EMPLOYMENT TRIBUNALS

Claimant: Mr S Varkey

Respondent: Costain Group Plc

UPON APPLICATION under rules 20 and 71 of the Employment Tribunals Rules of Procedure 2013 made by an email dated 8 April 2024 to reconsider the judgment sent to the parties on 8 April 2024 and without a hearing:

JUDGMENT

1. The judgment dated 15 March 2024 is revoked and set aside.

2. The response has been accepted.

3. A preliminary hearing with a listing of 3 hours will take place. The parties will be sent a notice of hearing.

REASONS

The Application and the parties' submissions in relation to it

1. The claimant presented a claim to the Tribunal on 25 October 2023. The respondent did not present a response. The papers were referred to me and I issued a judgment under Rule 21 which was sent to the parties on 18 March 2024.

2. The respondent's legal representatives wrote to the Tribunal on 8 April 2024 applying for a reconsideration of the judgment. The factual basis for its application was that it said it did not receive the claim form or notice of a claim. That was why no response had been presented. The respondent said that it only became aware of the claim when it received the judgment issued under Rule 21.

3. I asked the Tribunal administration to write to the parties pursuant to Rule 72(1) stating that I was of the view that time should be extended pursuant to Rule 5, so that the Tribunal could consider the application and, also, my provisional view that:

> *… the application to reconsider the judgment should be granted and that the judgment dated 15 March 2024 should be revoked in light of (1) the fact that the respondent's solicitors state that the respondent had no knowledge*

of the claim before they received the judgment - it seems unlikely that the respondent would have ignored the claim completely if it had received it; and (2) if it is the case that the respondent had no knowledge of the claim before they received the judgment, it is likely to be in the interests of justice for the judgment to be revoked.

4. I also asked the parties to provide their views on whether the application should be determined without a hearing.

5. The respondent had already indicated that it thought the application could be determined without a hearing. The claimant wrote to the Tribunal on 6 May 2024 objecting to the respondent's application and expressing the view that a hearing should take place, stating:

> *… if the application must be reconsidered, then I require a hearing to be able to review the particulars of the application for reconsideration as this has not been disclosed to me nor made aware of until your instruction.*

6. It therefore became apparent to me at this point that the claimant had not in fact seen the respondent's application so I ordered that it should be sent to him, giving him a further two weeks to comment on the matters referred to in the paragraph [3].

7. The claimant wrote again to the Tribunal on 1 July 2024. He said made various points including that the respondent had not evidence the "alleged non-receipt of the ET1" and that statements by the "Respondent's representatives do not align with the facts presented". He submitted, amongst other matters, that the delay by the respondent was not "unintentional but is in accord with the Respondents intent to cause delay" and that the application for reconsideration "attempts to mislead the Tribunal". He said the application for reconsideration "must be struck out" and that there should be a preliminary hearing to determine the matter.

8. Having regard to the claimant's response, I decided that the interests of justice did not require the application to be decided at a hearing. The parties were therefore given a further opportunity to make written submissions pursuant to rule 72(2). Neither party availed themselves of this opportunity, doubtless because they quite reasonably felt that they had said all they had to say on the application.

The law

9. The Tribunal Rules dealing with the situation when a judgment has been issued under Rule 21 after a respondent has failed to provide a response. include the following. First, there is Rule 20:

> ***20 Applications for extension of time for presenting response***
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> *(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.

10. Then there are the general provisions contained later in the Rules.

70 Principles

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.

71 Application

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.

72 Process

(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.

11. An application for a reconsideration under Rule 70 must including a weighing of the injustice to the party making the application if it is refused against the injustice to the party resisting the application if it is granted, giving weight to the public interest in the finality of litigation.

12. The reconsideration procedure is not a quasi-appeal on a point of law. Rather it exists to deal with oversights or some procedural occurrence that has resulted in a party not having a fair opportunity to present their argument on a point of substance.

Conclusions

13. I have concluded that the judgment should be revoked and time extended for the presentation of the respondent's response which, having been sent to the Tribunal, will now be accepted. Because of the procedure that has been followed following the application being made, this judgment is made under rule 72.

14. I have reached this conclusion because I consider that the injustice to the respondent if the application were refused outweighs that to the claimant if the application is permitted for the following reasons:

    14.1. The respondent made the application promptly after receiving the judgment. I conclude that the reason for its previous failure to present a response is, therefore, either that it did not receive the notice of claim and claim form or, alternatively, that they were received but an error was made in their administrative handling with the result that they were lost. It is highly unlikely that the respondent has simply been ignoring the fact of these proceedings: its prompt reaction to the judgment being issued is inconsistent with that. Further, it is a large and well-resourced company which would have been aware that ignoring an employment tribunal claim will, in the end, have unfortunate consequences for the employer.

    14.2. In these circumstances, whether the reason for the respondent's delay is that it never received the notice of claim and claim form, or that it made an administrative error on receiving them, the prejudice to the respondent in being unable to defend a claim to which it has now provided a detailed response far exceeds that to the claimant. The prejudice to the respondent is potentially being ordered to pay a large sum of money in respect of a claim the substantive merits of which have not been considered by the Tribunal. The prejudice to the claimant, on the other hand, is the delay caused by what has occurred and the loss of the "windfall" of the judgment issued under Rule 21.

14.3. Further, whilst I do not underestimate the prejudice to the claimant caused by the delay, the fact remains that if his claim is proved to be well-founded he will in due course receive a judgment to that effect and any compensation ordered. On the other hand, if the judgment is not revoked, the respondent will never have an opportunity to have its substantive defence to the claim considered.

15. In reaching these conclusions I have taken full account of the various points made by the claimant. However, I conclude that his analysis of the correspondence and documents is unconvincing. For example, in his letter of 6 May 2024 he suggests that the failure to deal with the claim form is a further example of “vexatious intent” previously demonstrated by the respondent who had, he said, previously and repeatedly “sought to frustrate, victimize and continue to harass Claimant”. In fact a respondent who has behaved in this way is most unlikely to ignore a claim form because this may lead to a judgment under Rule 21 being issued *without* it have an opportunity to further frustrate the claimant in question by defending the claim brought.

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Employment Judge Evans
19 July 2024