EMPLOYMENT TRIBUNALS

Claimant: Mr S Homwe

Respondent: Rerun Ltd

UPON THE RESPONDENT'S APPLICATION dated 5 February 2024 to reconsider the Judgments of the Tribunal dated 10 October 2022 and 28 June 2023 under rule 71 of the Employment Tribunals Rules of Procedure 2013.

JUDGMENT

1. The Respondent is granted an extension of time to 5 February 2024 to make its application for reconsideration.

2. The Tribunal determines that it is necessary in the interests of justice to reconsider its Judgments dated 10 October 2022 and 28 June 2023.

3. On reconsideration:

    a. Paragraph 1 of the Tribunal's Judgment dated 10 October 2022 is affirmed;
    b. Otherwise, the Tribunal's Judgments dated 10 October 2022 and 28 June 2023 are revoked.

REASONS

4. The Claimant has made two claims against the Respondent. He was representing himself when he presented his first claim (3323254/2021), but had instructed solicitors when he presented this, his second claim. Presumably on their advice, he withdrew his first claim, which was dismissed on 24 May 2022 following its withdrawal.

5. The Respondent accepts that the first claim was received by it, as a copy of the Notice of Claim was discovered earlier this year in a desk drawer of the Respondent's former HR Manager, John Sutton. Mr Sutton left the Respondent's employment on 30 May 2022. He seems to have completed form ET3 in respect of the first claim, as a copy of this was also discovered in his

desk drawer. Although the completed form is annotated at the top with the words "EMAILED 09.03.22" there is no record on the Tribunal's systems of the ET3 having been emailed to the Tribunal or otherwise received by it. I find that having completed the form by hand, Mr Sutton failed to file it with the Tribunal. In her evidence to the Tribunal, Louise Allen, the Respondent's Finance Manager said that Mr Sutton was going through a difficult divorce or relationship breakdown at the time, was distressed at times and that he had neglected certain of his duties.

6. I am satisfied that this second claim was served on the Respondent. It was sent to the same address as the first claim, namely to the Respondent's registered office. I find that it would have come to Mr Sutton's attention as the first claim did. Ms Allen states that the only document that has come to light in relation to the second claim is a letter from the Tribunal to the Claimant dated 28 May 2022, copied to the Respondent, headed, "Rule 21 Judgment – Claim not Quantified". Although it has the appearance of a Judgment, in fact it advised the Claimant that whilst a judgment could be issued in the absence of any Response from the Respondent, the Tribunal needed further information from the Claimant. That letter would have been seen by Mr Sutton in his final days of employment. He neglected to deal with the matter.

7. Although Mr Sutton left the Respondent's employment on 30 May 2022, his desk drawers were seemingly not checked for correspondence until on or around 18 January 2024 after an enforcement officer had attended the Respondent's premises to enforce a High Court Writ of Control. Given that Mr Sutton is said to have been neglecting his work in the period prior to his departure, but in any event as a matter of good business practice, I find it inexplicable that no-one at the Respondent thought to check Mr Sutton's desk drawers after he left the business to ensure they did not contain any work matters that required attention, or simply any personal belongings of his. Even had he not been neglecting his work, the Respondent might have cleared his work station of any papers or belongings as part of an orderly departure from the business, including an effective handover of his duties.

8. Prior to the enforcement officer's attendance on 18 January 2024, others in the Respondent's business were aware of a claim by the Claimant, after a letter from Quality Bailiffs had been posted through the door of the registered office headed "Notice of Enforcement". Yet the decision was seemingly taken to see if anything further happened. Ms Allen does not clarify who took that decision but in my judgment it was ill-advised and inexcusable. For a little over three months the Respondent was on notice that the Claimant had seemingly secured a judgment against it, yet it took no action to find out more. A call to Quality Bailiffs would almost certainly have revealed that the Claimant had pursued a claim in the Employment Tribunals and secured a Judgment in default of any Response having been filed. Instead, the Respondent only acted after the enforcement officer became involved. It evidences to me a pattern of neglect that extends beyond Mr Sutton's actions in failing to take action on the two claims and subsequent Rule 21 letter.

9. The question is whether, in such circumstances, it is necessary in the interests of justice to reconsider the Judgments of 10 October 2022 and 28 June 2023.

10. Rule 70 of the Employment Tribunal Rules of Procedure 2013 empowers the Tribunal, either on its own initiative or on the application of a party, to reconsider any judgment where it is necessary in the interests of justice to do so.

11. In Outasight VB Ltd. v Brown UK EAT/0253/14, the Employment Appeal Tribunal considered the Tribunals' powers under Rule 70 of the Employment Tribunal Rules of Procedure 2013. At paragraphs 27 – 38 of her Judgment Her Honour Judge Eady QC, as she then was, set out the legal principles which govern reconsideration applications, and observed,

> *"The interests of justice have thus long allowed for broad discretion, albeit one that must be exercised judicially, which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation."*

These principles were recently affirmed by His Honour Judge Shanks in Ebury Partners UK Ltd v Acton Davis [2023] EAT 40.

