Case number: 3302852/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss J. Harris	AND	Ms. T. Jegajeevan

HEARD AT: **Cambridge Tribunal** (by CVP) **ON:** 29 November 2022

BEFORE: **Employment Judge Douse (Sitting alone)**

Representation:

For Claimant: Ms. Bilbao, Solicitor

For Respondent: Ms. Evans-Jarvis, Litigation Consultant

RESERVED JUDGMENT

1. The default judgment of 16 June 2022 is revoked.
2. The Respondent's application to extend time to present a response is granted.

REASONS

Background

1. This case was previously before me for a 1-hour remedy hearing on 10 August 2022, via CVP, following default judgment being entered in favour of the Claimant on 16 June 2022.
2. By way of email correspondence to the Tribunal the evening before the hearing - at 8.19pm on 9 August 2022 - including a witness statement, the Respondent

stated that they had not received any prior correspondence regarding the case because it was sent to the wrong address. A similar email was sent to the Claimant's representative at 8.06pm on 9 August 2022.

3. The Respondent attended the hearing on 10 August 2022 and stated that she had no prior knowledge of proceedings, including the default judgment, until she received the hearing link from the Tribunal office. I confirmed with the Respondent that they were seeking reconsideration of the Rule 21 Judgment.
4. The Claimant, through her representatives, resisted the application stating that they found the Respondent's account inconceivable. They submitted that she had been in email correspondence with the Respondent and a member of their staff – Hayley Gough – in February 2022, prior to proceedings being issued in March 2022. Additionally, she had emailed the Respondent (although no reply was received) on:
    a. 7 July 2022 – sending the default judgment
    b. 13 July 2022 – sending the Claimant's Schedule of Loss and inviting proposals
    c. 21 July 2022 – sending the bundle for the remedy hearing, and the Claimant's Witness Statement

5. The Respondent denied receiving any of the above correspondence until she checked her junk mail folder after receiving the hearing link from the Tribunal. In relation to the address used for service of the original claim, the Respondent stated that this was a church hall and her business was not permitted to receive post at the address. She further stated that the Claimant was aware of her home address as she worked nearby and had been to the Respondent's home to collect things previously.
6. There were clearly parts of what the Respondent said that required a response from the Claimant. I was not satisfied that there was sufficient information before the Tribunal to decide the Respondent's application without Ms Harris giving evidence, and without any of the documentary evidence that was being referred to

by both parties. By that time, more than half the allocated hearing slot had been used and there was insufficient time to deal with the application fully.

7. I therefore decided that it was in the interests of justice to adjourn the hearing. I directed that the Respondent apply for a reconsideration in writing to the Tribunal, copying in the Claimant's representative by 5pm on Friday 12 August 2022, including any relevant supporting evidence.
8. In my adjournment notice I stated that:

   "An Employment Judge will consider the application – if they decide that there is no reasonable prospect of the original decision being varied or revoked they shall refuse the application. Otherwise, the Claimant will be given a period of time to respond. An Employment Judge will also consider if a hearing is necessary to decide the application."

9. This was referring to the procedure contained within Rule 72.
10. In order to avoid any further delay, I relisted the case for a half day hearing via CVP at 10am on 29 November 2022. I did not reserve this case to myself, although the parties indicated their preference that I deal with it if possible. Depending on the view of the duty Judge considering the Respondent's applications, the purpose of the hearing was to be one of the following:
    - If deemed necessary, Respondent's applications 1) for reconsideration of the Rule 21 judgment made on 16 June 2022; and 2) to extend the time limit to present a response
    - Any application for costs in relation to the consequences of the adjourned hearing
    - *If Respondent's applications are refused*, the Tribunal will go on to deal with remedy
    - *If Respondent's applications are granted*, the Tribunal will go on to deal with case management

11. The Respondent duly made a written application before 5pm on 12 August 2022, although it was in the manner of an N244 form used in the civil courts, and form T444, which is used to appeal to the Employment Appeal Tribunal.
12. However, unfortunately this was not referred to a DEJ, or to myself directly, so the intended preliminary review was not carried out. When the case was listed before me without that having been done, I determined that the hearing should go ahead to deal with the Respondent's application for reconsideration and revocation of the Rule 21 judgment, and accompanying extension of time to present a response.

