EMPLOYMENT TRIBUNALS

Claimant: Miss S Sherwin

Respondent: HJ Leisure Ltd

Heard at: Birmingham, by video (CVP)

On: 28 March 2023

Before: Employment Judge Coghlin KC

Appearances
For the claimant: In person
For the respondent: Mr Andrew Burgess (litigation consultant)

RESERVED JUDGMENT ON RECONSIDERATION

1. The respondent's applications dated 3 August 2022 for (1) an extension of time for seeking reconsideration of the tribunal's judgment of 17 June 2022; (2) for reconsideration of the judgment of 17 June 2022; (3) for an extension of time to present its response, and (4) for the setting aside of the tribunal's rule 21 order dated 16 May 2022, are rejected.

REASONS

Introduction

1. This is the respondent's application for a reconsideration of my judgment dated 17 June 2022, sent to the parties on 5 July 2022, by which I upheld the claimant's claims of wrongful dismissal and unauthorised deductions from wages brought by the claimant against the respondent, and connected applications.

2. The issues for determination today are as follows:

    a. whether the application for reconsideration was made in time, having regard to the 14 day time limit set out in rule 74(1) of the 2013 ET Rules, and if not whether time should be extended under rule 5; and

    b. whether:

        i. the judgment dated 17 June 2022 should be set aside;

        ii. an order dated 16 May 2022 made under rule 21 should be set aside; and

        iii. an extension of time for the presentation of a response should be granted.

The hearing today

3. The hearing today took place by video. The claimant represented herself and the respondent was represented by Mr Andrew Burgess, a litigation consultant. There was a bundle of documents running to 106 pages. Mr Alan Hough, a director of the respondent, provided a witness statement and gave oral evidence.

Background

4. The respondent runs the Horse & Jockey pub in Bentley Common, Atherstone. The claimant was employed there as head chef from July 2021 till 25 September 2021.

5. The claimant's ET1 was presented on 30 November 2021, following an Early Conciliation (EC) process which ran from 4 October 2021 and 15 November 2021. Mr Hough says that he received the EC Certificate by email on 15 November 2021 (he said in his witness statement that he received this on 15 October 2021 but confirmed in oral evidence that this was a typographical error) but did not find it in his mailbox till January 2022.

6. Once the ET1 had been submitted, the respondent had until 10 March 2022 in which to present its response to it. However no response was submitted by that date.

7. On 6 May 2022 the tribunal ordered that, no response having been received from the respondent, the respondent may only participate in any hearing to the extent permitted by the Employment Judge who hears the case.

8. Various items of correspondence were sent by the tribunal to the respondent, including the notice of hearing, but the respondent did not respond to any of them. Correspondence was posted to the respondent on at least four occasions in advance of the hearing on 17 June 2022:

    a. on 10 February 2022: a case management order, a combined notice of claim and notice of hearing, and a copy of the ET1;

    b. on 6 May 2022: a letter written under rule 21 of the ET Rules informing the respondent that, having failed to respond to the claim, "You are entitled to receive notice of any hearing but you may only participate in any hearing to the extent permitted by the Employment Judge who hears the case," and a copy of a letter addressed to the claimant;

c. on 30 May 2022: three items of correspondence dated 26 May 2022, namely a notice of hearing for 17 June 2022, a copy of a letter to the claimant about amendment, and joining instructions for the video hearing on 17 June 2022;

d. on 15 June 2022: a copy of an email to the claimant which summarised the history of the case, set out directions, and referred to the hearing listed for 17 June 2022.

9. The address to which these items of correspondence was sent was, in each case, "H&J Leisure Ltd, Horse & Jockey, Bentley Common, Atherstone, Warwickshire, CV9 2HL". This is the respondent's registered address on Companies House, and I shall adopt the shorthand used by Mr Hough who referred to this address as the "registered Companies House address".

10. The respondent pointed out to me today that the full address of the Horse & Jockey pub (and of the respondent company) is Horse & Jockey, ***Coleshill Road***, Bentley Common, Atherstone, Warwickshire, CV9 2HL (emphasis added). I shall return to this point later in these reasons.