12. In T and D Transport (Portsmouth) Ltd v Limburn 1987 ICR 696, EAT (a decision under previous rules of procedure), the EAT confirmed that, where notice of hearing has been properly sent, it is for the employer to satisfy the Tribunal that the notice was not properly received. I have already set out why I conclude that this second claim was received by the Respondent. However, I do not consider that fact alone is necessarily fatal in terms of its application for reconsideration i.e, that Limburn established any rule or principle that an application for reconsideration should be refused where a Judgment has been secured in default in circumstances where the claim was received by the Respondent but a response was not filed. The 2013 rules of procedure confer a broad discretion on Tribunals to reconsider judgments where this is necessary in the interests of justice. In my judgment, the Respondent should certainly not be 'punished' for Mr Sutton's neglect of the matter, even if his inaction has been compounded by the Respondent's handling of his departure and lax response to the letter from Quality Bailiffs.

13. Although the Respondent might be regarded as the author of its own misfortune, I am also mindful of the potential to confer a windfall on the Claimant if the Respondent has arguable grounds for resisting his claims. In this regard, I would distinguish between his claim in respect of unauthorised deductions from wages and his claims for unfair dismissal and failure to provide a written statement of particulars of employment. The Respondent has not suggested that wages were not due to the Claimant, rather it claims that the wages due to him are outweighed by sums owed by him to it in respect of missing (allegedly stolen) stock and by reason of falsified timesheets. However, the sums involved have not been quantified, save that they are said to exceed the amount of his outstanding wages. The Respondent has the burden of establishing both that it was entitled to make deductions from the Claimant's wages and the amounts in question. Whilst it has adduced evidence in support of its contention that it was authorised to make deductions from his

wages, Ms Allen's evidence as to the sums to be deducted comprises nothing more than an assertion on her part. She refers to an investigation, but no further details are provided, including the Respondent's calculations as to the value of the missing stock and why the Claimant might be responsible for this, or as to the losses that allegedly resulted from falsified timesheets and, again, why the Claimant might be responsible for these. This lack of detail and evidence is reflected in the Respondent's draft Grounds of Resistance which likewise proceed on the strength of a bare assertion in paragraph 16 that the sums owed by the Claimant, and therefore liable to be deducted from his wages, exceeded the amount of his outstanding wages. Even if the Respondent's solicitors were under pressure of time to draft and submit Grounds of Resistance in support of the reconsideration application, that does not excuse Ms Allen's subsequent failure to address the matter in any further detail some months later in her witness statement or her inability to provide that essential information when asked about the matter by me today

14. In my judgment, there is no proper basis for me to revoke or vary paragraph 1 of the Tribunal's Judgment of 10 October 2022 that the Respondent made unauthorised deductions from the Claimant's wages.

15. By contrast, I am satisfied that it is necessary in the interests of justice to set aside the Judgments in so far as the Claimant succeeded in his claims for unfair dismissal and for failure to provide a written statement of particulars of employment. As I say, I am mindful of the potential to confer a potentially unfair windfall on the Claimant in circumstances where the Respondent has put forward an arguable case as to why it dismissed the Claimant for misconduct rather than, as he alleges, because he asserted his statutory rights and why it says it complied with its duty under s.1 of the Employment Rights Act 1996 to provide him with a written statement of particulars of employment. Those respective matters are addressed in detail in Ms Allen's statement and in the Respondent's Grounds of Resistance. As regards the reason for dismissal, the Respondent has been consistent in stating that the Claimant was dismissed for misconduct (including in its letter dismissing him from its employment, in Mr Sutton's draft ET3 and in these proceedings) and, as regards s.1 of the 1996 Act, it has produced a terms and conditions of employment document purportedly signed by the Claimant. The Claimant was awarded £16,275.27 in respect of these two claims, a not insubstantial sum of money. If, as I am satisfied, the Respondent, albeit very belatedly, has come forward with arguable grounds to resist his claims, I consider it necessary in the interests of justice for the Respondent to be permitted to pursue these arguments to a full hearing, even if the effect may be to keep the Claimant out of two awards that it may transpire he was entitled to, if his claims succeed on their merits at a contested hearing.

16. I have made separate case management orders to ensure that this case comes back before a Tribunal for substantive determination without further undue delay. I have cautioned the Respondent that they must now ensure these proceedings receive their attention and that they comply with the orders I have made.

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Employment Judge Tynan

Date: 31 July 2024

Sent to the parties on:

9 September 2024

For the Tribunal: