**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4105211/2023**

**Held in Glasgow on 29 October 2024**

**Employment Judge P O'Donnell**

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| **Miss J Almussawi** | **Claimant**<br>**In Person** |
| **Wejdi Moussa**<br>**The Mailcoach** | **Respondent**<br>**Represented by:**<br>**Ms D McGuire - Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is:

1. The respondent's application for reconsideration is allowed and the Tribunal sets aside the judgment dated 5 August 2024 to the extent that it relates to the claims of notice pay, holiday pay and claims under the Equality Act 2010.

2. The respondent's application under Rule 20 is allowed and the Tribunal extends the time for presenting the ET3 to 19 August 2024 when the ET3 was first sent to the Tribunal.

**REASONS**

**Introduction**

1. The present hearing was listed to hear the respondent's application for reconsideration of the judgment dated 5 August 2024 and for an extension of time under Rule 20 of the Tribunal Rules of Procedure to lodge his ET3 response form.

## Evidence

2. The Tribunal heard evidence only from the respondent.

3. There was a file of productions produced by the respondent. A reference to a page number below is a reference to a page in that file.

## Findings in fact

4. The Tribunal made the following relevant findings in fact.

5. The claimant lodged her ET1 claim form with the Tribunal on 29 August 2023. It was sent to the respondent by letter dated 1 September 2023 with a deadline for the respondent to lodge their ET3 of 29 September 2023.

6. On receipt of the correspondence from the Tribunal, the respondent contacted his accountant. The respondent had never been involved with Tribunal (or any court proceedings before) and was not sure what to do. He sought advice from his accountant who undertook to lodge the ET3 on the respondent's behalf.

7. The ET3 was lodged by the accountant (pp59-60) but, for reasons which no-one can identify, this was not received by the Tribunal. As a result, the case proceeded as undefended to a final hearing listed on 5 August 2024.

8. On 24 July 2024, the respondent was contacted by a salesperson from Croner who informed him of the August hearing and offered to represent him. This was when the claimant first became aware of the hearing.

9. The respondent deals with most business matters online and any hard copy mail is kept in a box in the office. He found all the paperwork relating to the claim including the ET1 and the Notice of Hearing.

10. Over the days following 24 July 2024, the respondent met with representatives from Croner and instructed them to act for him. He provided them with all the paperwork in his possession and was advised that they would deal with the hearing listed on 5 August.

11. The respondent produced WhatsApp messages (pp61-65) from immediately before the hearing in which he was querying what was happening with replies reassuring him that it was all being dealt with.

12. In the event, Croner did not go on record for the respondent until after the hearing and it proceeded in the respondent's absence with a judgment being issued in the claimant's favour.

13. The present applications were made on 19 August 2024.

**Relevant Law**

14. The Tribunal has the power to reconsider a judgment under Rule 70 of the Tribunal Rules of Procedure. The only ground on which the Tribunal can reconsider is that it is in the interests of justice to do so.

15. The "interests of justice" test gives the Tribunal a broad but not unlimited discretion when reconsidering a decision. The Tribunal has to give regard to the principle of finality in litigation (*Newcastle Upon Tyne City Council v Marsden* [2010] ICR 743) and the power to reconsider is not there to deal with matters which should more properly be a matter of appeal (*Trimble v Supertravel Ltd* [1982] IRLR 451). The Tribunal has to approach the question of whether reconsideration is in the interests of justice by having regard to the justice to be done to both sides of the case (*Redding v EMI Leisure Ltd* EAT 262/81).

16. It was previously the case that the absence of a party was a specific ground for reconsideration and this would now be a matter which would be determined on the basis of the "interests of justice" test.

17. The case law regarding reconsideration arising from the absence of a party shows that the question is whether the party had a good and genuine reason for their absence (see, for example*, Morris v Griffiths* 1977 ICR 153, EAT and *Lewes Associates Ltd t/a Guido's Restaurant v Little* EAT 0460/08).

18. If it is the carelessness of a party that has led to their absence then this may still provide a genuine and honest reason which should be given weight by

the Tribunal in considering the interests of justice (*Lawton v British Railways Board* EAT 29/80). However, a party who consciously chooses not to attend a hearing will be expected to bear the consequences of that decision (*Fforde v Black* EAT 68/80).