11. The hearing proceeded before me, in the absence of the respondent, on 17 June 2022. By a judgment issued the same day I upheld the claimant's claim of wrongful dismissal and unauthorised deductions from wages, and made an award in the total sum of £6,305.46.

12. The judgment was sent to the parties on 5 July 2022. It was posted to the respondent at the registered Companies House address. This was the fifth time correspondence was sent to the respondent by the tribunal.

13. On 19 July 2022 Peninsula, an employment law consultancy firm, saw the judgment published on the CourtServe website. They contacted the respondent that day, presumably for the purpose of offering their services in relation to a potential appeal or reconsideration application. The respondent instructed

Peninsula the same day. All of this was confirmed by Peninsula in an email to the tribunal dated 1 November 2022.

14. By email dated 3 August 2022 Peninsula applied on the respondent's behalf for a reconsideration of the judgment dated 17 June 2022 and for a retrospective extension of time for the presentation of its response. The explanation offered for not having responded to the claim was that the respondent did not receive a copy of the claim form, or of any other correspondence in relation to the claim following the conclusion of early conciliation, and that the respondent only became aware of the existence of the litigation when Peninsula contacted the respondent. Among other things the application email said this:

    "In considering why the Respondent did not receive a copy of the Claimants claim, the Respondent considers that this is likely due to a problem with the post.

    The Respondent's registered address is Horse & Jockey, Coleshill Road, Bentley, CV9 2HL. The Respondent's address was updated on Companies House on 8 September 2020. Please find attached. The Respondent confirms they have not been in receipt of any Tribunal papers for the above matter. This has meant that the Respondent has no knowledge of the claim to be able to undertake any preparations to respond whatsoever."

15. Attached to the application was a Form AD01 from Companies House confirming the respondent's address as set out at paragraph **Error! Reference source not found.**.

16. Fifteen days therefore passed after the respondent had a copy of the judgment and instructed Peninsula before the reconsideration application was made. No explanation is offered for this in Mr Hough's evidence other than that "detailed instructions were obtained, and careful consideration was given in respect of the application". In submissions Mr Burgess told me that the matter had come out of the blue; the respondent had considered the matter closed; the respondent was then scrambling around to figure out what had happened and why the proceedings had been missed; and the individual at Peninsula who dealt with the matter was in

a period of supervision, which caused slight delays of a day or two while her work was checked by a colleague.

17. By an order dated 5 September 2022 and sent to the parties on 6 September 2022 I decided that the application for reconsideration should not be rejected under rule 72(1) of the ET Rules 2013. I explained:

"I cannot say that [the reconsideration application] has no reasonable prospect of success. There are questions of fact which would need to be resolved on the basis of witness evidence. My provisional view is that this will need to be done via oral evidence given at a hearing. In particular, the tribunal will need to scrutinise the explanation put forward by the respondent, namely that it did not receive any of the various items of correspondence which the file suggests were sent to the respondent both before and after the judgment."

18. In the same order I gave directions for (among other things) the provision and exchange of correspondence and witness evidence. I also directed the respondent to provide draft grounds of resistance, which it did on 24 October 2022.

Did the respondent receive correspondence regarding the claim?

19. There is a key factual issue at the heart of this application, namely whether the respondent received no correspondence regarding the claim such that it was unaware of the existence of the litigation, of the hearing on 17 June 2022, and (until 19 July 2022) of the judgment which was sent to the parties on 5 July 2022.

20. The respondent's position, expressed in correspondence and by Mr Hough in evidence, is that the respondent received none of the 5 items of correspondence which were sent to it in the post by the tribunal. The respondent says that if it had received any of them, it would have taken steps to participate in the proceedings. The respondent disputes the claimant's claims and would have wished to defend itself had it been aware of the proceedings.

21. Mr Hough did not suggest that there is any reason to think that if post was delivered to the respondent's pub it might not have reached him.

