CASE NO: 2600897/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr J Mellor

Respondent: GXO Logistics UK Limited

Heard at: Midlands (East) Region

On: 10 August 2022

Before: Employment Judge R Broughton (sitting alone)

Representation
Claimant: In person
Respondent: Mr Sands, Solicitor

JUDGMENT having been sent to the parties on 24 August 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT ON RECONSIDERATION

1. The Judgment of the Employment Tribunal is that the Respondent's request for reconsideration of the Rule 21 Judgment dated 30 June 2022, is granted under Rule 70.

2. Following reconsideration, that Judgment is revoked and an extension of time granted under Rule 20 for the Respondent to present its response .

REASONS

1. The claim was issued on 24 March 2022 and the Response was due on 2 May 2022. No Response was presented. A Rule 21 Liability Judgment was made by Employment Judge Britton, on 30 June 2022 and sent to the parties on 22 July 2022.

2. In summary, the claim is a complaint of disability discrimination. The Claimant was employed by the Respondent from 12 January 2020 until 25 November 2021. He resigned from his employment giving notice on 25 August 2021. The Respondent, in its draft response, concedes that the Claimant is disabled because of diabetes. The Claimant complains that working night shifts proved difficult for him because it was difficult to accommodate his diabetes. He

therefore wanted to work a day shift. When it came to his attention that there were opportunities to work the day shift, he made a request for day shift work and raised a grievance. He complains that the Respondent failed to make reasonable adjustments and that he was discriminated against. His claim is brought (as clarified with Employment Judge Britton at the preliminary hearing on 30 June 2022) as a section 15 and section 20-21 EqA claim.

3. In its draft Respondent, the Respondent denies that it failed to make reasonable adjustments and alleges that it had offered alternative shift patterns. The Respondent also denies that it discriminated because of something arising from his disability and further and in the alternative, defends the section 15 claim on the grounds that its treatment was a proportionate means of achieving a legitimate aim.

4. After receiving email communication from ACAS about the claim on 25 July 2022, an application was made on 27 July 2022 by the Respondent, under Rule 20, for an extension of time to file the Response and under Rule 70 for reconsideration of the Judgment. No draft Response was attached with the application, but the Respondent's position is that it had not received the Claim Form at that time and thus it was not possible to attach a draft Response with the application.

5. The parties both confirmed at the outset of today's hearing that they had no objection to me determining the application under Rule 70, despite the fact that I was not the Judge who made the original Judgment.

6. In terms of the evidence, I have been assisted by an agreed bundle of documents. The bundle is not paginated but the index sets out that there are 14 documents in total within that bundle. I have heard evidence from Helen Johnson, an HR Manager of the Respondent, which she gave under oath and she was cross-examined by the Claimant. I have heard oral submissions from both parties.

Findings of fact

7. I made the following findings on a balance of probabilities.

8. The Employment Tribunal sent by post a of number of letters to the Respondent to its registered address. It included four letters; a notice of claim which attached the ET1, on 4 April 2022; a notice that no Response had been received, dated 31 May 2022; a separate letter on 31 May 2022 giving notice that the preliminary hearing had been postponed, and then the Liability Judgment made by Employment Judge Britton which was sent out on 22 July 2022.

9. The Claimant had also, and it is not disputed by the Respondent, sent a letter to the Respondent attaching with it his schedule of loss which included the case number at the top of the document. It is not disputed by the Respondent, that that letter was signed for on 10 May 2022 and the bundle contains the proof of delivery document issued by Royal Mail. The proof of delivery document includes the following words; "*Signed for by: SECURITY COVID /19*". I find based on the documents and the oral evidence of Ms Johnson, that the letter

from the Claimant was signed for by a member of the security team at the Respondent's registered office.

10. The evidence of Ms Johnson, which I accept, is that the Respondent have a system in place for post whereby post sent to its registered office is forwarded onto Head Office. The registered office is a PO box address only. Security staff man the registered office but they are not responsible for dealing with the post, albeit they clearly sign for it. Those security staff are not employed by the Respondent. When the post reaches Head Office it is allocated to an HR business partner for the appropriate region and then sent on to the local HR manager. Ms Johnson was not sure who would receive the post at Head Office; she assumed it would be the central HR manager, Anna Vaughan but she was unsure.

11. The evidence of Ms Johnson, is also that she had spoken with Anna Vaughan of the HR Compliance Team once she received the email notification from ACAS on 25 July 2022 and was alerted to the claim. Anna Vaughan has since informed Ms Johnson that Head Office have no record of receiving any of the previous correspondence from the Tribunal . Ms Johnson's evidence is that she was told by Anna Vaughan that Ms Vaughan had spoken to the security staff at the PO box office, (albeit she was not sure whether this was the manager or simply someone who was on shift working at the registered office that day) and whoever Ms Vaughan had spoken to, they could not answer Ms Vaughan's questions about the 'missing' correspondence. The person at Head Office who is responsible for managing the post from the registered office is currently on annual leave (Ms Johnson was not able to provide her name) but I am informed by Ms Johnson that she is due back from holiday today. There is no witness statement from that individual and Respondent does not seek an adjournment of today's hearing in order to call that person to explain further what the position is with regards to the post that was sent to the registered office including what system and safeguards are in place to get the post from the registered office to head office etc.

