EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104568/2022

Employment Judge B Campbell

Ms A McKnight	**Claimant**
F47 Limited	**First Respondent**
WBI Limited	**Second Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL FOLLOWING RECONSIDERATION

The respondents' application for reconsideration of the tribunal's judgment dated 14 February 2023 is refused.

REASONS

Background

1. The claim was originally presented to the employment tribunal on 19 August 2022. Before that, the claimant had initiated ACAS Early Conciliation involving both respondents on 14 June 2022 and Early Conciliation numbers and certificates were issued on 22 July 2022.

2. The claimant was unsure which of the respondents was her employer, and so raised her claim against both.

3. The claim form and a notice of preliminary hearing were sent to both respondents in the usual way by post on 24 August 2022. Both have the same registered office, namely Clarence House, 7 Hood Street, Greenock PA15 1YQ and the correspondence was sent there. Response forms had to be lodged by 21 September 2022. The preliminary hearing was scheduled for 18 October 2022.

4. No responses were submitted to the tribunal and the respondents did not contact the tribunal office in any other way.

5. The preliminary hearing was converted to a full hearing at which the claim was to be heard undefended. Owing to unavailability of the claimant's solicitor who was on leave, it was then postponed.

6. Correspondence from the tribunal confirming both of those developments – the conversion of the preliminary hearing and its subsequent postponement - was sent to the respondents' registered address on 3 and 7 October 2022 respectively.

7. A case management preliminary hearing was arranged for 1 November 2022. Notice of the hearing was sent to the respondents at their registered address on 12 October 2022. The notice indicated that the full hearing would be listed within the period January to March 2023.

8. The preliminary hearing proceeded on 1 November 2022 by telephone. The respondents did not join in person or through a representative. A copy of the judge's note of the hearing was issued to the claimant and the first respondent (although not, it appears, the second respondent) by letter to its registered address, dated 2 November 2022. It indicates among other things that the claimant's solicitor stated he:

"…had been in touch with the respondents' HR department, and they had told him that the claimant was employed by the first respondent. However, the claimant's payslips disclose both names, and accordingly, while the claims are undefended, there remains a lack of clarity as to the precise identity of the

correct respondent in this case, as it is not clear which of the respondents was the claimant's employer."

9. Following the preliminary hearing a full hearing was fixed for 9 and 10 January 2023 at the Glasgow Employment Tribunal centre. The notice of hearing was sent to both respondents on 5 December 2022 at their registered address. The respondents were also copied in on a letter with the same date from the tribunal to the claimant's solicitor, directing him to provide a hearing bundle by 19 December 2022 and to bring sufficient copies of the bundle to the hearing itself. The claimant's solicitor complied, although he did not send a copy of the bundle to the respondents.

10. It had been agreed at the preliminary hearing on 1 November 2022 that the claimant's evidence in chief would be provided by way of a written witness statement, which would be submitted to the tribunal no less than 7 days before the first day of the full hearing. On 23 December 2022 the claimant's solicitor applied for an extension of that deadline until 4 January 2023 on the basis that holidays in between were anticipated to prevent the claimant's necessary instructions on the statement from being obtained. On 30 December 2022 a letter was sent to the claimant's solicitor confirming that a judge had granted his application. The letter was copied to the first respondent, although not the second, at its registered address.

11. The full hearing of the claim took place on 9 and 10 January 2023 as scheduled and after deliberation the tribunal issued a written judgment with reasons dated 14 February 2023. This was sent to the respondents on 15 February 2023 by post. The address used for each respondent was their registered address. It was also sent to the claimant's solicitor by both post and email on that day.

12. On 8 March 2023 a Ms Lynsey Penman emailed the Glasgow Employment Tribunal office to say that she dealt with HR for both respondents and had received the judgment on 6 March 2023, followed by a request by the claimant's solicitor for payment of the award granted in the judgment the

following day. It was said that this was the first that 'we', taken to be both respondents, were aware of the hearing having taken place.

13. The email also said that until that point the respondents were unaware that the tribunal had progressed, they had not received a response form to complete and return, and were unable to defend the claim. Ms Penman said that she had received emails from ACAS about the claimant in July 2022 and then Early Conciliation certificates, but nothing further since then.

14. On 10 March 2023 Ms Forsyth, a solicitor having been instructed by both respondents, emailed the tribunal office and attached an urgent request for reconsideration of the judgment under rule 71 of the Employment Tribunals (Constitution and Rules of Procedure) 2013 (the 'ET rules') – referred to below as the 'application'.