22. Mr Hough also said that he believed at the time that any dispute had been resolved through the EC process and through subsequent without prejudice exchanges. I did not explore this, given that such discussions were without prejudice and (in the case of discussions via ACAS) due to the restriction on admissibility of such evidence under section 18(7) of the Employment Tribunals Act 1996. I note that the respondent does not, in its draft grounds of resistance, advance a case that the claims were in fact settled. However I am prepared to assume for present purposes that Mr Hough did believe this at the relevant time.

23. As was fairly pointed out by Mr Burgess, the task today facing the respondent is an unenviable one, of having in effect to prove a negative by showing that it did not receive the correspondence in question.

24. The particular difficulty facing the respondent however is in showing that it received none of five separate items of correspondence sent to it over the course of a number of months by the tribunal. Even allowing for the possibility (as I do) that from time to time items of correspondence are not delivered, for this to happen on five consecutive occasions is inherently improbable.

25. In oral evidence, Mr Hough said that the respondent <u>never</u> receives correspondence which is addressed to the registered Companies House address which the tribunal used, namely its address without "Coleshill Road" included. He gave the example of council tax bills and so forth which had not been received. Mr Hough's position in oral evidence was not that post sent to that address is sometimes not delivered, but that it never is. Mr Hough however said that post addressed to the respondent at its registered Companies House address would occasionally be delivered to neighbouring properties.

26. On balance, I did not accept this account, for a number of reasons.

27. First, the address used by the tribunal (and registered at Companies House) accurately sets out:

    a. the name of the premises – premises which by their very nature (ie a pub) are likely to be easily recognisable and known to the local postmen and postwomen;

    b. the name of the village where the pub is located; and

    c. importantly, its postcode. I take judicial notice of the fact that postcodes cover a limited number of properties and are a primary and reliable tool used by the postal services in delivering post.

28. Second, it is inherently improbable that the postal services would occasionally deliver post, addressed to the respondent's registered Companies House address, to the pub's neighbours but never to the pub itself.

29. Third, the account given by Mr Hough in oral evidence – that post sent to the registered Companies House address was *never* received - had never been articulated by the respondent in these proceedings before, an omission which I found particularly striking. If the respondent was aware of as fundamental an issue with its receipt of post as that, I would have expected it to be placed front-and-centre in the respondent's explanation. Peninsula's application of 3 August 2022, which I was told was written with particular care to check its accuracy, offered a suggestion that there may have been "a problem with the post" but did not say that post sent to the respondent's registered Companies House address was *never* received. Nor was that suggestion made in correspondence subsequently. Indeed Mr Hough did not say it in his written witness statement. There, on the contrary, he said that "our post was received to our Companies House registered address" (para 7). He told me in oral evidence that this was an error, an error which he could not explain. He also said that "*on occasions*, post has historically not turned up to the registered address" (para 9) (emphasis added). He was unable to explain why, if post sent to that address was *never* received, he had said in his statement that this happened only "on occasions".

30. Mr Hough said in oral evidence that the respondents had sought to change the registered address on Companies House but that a code required to effect this change had itself been sent to the address without “Coleshill Road” included and so had not been received by the respondent. No documentary evidence (such as correspondence with the company’s accountants or the like) was produced to substantiate this.

31. Mr Hough also said that there were two other pubs called “Horse & Jockey” not far from the respondent’s pub. Their postcodes are CV7 8AA and CV13 6LY. However the proximity of these two other pubs was of no real relevance, since Mr Hough told me in evidence that so far as he is aware no correspondence sent to the registered Companies House address was ever mis-delivered to one of those pubs, and I see there is no reason to think that it would be, given that those pubs are in different towns/villages from the respondent’s pub and, importantly, in entirely different postcodes.

32. Mr Hough went on to add detail in a way which did not assist his overall credibility. In his written evidence he said that these two other Horse & Jockey pubs were within 8 miles of the respondent’s pub. In his oral evidence he began by saying – twice - that they were both within 2 miles of the respondent’s pub, before going on to say, somewhat later in his evidence, that he had checked on google maps and that one of them was 5.5 miles from the respondent’s pub. He was unable to explain the inconsistencies within his oral evidence, or between his oral evidence and his witness statement. I was forced to conclude that when he referred at the start of his oral evidence to a distance of 2 miles, that was a deliberate under-statement of the distance, designed to create the impression that the pubs were near-neighbours and to bolster the suggestion that post might have been mis-delivered there.