Procedure and evidence heard

13. I was provided with an 81-page electronic bundle by the Claimant – references to documents within this bundle will be to page numbers within [ ] and with the prefix 'C' - and a 24-page electronic bundle by the Respondent - references to documents within this bundle will be to page numbers within [ ] and with the prefix 'R'.
14. Both parties provided additional documents:

    14.1 From the Claimant:

        14.1.1 A pdf of emails sent to the Respondent/her personal assistant

        14.1.2 Screenshots of WhatsApp messages with the caretaker of Bradwell Memorial Hall

        14.1.3 An online OFSTED record of the Respondent's services

    14.2 From the Respondent:

        14.2.1 Photograph of OFSTED registration displayed on a noticeboard

15. The Claimant provided a signed witness statement consisting of 18 paragraphs, and gave oral evidence following an affirmation.
16. The Respondent provided a signed witness statement consisting of 12 paragraphs, and gave evidence after taking a religious oath.

Facts

17. The Claimant was employed by the Respondent (t/a Bradwell Preschool) as a Manager, from 7 September 2020 to 17 January 2022.
18. Issues regarding the complaints ultimately made to Tribunal arose from September 2021. I do not propose to go into detail about these here as the substantive matters, and each party's position on these, are not determinative of the issues I have to decide in relation to set aside and extension of time (except for consideration of the merits of the defence as detailed below).
19. On 23 November 2021, Hayley Gough, the Respondent's Personal Assistant, emailed the Claimant advising she would be investigating the complaints and asked for all correspondence to be sent to her [C22].
20. After emails back and forth between Hayley and the Claimant, the following day – in response to an email from the Claimant's partner – Hayley advised *"who you appoint as a legal representative they can email me and if they wish to do any discussions over the pho [sic]" [C33].* She later clarified that *"Any legal letters does still need to be addressed to Reka as she is the owner" [C34].*
21. A period of ACAS early conciliation began on 14 January 2022.
22. On 26 January 2022, the Claimant's representatives emailed the Respondent regarding payment of Statutory Maternity Pay (SMP).
23. Conciliation ended on 9 February 2022.
24. On 11 February 2022, the Claimant's representatives emailed the Respondent and Hayley Gough. Hayley replied on the same day keeping the Respondent copied in. The reply from the Claimant's representative, also that day, appears to be onyl to Hayley Gough. Hayley replied, copying the Respondent back into the chain.
25. By a claim form presented on 8 March 2022, the claimant brought complaints of pregnancy and maternity discrimination, victimisation, deductions from wages, and failure to provide payslips.
26. In the Respondent's details were recorded as: "*C/0 Bradwell Preschool, Bradwell Memorial Hall, Vicarage Road, Milton Keynes, Buckinghamshire MK11 4AQ".* This

is the address where the Claimant worked, and was a community hall that the Respondent hired for the preschool.

27. The Respondent also operated similar businesses at other sites.
28. The Tribunal sent the claim to the Respondent by post on 24 March 2022, requiring a response by 21 April 2022.
29. No response was received, and default judgment was issued on 16 June 2022. The case was subsequently listed for a remedy hearing on 10 August 2022 by CVP.
30. The Respondent gave evidence that she formally stopped providing services at the Bradwell Hall in May 2022, although her witness statement (paragraph 7) stated that it was March that year. Thereafter she was in communication with OFSTED about the closure.
31. The Respondent gave evidence that Hayley Gough stopped working for the nursery in March 2022, and had left the wider care provision business fully by the end of June 2022. She advised that the email address Hayley had been using was a paid for account which later became inactive.
32. On 7 July 2022, the Claimant's representatives emailed the Respondent and Hayley Gough attaching the default judgement, and advising that the remedy hearing had been set for 10 August 2022.
33. On 13 July 2022, the Claimant's representatives emailed the Respondent and Hayley again, this time attaching the Claimant's schedule of loss.
34. On 21 July 2022, the Claimant's representatives emailed the Respondent and Hayley attaching a bundle and the Claimant's witness statement.
35. As is common practice, the day before the remedy hearing – 9 August 2022 – the Tribunal emailed joining instructions to the parties.
36. That evening, the Respondent sent an email to the Claimant's representative (but not to the Tribunal) stating:

