that no appeal was offered or took place and nor did he address the question of disability.

22 The bundle of documents for use at this hearing did not include Mr Green's emails to the Tribunal sent in July 2020 nor did Mr Green refer to them in his witness statement. This put Ms Wood in a difficult position as she was not aware of their content and I gave her time to read them. I conclude that the emails materially undermine Mr Green's evidence today that due to the rules of the furlough scheme he was unable to deal with business matters until his return from furlough in or about September 2020. It is clear that not only did Mr Green receive emails connected to the Tribunal claim, he was able to deal with them and respond to the Tribunal in July 2020. I do not accept that Mr Green's furlough is an adequate explanation for failure to comply with Tribunal's Orders.

23 I found Mr Green's evidence about his knowledge of the 13 July 2020 hearing also to be unreliable. In his witness statement, Mr Green says that the notice of hearing was undated. The final page with the date was not included in the bundle so that Ms Wood was again unaware that it had actually been sent on 22 February 2020, a month before lockdown. Even if he had not received the letter stating that the hearing would now deal with remedy, Mr Green was well aware that there was a Tribunal hearing on 13 July 2020 and made no effort to attend or to check if it would proceed.

24 It transpired during Mr Green's oral evidence, although again not included in his witness statement, that an office manager was at work throughout the lockdown period and was sending and receiving post as well as monitoring the company's email address. It was a standard part of her role to follow-up on important correspondence.

25 In all of the circumstances, I am not persuaded that any delay in receipt of relevant correspondence is a matter which renders it necessary in the interests of justice to reconsider the liability Judgment. Tribunal correspondence was sent to an office email address that was monitored throughout the furlough period. It was sent by post to the company's registered business address and, despite knowing of the Tribunal proceedings

before March 2020, the Respondent took no steps to notify or update the Tribunal's records. Furthermore, at the time that the nationwide lockdown was introduced, the Respondent was aware that there was an ET3 due and that there was was an outstanding application for an extension of time. As the correct email address was used by the Tribunal to grant the extension of time, that email would have been received by the office manager and it should have been immediately clear that it required further action. The Respondent to this claim is not Mr Green personally, it is the company. The company had an office manager and was functioning throughout that period. In conclusion, I do not accept that Mr Green's furlough or the effects of the lockdown are sufficient explanation for the failure to present a Response or attend the hearing on 13 July 2020.

26 In any event, despite knowing in July 2020 that Judgment had been entered and intimating a desire for reconsideration, the Respondent failed to present a draft Response form until 15 October 2020, some three months later. There is no adequate explanation for the failure to provide a draft Response before 15 October 2020, in breach of the second extension of time to 3 October 2020, given that a draft Response had apparently been with HR since 20 March 2020.

27 In the circumstances, I conclude that the attitude shown by the Respondent towards these proceedings and the requirement to present a Response, has been at best cavalier and most likely a deliberate decision to focus on keeping the business running as Mr Green said in evidence. The Respondent has not shown a good explanation for its non-compliance with the date to present a Response, twice extended.

28 I accept that there is some prejudice to the Respondent in refusing the application as it has been deprived of an opportunity to produce evidence and challenge the claims on their merits. The claims are significant, not only unfair dismissal but also disability discrimination. The degree of prejudice to the Respondent is affected, however, by the merits of the defence advanced.

29 The draft Response (produced with HR input) admits that the Claimant was not provided with details of the allegations faced until the beginning of the disciplinary hearing. Even if he and his mother-in-law were given time to read it at the beginning of the hearing, he was not given a proper opportunity to consider his response and mitigation properly and fully in advance of a hearing which resulted in his summary dismissal. This was in breach of paragraph 9 of the ACAS Code of Practice for Disciplinary and Grievance Procedures. The draft Response does not address the Claimant's grounds of appeal and his reasons for being uncontactable/absent on the days in question. It is not disputed that there was no appeal hearing held despite the Claimant's attempt to appeal, this is in breach of paragraphs 26 to 29 of the ACAS Code. The draft Response does not dispute that the Claimant's mental health amounted to a disability or assert that it lacked knowledge of disability. It does not address the Claimant's case that a mental health crisis caused his absence or advance any justification defence.

30 I also took into account the content of Mr Green's witness statement and evidence to the Tribunal. He now asserts that the Claimant's wife had notified another engineer that he was in hospital "as he had been drinking and had been on a bender" and that the van was damaged. It is significant, however, that the allegation of drinking being the cause of the absence is not pleaded in the draft Response and I consider it an attempt to bolster the defence without any evidential basis. There is no dispute that the Claimant was not

notified of the disciplinary allegations in advance and that he was given no right of appeal. There is no dispute that the Claimant is disabled by reason of mental health.

31 In the circumstances, I conclude that the defence set out in the draft Response has no real merit to it. Insofar as the Respondent might argue that a fair procedure would or might still have resulted in dismissal or that there should be any reduction for contributory fault, these can be addressed at the remedy stage if Employment Judge Burgher is satisfied that his original remedy Judgment should be reconsidered.

32 By contrast, if the Judgment is revoked on reconsideration and an extension of time granted for the Response, the Claimant will suffer very real prejudice. His dismissal occurred in November 2019, over two years ago. Whilst not all of the delay is directly the fault of the Respondent, it has all arisen from the Respondent's failure to comply with the requirement to provide a Response, despite being given two extensions of time. As a result, the Claimant has been deprived of closure and the financial remedy to which he was deemed entitled in July 2020. The passage of time would impair the quality of the evidence in a case where there appears to be little contemporaneous documentation. If the case were listed for a hearing now, it is unlikely that it could be heard until the end of 2022 at the earliest. As I say, it is very likely that the Claimant would succeed on unfair dismissal due to procedural unfairness at the very least, he will suffer the combined prejudice of delay, anxiety and additional cost of time off work to attend hearings.

33 Balancing all of those points, I am satisfied that the rule 21 Judgment on liability was properly entered. It is not in the interest of justice to vary or to revoke that Judgment and therefore the application for reconsideration fails and is dismissed. It follows by consequence of that, that I have also refused the application for an extension of time.

34 In my letter sent in September 2020, I indicated to the parties that there appeared to be potential grounds for reconsideration of the remedy Judgment too. Even where a Judgment has been entered under rule 21, a Respondent is entitled to notice of remedy hearing and to participate in that hearing to the extent permitted by the Tribunal. Ms Wood confirmed that the Respondent does wish to have the remedy Judgment considered. Accordingly, the file has been passed to Employment Judge Burgher.

35 Since giving this Judgment and reasons orally, the remedy Judgment was reconsidered. Unfortunately, due to an administrative oversight, the request for written reasons was not passed to me until recently. I apologise for the consequent delay.

Employment Judge Russell

Dated: 1 June 2022