33. Mr Burgess points out that since 19 July 2022 the respondent has shown its keenness to dispute the claimant’s claim, and submits that if the respondent had known of the proceedings earlier it would have engaged in those proceedings earlier. There is only limited force in this suggestion. It is far from unheard-of that

respondents (or defendants) choose not to participate in litigation, but subsequently seek to challenge a judgment which has been entered against them.

34. On balance, I do not accept the account given by Mr Hough. In my judgment it is likelier than not that the tribunal's communications were indeed delivered to the respondent, and that the respondent was aware of the existence of the proceedings but for whatever reason chose not to participate.

The law

35. Rules 16(1) and 20 and 21 of the ET Rules 2013 provide:

Response

16.—(1) The response shall be on a prescribed form and presented to the tribunal office within 28 days of the date that the copy of the claim form was sent by the Tribunal.

Applications for extension of time for presenting response

20.—(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 an extension, any judgment issued under rule 21 shall be set aside.

Effect of non-presentation or rejection of response, or case not contested

21.—(1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.

(2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), 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 accordingly. Otherwise, a hearing shall be fixed before a Judge alone.

(3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.

36. Rules 70 to 72 of the ET Rules 2013 provide as follows:

Reconsideration of Judgments

Principles

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.

Application

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.

Process

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.

37. The last day for compliance with rule 71 in this case was therefore 19 July 2023. Mr Burgess of course accepts that this deadline was not complied with.

38. However the time limit under rule 71 may be extended under rule 5 which provides:

The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.

39. Mr Burgess referred me to the case of **Dean-Verity v Khan Solicitors Limited** EA-2020-000398-OO, a decision of HHJ Shanks sitting in the EAT, dealing with extensions of time in the context of reconsideration applications. That case illustrates the need to consider properly the prejudice to the claimant. HHJ Shanks observed:

"the delay and the lack of good reason for it are absolutely central to the question whether time should be extended but the prejudice to the claimant of not extending time needs to be weighed properly in the balance and cannot be discounted beforehand because it is also caused by the claimant's delay."

40. As for the principles to be applied in deciding an application for an extension of time for presenting a response, Mr Burgess referred me to **Kwik Save Stores Ltd v Swain** [1997] ICR 49. In that case Mummery J identified some discretionary factors which are likely to be relevant to the exercise of the tribunal's discretion. He held that:

"The explanation for the delay which has necessitated the application for an extension is always an important factor in the exercise of the discretion. An applicant for an extension of time should explain why he has not complied with the time limits. The tribunal is entitled to take into account the nature of the explanation and to form a view about it. The tribunal may form the view that it is a case of procedural abuse, questionable tactics, even, in some cases, intentional default. In other cases it may form the view that the delay is the result of a genuine misunderstanding or an accidental or understandable oversight. In each case it is for the tribunal to decide what weight to give to this factor in the exercise of the discretion. In general, the more serious the delay, the more important it is for an applicant for an extension of time to provide a satisfactory explanation which is full, as well as honest.

In some cases, the explanation, or lack of it, may be a decisive factor in the exercise of the discretion, but it is important to note that it is not the only factor to be considered. 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. An important part of exercising this discretion is to ask these questions: what prejudice will the applicant for an extension of time suffer if the extension is refused? What prejudice will the other party suffer if the extension is granted? If the likely prejudice to the applicant for an extension outweighs the likely prejudice to the other party, then that is a factor in favour in granting the extension of time, but it is not always decisive. There may be countervailing factors. It is this process of judgment that often renders the exercise of a discretion more difficult than the process of finding facts in dispute and applying to them a rule of law not tempered by discretion.

It is well established that another factor to be taken into account in deciding whether to grant an extension of time is what may be called the merits factor identified by Sir Thomas Bingham M.R. in Costellow v. Somerset County Council [1993] 1 W.L.R. 256, 263:

"a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate."