> *"Dear madam*
>
> *your client well known correspondent address :78 the high street , two mile ash ,mk8 8hd , can you update to court , i have received from court hearing*

today , its illegal you submited [sic] to court wrong my correspondent address , sending wrong address for defendant all the court paperwork I didn't receive

i hope you receive my hard copy by post already and now I attached defence in pdf

kind regards ,

Thanureka Jegajeevan"

37. Attached to that email was a document, described as the Respondent's defence, which in general terms denied the claims being made. It stated that Statutory Sick Pay (SSP) had been paid whilst the Claimant had been off sick, and that she had not been treated less favourably because of her pregnancy, and that any changes were for the benefit of the Claimant because she was unwell.
38. At the hearing, the Respondent continued to rely on the wrong address being used as the reason for not receiving the ET1. She maintained that the Claimant knew her home address, and that in particular she would have seen it on the OFSTED registration document displayed at the Bradwell Preschool.
39. She further stated that she was not permitted to receive post at the Hall, and relied on a message from the Hall Manager [R 17] to support this. The message did confirm that post should not be sent there, but also that lots of mail did come there for her.
40. The Claimant gave evidence that she would collect post that arrived and pass it on to the Respondent when she saw her.
41. I find that regardless of the Hall's preference, mail did arrive there for the Respondent.
42. The Respondent provided a photograph of a registration certificate dated 22 July 2019, on a noticeboard, which has her home address and the address of the preschool. The photograph is undated, although another document in the image – certificate of employer's liability insurance – has cover dates of September 2022 – 2023, so it cannot be a photograph taken at the time the Claimant was working

there. However, as it is a requirement for a certificate to be displayed, I accept that would have been the case during the Claimant's employment.

43. The Respondent also referred to correspondence from OFSTED to her home address [R14] her tax records [R6-13] which show her home address as the relevant business address. Although, as pointed out by the Claimant's representatives, these are not publicly available records.
44. The Claimant agreed that she was aware of where the Respondent lived as she had driven there before, but said she did not know the exact address. She acknowledged that she could have driven there to get the address, but that she was worried about the possibility of an interaction with the Respondent.
45. In relation to the emails sent to her account by the Claimant's representative, the Respondent denied seeing any of these. She gave evidence that the first time she was aware of the Tribunal claim and default judgment was when she received the Tribunal's email of 9 August regarding the remedy hearing the following day. She went on to say that upon checking her junk mail – which she did every 1 or 2 months, and on this occasion because she was on holiday – she found the emails from the Claimant's representative.

Law

Reconsideration

46. Rule 70 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

    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.

Extension of time to submit a response

47. In the case of *KwikSave Stores Ltd v Swain and ors 1997 ICR 49, EAT* the EAT held that, when exercising a discretion in respect of the time limit, a judge should always consider the following:

45.1 **The employer's explanation as to why an extension of time is required**

In the EAT's opinion, the more serious the delay, the more important it is that the employer provide a satisfactory and honest explanation. A judge is entitled to form a view as to the merits of such an explanation

45.2 **The balance of prejudice**

Would the employer, if its request for an extension of time were to be refused, suffer greater prejudice than the complainant would suffer if the extension of time were to be granted?

45.3 **The merits of the defence**

If the employer's defence is shown to have some merit in it, justice will often favour the granting of an extension of time — otherwise the employer might be held liable for a wrong which it had not committed.

48. In *Grant v Asda [2017] ICR D17*, confirming *Kwik Save*, the EAT held (at paragraph 18):

> *"In our judgment, it applies with equal force to the 2013 Rules. So, in exercising this discretion, tribunals must take account of all relevant factors, including the explanation or lack of explanation for the delay in presenting a response to the claim, the merits of the respondent's defence, the balance of prejudice each party would suffer should an extension be granted or refused, and must then reach a conclusion that is objectively justified on the grounds of reason and justice and, we add, that is consistent with the overriding objective set out in Rule 2 of the ET Rules."*

Submissions

49. Ms Evans-Jarvis made oral submissions for the Respondent. In summary, these were:

49.1 The correct address for the Respondent was her home address, which the Claimant knew/had access to. The inclusion of "c/o" at the start of the address in the ET1 supports this.