12. Ms Johnson gave evidence that the Respondent is conducting an ongoing investigation into why the post had not been received from the registered office however , Ms Johnson did not know very much about that investigation. She did not know what stage the investigation had reached or what the findings so far are.

13. According to the evidence of Ms Johnson there had been at least one occasion in the past where post had not reached Head Office from the registered office. She was unaware however what, if any, measures and steps had been put in place since that date, to ensure that there was no repeat of post not being properly passed forwarded on to HR at Head Office.

Legal Principles

14. I took time at the outset of the hearing to go through the applicable Tribunal rules, primarily for the Claimant's benefit. In terms of Rule 21 Judgments, there is no specific provision that deals with reconsideration of those types of Judgments, therefore the Tribunal's power fall under the general discretion under Rule 70 -72. Under Rule 70, there is one ground for reconsideration and

that is whether it is necessary in the interests of justice to reconsider a Judgment:

Rule 70 -72

__70.__ 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.*

__71.__ Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 *days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.*

__72.__—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full *tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.*

15. There is an important underlying principle that in all proceedings of a judicial nature, there should be finality of litigation. However, when determining an application under Rule 70, and indeed under Rule 20, I am required to have regard to Rule 2 and the need to deal with cases fairly and justly in accordance with the overriding objective and to be guided by the principles of justice and fairness.

Rule 2 Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a)ensuring that the parties are on an equal footing;
(b)dealing with cases in ways which are proportionate to the complexity and importance of the issues;
(c)avoiding unnecessary formality and seeking flexibility in the proceedings;
(d)avoiding delay, so far as compatible with proper consideration of the issues; and
(e)saving expense.

16. Pursuant to Rule 90 once it is established that a document was properly addressed, stamped and posted it will be presumed, unless the contrary is proved, in this case by the Respondent, that it was received by the party. The Rules relating to service are set out at Rules 85 through to 87.

***Rule** 90.*

Where a document has been delivered in accordance with rule 85 or 86, it shall, unless the contrary is proved, be taken to have been received by the addressee—

(a)if sent by post, on the day on which it would be delivered in the ordinary course of post;

(b)if sent by means of electronic communication, on the day of transmission;

(c)if delivered directly or personally, on the day of delivery.

Submissions

Respondent Submissions

17. The parties both made oral submission which I have considered in full. I set out briefly and in summary below, those submissions:

18. Mr Sands submits that the application made on 27 July 2022 was made in accordance with Rule 20.Mr Sands invites me consider Rule 2 and in particular ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and avoiding unnecessary formality and seeking flexibility in the proceedings.

19. Mr Sands submits that this is simply a case of the Respondent for some reason not having received the claim form, that that it had gone 'array' at the registered office . Mrs Johnson made reasonable enquiries about the system which is in place when post is received at the Head Office and he refers to this as a genuine error.

20. Under the previous Tribunal Rules 2004, the employment judge could only extend time for submitting a response if he or she was satisfied that it was 'just and equitable to do so'. The 'just and equitable' test is not set out in the 2013 Rules however Mr Sands referred me to the case of **Kwik Save Stores Ltd v Swain and ors 1997 ICR 49, EAT,** which set out the correct test for determining what was 'just and equitable' and its continued relevance to the exercise of a

discretion under the Rules. The EAT held in the Kwik case, 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*'. In particular, the EAT held that, when exercising a discretion in respect of the time limit, a judge should always consider the employer's explanation as to why an extension of time is required, the balance of prejudice and the merits of the defence.

21. Mr Sands also referred me to the case of **Pendragon plc (t/a CD Bramall Bradford) v Corpus [2005] ICR 1681 (EAT)** where the Tribunal heard the reasons given by the respondent for its delay in putting in a notice of response within the 28 days laid down by the new Rules, and it was not satisfied with that explanation. There was no question of any deliberate default, but it the Tribunal Judge decided that it clear that there was no satisfactory competent explanation given for the delay, in relation to the document being passed from hand to hand, before it finally was dealt with. The Tribunal concluded that unless it was satisfied that there was a good explanation for the delay, it had no discretion to grant an extension of time. The EAT overturned this decision and reiterated the continued relevant of the criteria in the Kwik Save case

22. Mr Sands in terms of reason for delay concedes that the Respondent cannot provide a conclusive answer to why the claim form was not received but referred to the Respondent unwittingly missing the deadline .The balance of prejudice he argues, falls on the Respondent if the exercise to extend time is not granted.

23. Mr Sands submits that there would be no risk to the hearing date because the cause is not listed until September 2023 and disability is conceded.

