



EMPLOYMENT TRIBUNALS

Claimant: Mr T Wilks

Respondent: Simply Video Ltd

Heard at: Bristol by VHS **On:** 3 February 2023

Before: Employment Judge Christensen

Representation

Claimant represented himself

Respondent represented by Mr Deighton CEO of respondent

JUDGMENT ON APPLICATION TO RECONSIDER RULE 21 JUDGMENT

The judgment of the tribunal is that the respondent's application for reconsideration is refused.

REASONS

1. The respondent has sought a reconsideration of the judgment entered under Rule 21 dated 7 September 2022 which was sent to the parties on 14 September 2022 ("the Judgment"). The grounds are set out in its e-mail letter dated 22 September 2022.
2. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under Rule 21(2) judgment can be issued where no response has been presented within the time limit in Rule 16, or a response has been rejected and no application for reconsideration is outstanding, or the respondent has stated that no part of the claim is contested.

3. Under Rule 71 an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received within the relevant time limit.
4. Under Rule 5 the Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in the Rules or in any decision, whether or not (in the case of an extension) it has expired. The respondent has not made any application for an extension of time to present an ET3.
5. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.
6. The timeline of facts are these:
7. The respondent suffered the loss of a number of staff (including the claimant) in January/February 2022. On 11 March the respondent sent a 'letter before action' to the claimant (and others) setting out a number of potential breaches of contract including restrictive covenants and intellectual property rights. No proceedings have been issued to date.
8. 21 July 2022 the claimant issued a claim for unpaid wages and holiday pay in the Bristol Employment Tribunal. 2 August 2022 the tribunal sent a service letter to the parties; it informed the respondent that a response must be received by 30 August and that a judgment may be issued if the response is not submitted in time. It informed the respondent that it could seek an extension of time for its response. The service letter informed the parties that a hearing was listed on 13 January 2023. That letter was received by Mr Deighton.
9. 6 September the respondent was written to by the tribunal to confirm that it had not submitted a response and that a judgment may now be issued.
10. 7 September 2022 a Rule 21 Judgment is issued by Employment Judge Midgely relating to unauthorised deductions from the claimant's wages in the sum of £1,410.59. The judgment was sent to the parties on 14 September.
11. 12 September 2022 the respondent wrote to the tribunal confirming that it had not submitted a response, confirming receipt of the letter of 6 September and setting out that it wished to respond to the claim. An on line response was completed by the respondent on that date. It set out that the claimant was paid correctly through the payroll. It was not accompanied by an application to extend time. It appears that the late

response was not referred to a judge under Rule 18 and no notice of rejection was issued.

- 12.22 September 2022, and after receipt of the Rule 21 Judgment, the respondent wrote again to the tribunal. In that letter it submitted an application for reconsideration of the Rule 21 Judgment that had been sent on 14 September. That letter confirms (a) that the respondent had received the service letter setting out the deadline to respond of 31 August 2022 and (b) that it was due to 'exceptional circumstances' that the deadline was missed and that it wishes to defend the claim. It confirmed that an on line response had now been completed. The application indicated that the respondent could get its account department to set out that salaries were paid correctly but gave no details of how it would do that.
- 13.2 February 2023 the respondent sent the tribunal a time line of events between 3 January 2022 and 4 March 2022 during which time it was dealing the departure of many members of staff.
14. The grounds relied upon by the respondent are these:
15. That exceptional circumstances existed that explain its failure to respond to the claim on time and that it would be just and equitable to revoke the Rule 21 Judgment. These circumstances relate to the period January to March 2022 during which the respondent struggled to stay afloat with the departure of a number of key staff. By August/September 2022 the respondent continued to trade but with a reduced staff. Mr Deighton described the respondent as being in intensive care in August/September.
16. That the respondent has apologised for its default and that the Rule 21 Judgment was made without the full facts and was issued with speed only 5 days after the deadline for presenting the response. The respondent has set out that it had expected to be able to present all its evidence at the hearing in January 2023.
17. Under the previous Rules of Procedure the EAT gave guidance on the factors which tribunals should take into account when deciding whether to review a default judgment in Moroak t/a Blake Envelopes v Cromie [2005] IRLR 535. The EAT held that the test that a tribunal should apply when considering the exercise of its discretion on a review of a default judgment is what is just and equitable. In doing so, the EAT referred to the principles outlined in Kwik Save Stores Ltd v Swain and others [1997] ICR 49.
18. In the Kwik Save decision, the EAT 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". The case established that an Employment Judge should always consider the following three factors. First, the explanation supporting an application for an extension of time. The more serious the delay, the more important it is that the Employment Judge is satisfied that the explanation is honest and satisfactory. Secondly, the merits of the defence. Justice will often favour an extension being granted where the defence is shown to have some merit. Thirdly, the balance of prejudice. If the employer's request for an extension of time was refused, would it suffer greater prejudice than the employee would if the request was granted?

19. Applying these principles in this case:

20. Although there is no application made for an extension of time in which to present the defence submitted on line on 12 September 2022 I nonetheless have considered the arguments put forward by the respondent for its default to ensure that I balance all the factors. Although I accept that the period from January to March 2022 must have been stressful and chaotic for Mr Deighton and his company I have not been satisfied that by August/September 2022 that the circumstances were such that there is any proper reason not to have presented its response in time. The company continued to trade, albeit with a smaller workforce and it is clear that Mr Deighton received and read the service letter of 2 August. He has told me that he focused on the date of the hearing in January 2022 but the service letter makes it very clear that the respondent **must** send a response by 30 August 2022, that a judgment may be issued if it did not and further that it could apply for an extension of time.

21. I cannot properly judge the merits of the defence as insufficient details have been provided in the late response and in the application for reconsideration. In essence the respondent is doing nothing more than asserting that it can provide evidence to defend itself against the claim but does not give any further details.

22. I do not regard the balance of prejudice to be such that it would be just and equitable to revoke the Rule 21 judgment. Although I accept that the respondent is still adjusting to new trading conditions and pressures, after the loss of a number of key members of staff early last year, I also accept that the financial sum awarded is relatively modest. It appears that there is a greater dispute outstanding between the parties which may be the subject of litigation elsewhere but I regard the balance of prejudice to weigh in favour of the claimant in terms of the Rule 21 Judgment that has been issued.

23. Taking all of these factors into account and on balance, I refuse the application for a reconsideration.

Employment Judge Christensen
Date: 3 February 2023

Judgment sent to the Parties: 17 February 2023

FOR THE TRIBUNAL OFFICE