49.2 The business address was a community hall that was hired out

49.3 The hall did not permit post to be sent there for the Respondent, nor did they forward it on

49.4 There was purposefully no communication from the Claimant/her representatives to the Respondent/Hayley Gough between the date the claim was issued and the default judgment being received as they were aware the address was not the usual correspondence address

50. Ms Bilbao provided written submissions, which she expanded on orally, on behalf of the Claimant. In summary, these were:

50.1 The address provided for the Respondent on the ET1 was the business address, so correct for service

50.2 The Respondent's explanation about non-receipt of documents and emails was not credible

50.3 The defence does not show sufficient merit

50.4 The Claimant will be prejudiced by the case reverting back into the Tribunal system, because she will incur additional expense

Conclusions

51. In relation to the Respondent's explanation for not presenting a response in time, and for the delay until the remedy hearing, I conclude that this is plausible because of the circumstances surrounding the use of the Bradwell Memorial Hall.
52. I make no criticism of the Claimant or her representatives in relation to the contact details for the Respondent that they provided to the Tribunal for service of the claim. It is not that an incorrect address was used. I accept that correspondence likely did arrive for the Respondent at the Bradwell Church Hall, despite them specifying that it was not to be used in this way. However, there is sufficient doubt in my mind that the Respondent actually received the documents.
53. Whilst the Claimant may have passed on post to the Respondent when she worked there, there was no evidence before me that anyone did this once the Claimant left, or that there was an arrangement with the Hall for this.
54. The situation described by the Respondent regarding her emails is possible, in that they may have been received, but went to her junk folder. We will all at one time or another have experienced a situation where something is inexplicably sent to the junk/spam folder. I note that she never replied to any of the emails sent by the Claimant's representatives, even though she was copied in by them and Hayley Gough. I further accept that Hayley had left employment with the Respondent by the time the July 2022 emails were sent.
55. I accept the Respondent's evidence that she did properly receive the Tribunal's email on 9 August 2022, and she acted quickly thereafter as she sent an email to the Claimant's representative that same day. She then attended the hearing the next day. She could have chosen not to, but felt strongly enough about the Claimant's account of events and disputing it that he has right here. It appears reasonably likely, therefore, that she would have filled in the response form if she had received it.
56. The defence within the documents is certainly not full, it cannot be said that there is information within them regarding a possible defence to the majority of the claim. That is that payments if SSP were made – this issue could be readily resolved with reference to documentary evidence in the usual disclosure process – and in relation to discrimination, the Respondent clearly denies this. What she appears

to be saying is that there were changes - which may amount to different treatment – but that these were not less favourable. Whether treatment is less favourable or not, is an issue that would be explored at a merits hearing.

57. Although not detailed, and not expressed in legal terms - I note that at the time the defence documents were submitted, the Respondent was unrepresented – in my view the information does amount to a potentially arguable defence. There is sufficient merit within what has been provided so far.
58. 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.
59. The Claimant's representatives cite an additional financial burden, however the cost of bringing the claim at a full merits hearing will be the same as was expected when the claim was first brought. Of course, she has likely incurred additional expenses in relation to the hearings in August and November. If I allow the revocation and extension of time, and the Claimant ultimately succeeds, it is open to her to apply for costs in an attempt to recover these.
60. On the other side, is the financial burden to the Respondent if I refuse the applications and the case proceeds directly to remedy. The compensation claimed within the schedule of loss is not insignificant – the discrimination element alone exceeds £30,000. In my view this could be seen as a windfall without proper scrutiny of the claims. If the case proceeds to a full merits hearing, the Claimant may still receive compensation of some level. I conclude that the prejudice weighs greater on the Respondent.
61. Taking into account all relevant factors, and the overriding objective, in all the circumstances I now agree to revoke the default judgment made on 16 June 2022 and to permit the Respondent to defend the claims.

62. I grant an extension of time for the Respondent to lodge a Response on the prescribed ET3 form no later than 5pm on 26 January 2023. A copy of the Response must be sent to the Claimant.
63. The hearing listed for 27 January 2023 will now be converted to a telephone case management hearing listed for 2 hours in order to make case management orders, agree a List of Issues, list a final hearing and to deal with other outstanding matters.

Employment Judge Douse
Date: 18 January 2023

Sent to the parties on:
19 January 2023
For the Tribunal:

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