24. In terms of merits of the claim, Mr Sands submits that the section 15 claim as presented falls short of establishing a prima facie case in that it fails to identify what the 'something arising from' the disability is, albeit he accepts that is not insurmountable, and could be addressed in further particulars. However, he also refers to the Response presenting a different factual account of events to the Claimant, the Response has better than reasonable prospects and the Respondent should be allowed to defend the claim at a final hearing.

25. Mr Sands submits that the Respondent dealt with the claim expeditiously when it became aware of the claim, submitting a response within 28 days of receiving the claim form.

Claimant's submissions

26. The Claimant's submissions were brief however, he submits that the whole process the Respondent had in place for receiving post at the registered office was 'flawed' . He referred to the evidence of Ms Johnson that there was an error in the system but she had been unable to explain what measures had since been taken to rectify it.

27. The Claimant referred to the impact on him of the tribunal process and of having to go through that again if the default judgment is overturned, but he accepted that the impact would have continued if the Respondent had responded to the claim earlier.

28. The Claimant also referred to the strength of his case and that that he had an email from his subject access request which showed that a colleague on the day shift had enquired about moving into the Claimant's night shift role and that he could therefore have been offered day shift work.

Conclusions

29. The application by the Respondent was made in accordance with Rule 20 and Rule 71. That is not disputed by the Claimant. The Rule 21 Judgment was sent to the parties on 22 July 2022, the application for reconsideration and an extension of time was submitted on 27 July 2022.

30. Taking in account all the evidence, including the evidence of Ms Johnson, I conclude that the Respondent has failed to discharge the burden on it under Rule 90 and therefore the presumption stands that the post, despite what is said in the application by the Respondent (i.e. that no post was ever received by the Respondent), was received by them, in that the post was received at its correct registered office.

31. I accept on balance that something did then go wrong with the process in that although the post was received at the Respondent's registered office, it was not forwarded to the relevant people at the Head Office. It is incumbent upon the Respondent, which is a large employer with over 28,000 employees, to make sure that it has in place appropriate systems to ensure that post sent to its registered office is dealt with appropriately. From the evidence I have heard, its systems are, or at least were at the relevant time, deficient. The Respondent has no satisfactory competent explanation for what happened to the claim form and the further correspondence which was sent to it by the Tribunal or by the Claimant. However, as made clear by the EAT in the Pendragon case, that however is not the sole factor to take into account when deciding whether to exercise a discretion.

32. I do find that once Ms Johnson was made aware of the claim by ACAS, the Respondent acted promptly in notifying the Employment Tribunal and filing a draft Response when it was in a position to do so.

33. I do not find, and the Claimant does not submit, that there was any deliberate failing by the Respondent to respond to his claim but it is clear that the Respondent had an unsatisfactory system in place.

34. I need to consider (applying Rule 2 when doing so) whether it is necessary in the interests of justice under Rule 70 to reconsider the Judgment.

35. I have taken into account that this is not a case where there has been a full hearing, it is a Rule 21 Judgment which is relevant when considering the relative prejudice to the parties. The parties both made submissions in respect of the relative merits of the claim and response and I conclude that on the face of the pleadings, there is an arguable claim and there is an arguable response to it. I also take into account that this is a claim of discrimination which are often fact sensitive and further, these are serious claims for the Respondent to face.

36. I also take into account that the case is not actually listed until 11 - 13 September 2023 and that disability is not disputed. Other than the provision of the schedule of loss, there has been no further preparation in terms of case management for the final hearing next year.

37. I have taken into account what the parties have said about the respective prejudice and I have taken on board what the Claimant has said about the impact of revoking the Judgment in terms of how stressful the process has been for him and while I am mindful of that impact also appreciate his candour in conceding that if the Respondent was allowed an extension of time to present its Response, the prejudice amounts effectively to putting him back in the same position he would have been in had the Respondent filed its Response in time.

38. I conclude that the balance of prejudice does favour the Respondent because it would not be in a position unless the discretion is exercised, to respond to what are serious allegations of discrimination.

39. Therefore, although I appreciate the Claimant will be disappointed by this, I am persuaded that under Rule 70 – 72 and Rule 2 it necessary in the interests of justice to reconsider the Judgment and in doing so I revoke it. With respect to the Rule 20 application, on the face of it the employer's defence has some merit in it, and justice will often favour the granting of an extension of time in those circumstances otherwise the employer might be held liable for a wrong which it had not committed. The prejudice favours the Respondent and while I am not satisfied that the Respondent's processes for dealing with post are or were, satisfactory and competent, on balance I consider that the application to extend time should be granted and the response therefore accepted.

40. The case will proceed to a final hearing in September of next year. Separate case management orders have been issued.

41. The Respondent should not be complacent in terms of its systems for dealing with post going forward, such deficiencies impact directly on the claimants' bringing claims and on Tribunal time and resources. Any failure to address these deficiencies in its systems for dealing with post, is likely to be taken into account by any Judge dealing with similar applications in the future.

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Employment Judge R Broughton
Date: 10 September 2022
JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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