Thus, if a defence is shown to have some merit in it, justice will often favour the granting of an extension of time, since otherwise there will never be a full hearing of the claim on the merits. If no extension of time is granted for entering a notice of appearance, the industrial tribunal will only hear one side of the case. It will decide it without hearing the other side. The result may be that an applicant wins a case and obtains remedies to which he would not be entitled if the other side had been heard. The respondent may be held liable for a wrong which he has not committed. This does not mean that a party has a right to an extension of time on the basis that, if he is not granted one, he will be unjustly denied a hearing. The applicant for an extension has only a reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner. That will involve some consideration of the merits of his case.”

Analysis and conclusions

41. I refuse the respondent's applications for the following reasons.

42. I begin with the merits of the reconsideration application itself.

43. I have given consideration to the merits of the defence put forward by the respondent in its draft grounds of resistance. Of course, that defence cannot be tested in any detail at a hearing such as this. I note that the respondent denies the claimant's wages claim on the basis that she was paid for all the hours she worked, and it denies the claimant's wrongful dismissal claim on the basis that the claimant was guilty of a repudiatory breach of contract. It cannot be said that the defence is either particularly powerful or particularly weak. I bear in mind that the effect of refusing this application for reconsideration will be to prevent the respondent from advancing a defence which cannot, on paper at least, be regarded as unmeritorious, and that the respondent will continue to face a judgment in favour of the claimant in the amount of over £6,000 which is a substantial sum. However that is only one factor in the analysis.

44. The respondents have in my judgment failed to give a full or satisfactory explanation for their failure to respond to the claim in a timely manner or to participate in proceedings. I have already set out above my reasons for rejecting Mr Hough's evidence on the question of the receipt of the tribunal's correspondence.

45. The respondent's failure to participate in proceedings despite, on my findings, having notice of the proceedings and of the hearing on 17 June 2022, is a powerful factor pointing towards it not being in the interests of justice to set aside, revoke or vary the judgment of 17 June.

46. I bear in mind the important public interest in the finality of litigation. This too is a strong reason not to interfere with my judgment of 17 June.

47. There is a linked question of the timing of the application for reconsideration. Here, too, I consider that the respondent has failed to provide a full or satisfactory reason for the delay. Given my rejection of Mr Hough's evidence, I do not accept that the respondent was unaware either of the tribunal proceedings in the run-up to the hearing on 17 June 2022 or of the tribunal's judgment which was sent to it on 5 July 2022. Then there is the further 15-day delay between 19 July 2022, when the respondent saw the judgment and instructed Peninsula on 19 July 2022, before the respondent made its application for reconsideration. That is a substantial period of delay bearing in mind that it is longer than the usual primary time limit of 14 days running from the date when the judgment is sent to the parties. I find the reasons offered for that further period of delay, throughout which the respondent was professionally advised, to be inadequate and unsatisfactory. With the assistance of specialist employment law advisors the respondent must be taken to have been aware of the need for urgency in making any application for a reconsideration. No detailed factual investigation was necessary.

48. In the circumstances I reject the application for an extension of time under rule 5 to present the reconsideration application. Had I extended time, I would have rejected the application for reconsideration on its merits.

49. In light of my findings above, I refuse the claimant's application for an extension of time to present its response and for the consequential setting aside of the tribunal's rule 21 order dated 16 May 2022.

50. In reaching these conclusions I have had regard to the overriding objective. Had I been satisfied (on the balance of probabilities) that the respondent was, as it claims, unaware of the proceedings, there would have been force in the respondent's submission that acceding to its applications would have enabled the parties to be placed on an equal footing, to deal with matters flexibly, and overall to deal with the case justly, although I would still have been troubled by the failure to act more promptly after 19 July 2022. However the respondent has not satisfied me of that. In light of this, it is in my view not in the interests of justice, nor would it further the overriding objective, to set aside, vary or revoke the judgment which the claimant has properly obtained.

51. Accordingly, my judgment dated 17 June 2022 stands.

Employment Judge Coghlin KC
Dated: 30 March 2022