19. Rule 20 of the Employment Tribunal Rules of Procedure deals with an application for an extension of time to lodge an ET3. It provides as follows:

> *(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.*

20. In considering an application under Rule 20, the Tribunal is exercising a discretion to extend the time limit for complying with one of its Rules of Procedure (that is, Rule 16). In doing so, the Tribunal should bear in mind the principles set out in *Kwik Save Stores Ltd v Swain* [1997] ICR 49. Although that decision was made under a previous version of the rules, those principles continue to be the matters which the Tribunal should take into account (*Moroak (t/a Blake Envelopes) v Cromie* [2005] IRLR 535).

21. The position is summarised in the head note of Swain as follows:

*'... it was incumbent on a respondent applying for an extension of time for serving a notice of appearance ... to put before the industrial tribunal all relevant documents and other factual material in order to explain ... both the non-compliance and ... the basis on which it was sought to defend the case on its merits; that an industrial tribunal chairman in exercising the discretion to grant an extension of time to enter a notice of appearance had 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 them one against the other, and to reach a conclusion which was objectively justified on the grounds of reason and justice; that it was it was important when doing so to balance the possible prejudice to each party ...'*

**Decision**

22. The Tribunal considers that the two applications are inextricably linked; if one of them is granted and the other refused then parties would find themselves in the nonsensical position of the respondent being allowed to present a defence where there is a final judgment which stands or that judgment being set aside but the respondent being prevented from defending the case. Neither of those scenarios would be in keeping with the interests of justice.

23. Further, the factors which the Tribunal has to take into account in deciding the two applications are fundamentally the same.

24. For these reasons, the Tribunal intends to deal with the two applications as a whole rather than addressing them separately.

25. The Tribunal is satisfied that the respondent has a genuine and valid explanation why no ET3 was received and why he did not attend the hearing in August 2024. This is not a case where the respondent sat back and did nothing or ignored the Tribunal proceedings. Rather, in both instances, he instructed agents to act for him and trusted that things were in hand. Unfortunately, in both instances, his trust was misplaced; the ET3 response which he believed had been lodged on his behalf had not, for whatever reason, been received by the Tribunal; the agents who he understood were dealing with the August 2024 hearing did not do so.

26. In neither case can any blame be laid at the feet of the respondent nor should he bear the consequences of this. It is not in the interests of justice for a respondent who took action to defend a claim to be denied the opportunity of doing so for reasons which were out of their control.

27. Further, the ET3 response form sets out a statable defence to the claim. This is not to say that that defence will succeed but, rather, that if the respondent proves the matters he offers to prove then he would succeed in defending the claim. The same position applies to the claimant; if she proves the matters which she offers to prove then she will succeed in her claim.

28. The important point is that both parties should be given the opportunity to present their respective cases and lead evidence in relation to those claims for the Tribunal to determine which of them succeeds.

29. There would be a significant prejudice to the respondent if his applications were refused as he would be denied the opportunity of presenting his case. If the respondent's application is allowed then, although she no longer has the benefit of the August 2024 judgment, there is less prejudice to the claimant who still has the opportunity to present her case and secure a judgment in her favour.

30. Taking account of all of these factors, the Tribunal considers that the balance of prejudice and the interests of justice fall in favour of granting the respondent's applications.

31. The Tribunal, therefore, grants the respondent's application for reconsideration and sets aside the judgment dated 5 August 2024 to the extent that it relates to the claims of notice pay, holiday pay and the claims under the Equality Act 2010. The respondent did not seek reconsideration of the judgment to the extent that it relates to the claim of unfair dismissal and, for the avoidance of doubt, this part of the judgment has not been reconsidered nor has it been set aside.

32. The Tribunal also grants the respondent's application under Rule 20 and extends the time for presenting the ET3 to 19 August 2024 when the ET3 was first sent to the Tribunal.

**P O'Donnell**
**Employment Judge**

**30/10/24**
**Date**

**Date sent to parties** **01/11/24**