15. In summary, the grounds were:

    a. Neither respondent received notification of the claim, or any further correspondence about it, until the judgment itself was received by post on 6 March 2023;

    b. They were consequently unaware of any of the hearings and were denied the opportunity to state their position to the tribunal;

    c. The tribunal's finding that the second respondent was the claimant's employer was denied, and this would have been stated had it been able to participate in the claim;

    d. The respondents were unaware of any problems with them receiving items of mail; and

    e. It would not therefore be in the interests of justice to allow the judgment to stand.

16. On initially reviewing the application I did not consider there to be 'no reasonable prospect of the original decision being varied or revoked' under rule 72(1). Subject to fuller development, and any submissions in reply by the claimant, the respondents had put forward a stateable case. This was my

preliminary assessment of the application both in relation to its merits and any question of whether it had been submitted out of time, and if so, the reasons for that and whether time should be extended to allow it to be determined.

17. I therefore did not refuse the application at that time and asked for the claimant's preliminary view on the application, and sought confirmation from both parties of whether they were content for the application to be determined without the need for a hearing. Both parties confirmed they agreed to the application being determined without a hearing. Mr McKinlay for the claimant provided a note summarising the claimant's reasons for resisting the application on 20 March 2023.

18. In summary, the basis for the claimant's objection to the application were:

    a. As the judgment was dated 14 February 2023 and sent to the parties the following day, and the application was made on 10 March, it was nine days late according to the 14-day time limit in rule 71;

    b. Further, no application had been made to vary that time limit (under rule 5);

    c. It was denied that the respondents were unaware of the claim. It was said that they participated in Early Conciliation via ACAS and there were further settlement discussions involving ACAS in their capacity as conciliators after the claim had been presented to the tribunal;

    d. It was 'doubtful' that the respondents had received no correspondence from the tribunal until the judgment, particularly as the address used on every document was the same;

    e. Under rule 90(a) of the ET rules there is a presumption that any piece of correspondence sent by post will have been delivered within the usual timescale for that process. That presumption would be for the respondents to rebut with evidence, or otherwise it should operate in favour of a conclusion that any items sent by post were delivered;

f. It would not be in the interests of justice to grant the application. Noting in particular the emotional toll on the claimant by the tribunal process and the additional financial cost she would incur were the claim to be reset to the beginning of the process; and

g. There would be significant delay in the claimant receiving closure of the matter. This would prejudice her and run contrary to the principle of finality in litigation.

19. I agreed to consider the application on the basis of written submissions and gave the parties an opportunity to provide anything further in support of their positions. I was content that the overriding objective under rule 2 was best served by dispensing with the need for a hearing, taking into account in particular the desire to save expense and further delay, and to deal with issues proportionately. Both parties were legally represented and able to set out their positions in writing in a way which did justice to them.

20. Ms Forsyth provided a note of submissions on 7 April 2023. A colleague of Mr McKinlay, Mr Dorrian, provided a note of submissions on 14 April 2023.

21. In addition to the points made in the application, Ms Forsyth's note of 7 April covered the following:

a. Had they been able to participate in the claim the respondents would have given evidence to the effect that the second respondent was not the claimant's employer, as had been found by the tribunal, and that instead the first respondent was her employer;

b. The complaints of unlawful discrimination and unfair dismissal would have been defended on their merits in any event;

c. The first and second respondents are separate legal entities and should be treated as such;

d. It was not possible to make the application within the 14-day period prescribed by rule 71 as the judgment was received by the respondents after that deadline had elapsed;

e. The respondents had discussions with ACAS about 'a potential claim' but were not made aware that claim had been lodged with the tribunal, and could not have known that;

f. The respondents received no correspondence or communication from the claimant's solicitor or the tribunal (until receipt of the judgment);

g. It was assumed that no further correspondence was sent to the respondents after the claim was issued to them and the deadline for lodging responses had passed without any responses being lodged; and

h. The respondents cannot prove non-receipt of correspondence and so cannot produce evidence to rebut the presumption in rule 90(a).

22. Mr Dorrian's note added the following to Mr McKinlay's initial submissions:

a. The claimant's solicitors had sent a copy of the judgment to the respondents on 2 March 2023 by recorded delivery post together with a letter of request for payment by post and email to the first respondent on that day. The email was sent to Ms Penman's email account 'lynsey@wbigroup.co.uk' which the address she had given at the ACAS Early Conciliation stage;

b. Accordingly it is to be assumed that the email was received by Ms Penman on 2 March 2023. If so there was a delay in making the application of 8 days. It was out of time;

c. Further, the reference to 'WBI' in Ms Penman's email address suggested that the second respondent was her employer and it would be 'bewildering' to the claimant were Ms Penman to argue that she the claimant was an employee of the first respondent;

d. The merits of the application itself should be considered under reference to the judgment of the Employment Appeal Tribunal in ***TM White and Sons Limited v White UK/EAT/0022-23/21/VP;***

e. The respondents have not displaced the presumption of regular delivery created under rule 90(a). Their address has remained the same at all material times and was used on the Early Conciliation certificates provided by ACAS;

f. The claimant provided the address of her workplace separate to the respondents' registered office in her claim form, and assumed that the claim form had also been sent there;

g. It was likely that each piece of correspondence sent by the tribunal office to the respondents at their registered office address was received there – a total of eight occasions. Alternatively, on the balance of probability at least one item would have been successfully delivered. That would have been enough to reasonably prompt the respondents to contact the tribunal office;

h. No statement was provided by Ms Penman as to her evidence on the matter of how the respondents normally receive correspondence and what happened in relation to the correspondence issued in this claim;

i. It was not in the interests of justice to decide the application in the respondents' favour on its merits. This would conflict with the principle of finality of judgments. The respondents are in effect seeking a 'second bite at the cherry'. Reference was made to the cases of ***Ebury Partners UK Limited v Mr M Acton David [2023] EAT 40*** and ***Flint v Eastern Electricity Board [1975] ICR 395***;

j. The respondents have not explained adequately how it would be in the interests of justice for the application to be granted. They do not go beyond the point that they did not have notice of the claim. The tribunal has already fulfilled its role in deciding the claim;

k. The claimant herself complied with all orders and directions of the tribunal;

l. The tribunal satisfied the overriding objective in dealing with the claim as it did; and

m. The balance of fairness should favour the judgment being undisturbed.

Discussion and decision

23. I took note of the judgment of HHJ Tayler in ***T W White & Sons Limited v Ms K White UKEAT/0022/21*** and ***UKEAT/0023/21*** and in particular paragraph 49 which summarised the sequential approach to be taken in dealing with an application for reconsideration.

24. I considered the following to be relevant to the determination of the application:

a. As it was not made within the time period prescribed by rule 71 of the ET rules, whether it was appropriate to extend time under rule 5 so that it could be considered on its merits;

b. If the application was to be considered on its merits, was it 'necessary in the interests of justice' per rule 70 that it be granted; and

c. If the application were granted, what further orders or directions should be made for the management of the claim.

25. I noted that the respondents were seeking that the entire judgment dated 14 February 2023 be set aside and that the claim proceed anew by being served again on them so that they could defend it. In essence the whole of the procedural history of the claim would be erased.

Time bar question

26. The judgment was posted out to the parties on 15 February 2023. The respondents say they did not receive it until Monday 6 March 2023. It was received in the post. They suggest that the claimant may have received the judgment around the same time given that her solicitor's letter requesting payment was received on 7 March 2023, although they do not say when it was dated. The claimant's solicitor stated in his note dated 14 April 2023 that the letter was emailed to Ms Penman and posted on 2 March 2023 – a Thursday. Neither a copy of the email nor one of the letter was produced.

27. On the information available I consider the most likely sequence of events to be that the claimant's solicitor sent the copy judgment and payment request letter by post on Thursday 2 March 2023 and that this was received by Ms Penman on Monday 6 March 2023. He also emailed those documents to Ms Penman on 2 March 2023 using the email address the claimant had nominated at the Early Conciliation stage and which Ms Penman had confirmed was correct.

28. It is possible that this email did not reach Ms Penman on 2 March, or at all, for example if it had been held up because it contained attachments or because the sender was unknown. I consider it more probable than not that the email was safely received by Ms Penman on 2 March 2023 but in any event this only gave her one further full working day to respond to it as compared with receipt of the hard copy on the following Monday.

29. On any interpretation of the information available, it was not possible to say that the respondents had received the judgment within 14 days of its issue date and therefore had the opportunity to apply for reconsideration within time. The likelihood is that they did not. Therefore the balance of fairness is in favour of extending time subject to them demonstrating that they did not delay unduly after receiving the judgment in submitting their application.

30. The judgment was received on Thursday 2 March at the earliest and the application was made on Friday 10 March. Given that the judgment would have to be read, its findings and consequences considered, and then legal advice obtained before the application could be drafted in the form in which it was submitted, I do not consider the time taken to be excessive. I believed it to be in the interests of justice for the application to be decided on its merits given the potential consequences for both respondents as weighed against the relatively short period of time in which they had to respond, given that they had no realistic opportunity of applying within the normal timescale.

The substantive application

31. I turned to consider the respondents' application on its merits. There is no onus on either party in terms of whether it is in the interests of justice that a tribunal decision be varied revoked under rule 71.

32. It is self-evident that for a party to be denied the opportunity to defend a claim through no fault of their own would be unjust. This is particularly so if the party would seek to challenge the evidence of its opponent, and even more so where the party's argument is that it is not a legal person which could be liable at all.

33. The gravamen of the respondents' application is that they were in such a position. It is said that the second respondent was not even legally capable of being liable for any of the claimant's complaints, and the first respondent would have mounted a legitimate defence of them.

34. I gave consideration to the parties' submissions as well as the additional facts available from the tribunal file, and I considered the overriding objective of employment tribunals set out in rule 2 of the ET rules. My decision was not to grant the application for the following reasons.

Whether the respondents had notice of the claim

35. The respondents were sent a number of pieces of correspondence by the tribunal office in connection with the claim. Eight items were sent out in total, although it is noted that on two of those occasions the correspondence was sent to the first respondent only. Nevertheless, whilst the respondents are, as Ms Forsyth correctly points out, separate legal entities, they shared a registered office and were both represented by Ms Penman. In reality, the second respondent had an equal opportunity to become aware of the claim and its progress at various stages to the first respondent.

36. Notably, the correspondence was sent to the same postal address each time, which was also the address used when the judgment was sent out, and which the respondents received. The respondents' position was that they were aware of no problems receiving mail properly addressed to them.

37. Whilst it is credible for a respondent to hold the position that merely by participating in Early Conciliation they would not be expected to know an employment tribunal claim had subsequently been raised, here the claimant took part in settlement negotiations via ACAS after the claim was raised. It is unlikely that any such discussions would have taken place without any ACAS Conciliator involved making reference to the claim itself.

38. I therefore concluded that most likely the respondents would have received at least one of the eight pieces of correspondence issued, and that there was no good reason why they would not have received all of them. The nature of each item was such that it would readily convey that the claim had been formally raised and was progressing towards a full hearing. I also concluded that there would have been reference to the claim by ACAS in the contact that they made with the respondents following it being raised.

39. The wording of rule 90(a) creates a presumption of effective service of documents, which is determinative 'unless the contrary is proved'. It may have been possible to accept that the respondents did not receive one document which was sent to them, but not to receive eight over a period of five months and have no explanation as to why is insufficient to discharge the onus that rule 90(a) imposes.

40. It follows that the respondents' key argument, namely that they were unfairly denied the opportunity to defend the claim, is not accepted.

The consequences for the respondents should the application not be granted

41. I considered the consequences for the respondents in not now having the opportunity to defend the claims. I recognise that there is a risk that the wrong respondent was found liable to the claimant for the complaints she raised, and that they could have been successfully defended in any event. These matters initially mitigate in favour of the granting of the application.

42. However, when weighed against the evidence in support of the position that the respondents had adequate opportunity to defend the claim (or at least

apply to be heard before it was determined) but did not take it, this is insufficient to reach the threshold of the interests of justice being met.

43. Although it would be possible that either respondent would bring further evidence – documentary or oral – to the hearing which would help clarify the issues, there was a sufficient body of evidence available at the original hearing on which to base the findings of fact and legal conclusions which the tribunal made. The respondents did not specify any new evidence in support of their contrary position.

Finality of litigation

44. Also of relevance was the 'finality of litigation' issue. The principle was reinforced as recently as the beginning of this year by the EAT in ***Ebury Partners UK Limited v Mr M Acton David [2023] EAT 40***. Tribunals are urged to make decisions which offer a party a second bite at the cherry 'with caution'. In Ebury it was the tribunal's own decision to reconsider its previous judgment in order to consider arguments not led by the parties that drew criticism. Nevertheless the wider principle was that if parties had a fair opportunity to lead their respective cases, the process should not be reopened after a final judgment had been reached unless there was something akin to a 'procedural mishap'. I did not consider there had been a procedural mishap in this claim, and in any event not one which prevented the respondents from asking to have their position considered before a judgment was reached.

45. The claimant raised her claim in August 2022 and received a judgment in February of 2023. In the process, as the tribunal found, she had been emotionally affected by her dismissal and the actions of her managers leading up to it. It was visibly upsetting to her to recount that in the hearing. She would have to repeat that process and would not be able to achieve closure of the matter for a number of further months from this point. To allow the respondents to reset the process to the start would have consequences, in terms of both the claimant's emotional state and in taking further time and

tribunal resources. The claimant herself would be put to further expense without there being any guarantee of recovery.

46. The balance is therefore in the claimant's favour and against the granting of the application on this issue, and as a whole. Accordingly, there is no need to make further directions as the original judgment stands.

Employment Judge: **B Campbell**
Date of Judgment: **12 May 2023**
Entered in register: **16 May 2023**
and copied to parties