



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr Elliot Ward

AND

Respondent
VG Performance Cars Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HEARD REMOTELY BY VHS ON 16 June 2023

EMPLOYMENT JUDGE N J Roper

Representation:

For the Claimant: In person

For the Respondent: Mr L Fakunle, Peninsula

JUDGMENT ON APPLICATION TO RECONSIDER RULE 21 JUDGMENT

The judgment of the tribunal is that the respondent's application for reconsideration is allowed and the Judgment dated 24 January 2023 is hereby revoked.

REASONS

1. The respondent has sought a reconsideration of the judgment entered under Rule 21 dated 4 January 2023 which was sent to the parties on 6 February 2023 ("the Judgment"), and it has made an application for an extension of time to serve its response. The grounds were initially set out in its e-mail letter dated 21 March 2023.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Video Hearing Service. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 67 pages, the contents of which I have recorded. The order made is described at the end of these reasons.

3. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2015 ("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.
4. 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.
5. 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.
6. 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.
7. The grounds relied upon by the respondent are effectively that it was unaware of the proceedings for the following reasons. The respondent was in dispute with its landlord who had been withholding mail, and the respondent was sufficiently concerned about this to have reported the matter to the Police. On 21 March 2023 Miss Stachowicz, a director of the respondent, emailed the Tribunal office to the effect that she had not been aware of these proceedings and had just learnt of the Judgment. She applied for reconsideration of the same. That application was resubmitted on 4 April 2023 with Mr Stachowicz again confirming that she was unaware of the claim as a result of the missing mail. I then gave directions to the effect that any application for reconsideration should be supported by an application for extension of time and the proposed defence to the claim.
8. On 4 April 2023 the claimant emailed the Tribunal office to confirm that he opposed the application for reconsideration on the basis that the respondent was aware of their dispute.
9. The respondent subsequently instructed its representative, and by letter dated 25 April 2023 the respondent's representatives emailed the Tribunal to confirm that the respondent had been unaware of these proceedings until after receipt of the Judgment. That letter made an application for reconsideration; an application for an extension of time to consider the reconsideration; and an application for an extension of time to file the response. The letter also included a detailed proposed response which raises a valid arguable defence to each of the claimant's four claims of breach of contract, unlawful deduction from wages, accrued holiday pay, and in respect of an alleged failure to provide a written statement of the terms of the claimant's employment.
10. Under the previous Rules of Procedure (relating to the review of what were called Default Judgments) 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.
11. 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?
 12. This guidance in Kwik Save was approved by reference to the subsequent 2013 Rules in Office Equipment Systems Ltd v Hughes UKEAT 0183/16/JOJ.
 13. I have also considered the case of Pendragon Plc (trading as C D Bramall Bradford) v Copus [2005] ICR 1671 EAT which confirms that in conducting a reconsideration of a Rule 21 Judgment (formerly a review of a default judgment under the previous Rule 33) an Employment Judge has to take account of all relevant factors, including the explanation or lack of explanation for the delay and the merits of the defence, weighing and balancing the possible prejudice to each party, and to reach a conclusion that was objectively justified on the grounds of reason and justice.
 14. Applying these principles in this case, I find that the respondent made a prompt application for reconsideration as soon as it became aware that the Judgment had been entered against it. The explanation for the failure to submit a response, namely that the proceedings were served by mail and never delivered to the respondent, has been maintained consistently by the respondent throughout. Upon receiving directions to clarify the nature of the response and to apply for an extension of time the respondent instructed its representatives who made that application promptly. The proposed defence to the claim arguably has merit, not least because it gives details of alleged dishonesty by the claimant which, if proven, would defeat the vast majority of his claims. The defence also includes an employer's contract claim which the respondent also wishes to pursue and which follows logically from its submissions.
 15. In conclusion there was no significant delay with this application; the proposed defence has merits; and on considering the balance of prejudice between the parties if the application were to be granted than the claimant would lose the opportunity to rely on the Judgment, but would still be able to argue his case on its merits, whereas if the application were refused the respondent would be denied the opportunity to rely on an arguable defence

- at a full hearing. In my judgment therefore it would be more prejudicial to the respondent to refuse the application, and I therefore allow the respondent's application.
16. Accordingly, I allow the application for reconsideration pursuant to Rule 70 and the Judgment is hereby revoked. I also allow the application for an extension of time and the respondent's response is accepted.
 17. The response which has been allowed also includes an Employer's Contract Claim. The claimant has brought a claim for breach of contract under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, and an employer's contract claim is allowable under these provisions, and I consider that it is just and equitable to allow this employer's contract claim in the circumstances. This claim will now be processed, and further case management orders will follow so that the matter progresses.

Employment Judge N J Roper
Dated 16 June 2023

Judgment sent to Parties: 29 June 2023

FOR THE TRIBUNAL OFFICE