EMPLOYMENT TRIBUNALS

Claimant: Mr P Crinnigan

Respondent: Bushbay Ltd

JUDGMENT

1. The judgment sent to parties on 14 March 2024 is revoked

2. The claim is struck out.

REASONS

1. Rules 70-72 of the Tribunal Rules provides as follows:

> **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.
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> **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.
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> **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. …

2. The Tribunal has discretion to reconsider a judgment if it considers it in the

interests of justice to do so. Rule 72(1) requires the judge to dismiss the application if the judge decides that there is no reasonable prospect of the original decision being varied or revoked. Otherwise, the application is dealt with under the remainder of Rule 72.

3. When deciding what is "necessary in the interests of justice", it is important to have regard to the overriding objective to deal with cases fairly and justly, which includes: ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.

4. The situation remains, as it had been prior to the 2013 rules, that it is not necessary for the applicant to go as far as demonstrating that there were *exceptional* circumstances justifying reconsideration. There does, however, have to be a good enough justification to overcome the fact that, when issued, judgments are intended to be final (subject to appeal) and that there is therefore a significant difference between asking for a particular matter to be taken into account before judgment (even very late in the day) and after judgment.

5. Rule 20 states:

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

6. The Employment Appeal Tribunal's decision in Kwik Save Stores Ltd v Swain and ors 1997 ICR 49 sets out the correct test for granting an extension of time for a response under version of the rules which was then in force. Although the new rule is worded differently, the case remains relevant to the question of whether, having regard to the overriding objective, an application for an extension of time to submit a response should be granted.

7. In Kwik Save, the employer's responses (in respect of claims from different claimants) had been entered between 14 and 26 days late. The employer applied for extensions of time. It submitted that its failure to comply with the

time limits had been due to an oversight. The tribunal judge found the employer's explanation to be unsatisfactory and refused to grant the extensions of time. The employer appealed to the EAT, arguing that the judge had exercised his discretion incorrectly. The EAT stated 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. In particular, the EAT held that, when exercising a discretion in respect of the time limit, a judge should always consider at least the following factors, though other factors might also be relevant:

7.1. the employer's explanation as to why an extension of time is required;
7.2. the balance of prejudice;
7.3. the merits of the defence.

8. Commenting on these factors, the EAT's opinion was:
   8.1. the more serious the delay, the more important it is that the employer provide a satisfactory and honest explanation. A judge does not have to accept the explanation given. A judge is entitled to form a view as to the merits of the explanation.
   8.2. In relation to the balance of prejudice, it is necessary to consider whether the employer, if its request for an extension of time were to be refused, would suffer greater prejudice than the Claimant would suffer if the extension of time were to be granted.
   8.3. In relation to the merits of the defence, the Employment Appeal Tribunal suggested that if the employer's defence is shown to have some merit in it, justice will often favour the granting of an extension of time, or else the employer might be held liable for a wrong which it had not committed.

9. No matter how serious the failure of the Respondent, and no matter how inadequate its explanation, it is an error of law for a judge to fail to consider the other factors as well as part of the overall decision.

10. The analysis of the balance of prejudice is likely to be affected by whether a judgment has been issued and, if so, when. The fact that an extension of time, if granted, would have the effect of depriving the Claimant of a judgment is a relevant factor; judgments are intended to be final. However, it is not a decisive factor. In an appropriate case, an extension of time should still be granted, provided that proper weight has been given to the prejudice caused to the Claimant.

<u>The Respondent's application</u>

11. On 10 June 2024, the Respondent made an application to the Tribunal which was copied to the Claimant. It attached a Form ET3 response, and various

other documents seeking extension of time and purporting to supply evidence that the claim form had (a) not been received by the Respondent and (b) would have led to a response being submitted if it had been received.

12. No response to these items has been received from the Claimant. There had been previous correspondence, including emails on 27 March 2024 from each of the Respondent and its representatives, Avensure, and then on 12 April from Avensure. The Claimant did respond to that (at 19:19 on 15 April 2024).

13. Avensure wrote to the Tribunal on 16 April 2024, commenting on the Claimant's reply, and the Tribunal wrote to the parties on 30 May on my instructions. The Respondent's 10 June application was made within the time frame set out in that letter.

14. On 26 July, the Tribunal wrote to the parties on my instructions with my provisional opinions on how the application should be dealt with. The parties had the opportunity to comment generally. In particular, the Claimant was told he had until 23 August 2024 to write to the Tribunal if he objected to (the judgment being revoked and) the claim being struck out.

15. I am satisfied that the Respondent's proposed defence is not fanciful. Give the lack of a response from the Claimant, I am not proposing to comment in detail on the alleged reasons for failing to submit a response in time.

16. The Respondent asserts that the Claimant has actually been paid the sums in question. I am not making a decision one way or the other on that, save to note that the Claimant has had the opportunity to assert that this is false, and has not done so.

17. I extend time for the response (under Rule 20) and I accept the 10 June response. For the reasons stated in the warning sent to the Claimant on 26 July 2024, I am striking out the claim because it is not being actively pursued.

Employment Judge Quill

Date: 5 September 2024

JUDGMENT SENT TO THE PARTIES ON
14 October 2024

FOR THE TRIBUNAL OFFICE