Case Number: 2300991/2016

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THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
(sitting alone)

BETWEEN:

Mr G Brown **Claimant**

AND

Leroy Reid & Co **Respondent**

ON: **24 February 2017**

APPEARANCES:

For the Claimant: **Mr A Wills, Counsel**

For the Respondent: **Ms A Carse, Counsel**

JUDGMENT

The judgment of the Tribunal is that:

1. The application for reconsideration succeeds and the default judgment of 5 September 2016 is set aside.

2. The Respondent is given an extension of time until 3rd May 2017 for filing a response to the Claimant's claims.

REASONS

1. I reached my decision in this case after reviewing the Respondent's draft response to the Claimant's claim, the documents in the bundle to which I was referred by the parties representatives and hearing the evidence of Mr Reid. I considered Mr Wills' objection to the admission of Mr Reid's evidence as it was provided very late and Mr Wills said that he had been unable to take instructions. The Claimant was not present and Mr Wills submitted that to the extent that the Respondent's prospects of success in the application consisted of an attack on her claim, she was prejudiced by not being present. He asked me either to exclude the evidence or to adjourn the hearing so that he could take instructions.

2. I noted however that the basis of the Respondent's application for a reconsideration had been communicated to the Claimant in September 2016 so the Claimant would have understood then the basis of the Respondent's application. I accepted Ms Carse's submission that the application was one in which the Respondent was required to explain its own conduct and the Claimant's evidence would have little, if any, relevance. Mr Wills would be able to cross examine Mr Reid on his statement. It was regrettable that the Respondent's bundle was served so late, but the vast majority of its 450 pages consisted of Mr Reid's medical records. Only a few pages of those were relevant to the application. The Claimant was not therefore unduly prejudiced by the late production of the bundle. The hearing would not involve a detailed assessment of the respective merits of the parties cases, but merely a general assessment of whet her the Respondent had a reasonable prospect of defending the claim. In light of these considerations I did not consider it proportionate or consistent with the overriding objective to adjourn the hearing, or exclude Mr Reid's evidence.

3. The Claimant had presented her claim on 26 May 2016 and it is now accepted by the Respondent that the claim was submitted in time in light of the date on the Claimant’s Early Conciliation Certificate. I make no other findings or decisions concerning whether the claims in respect of the matters relied on were bought within statutory time limits for the avoidance of any doubt on that point.

4. The Respondent failed to respond to the Claimant’s claim and despite correspondence from the Tribunal on 4 and 6 July and an application from the Claimant on 11 July the Respondent took no action in response to the claim. A default judgment was issued under rule 21 by Employment Judge Martin on 5 August 2016. The Respondent instructed solicitors two week’s later and a further two weeks after that those solicitors instructed applied for the default judgment to be reconsidered, using the procedure for applying for a reconsideration of the judgment in Rule 70 onwards of the Tribunal Rules as recommended by the Presidential Guidance issued in 2013.

5. During the course of the very helpful submission from Counsel on both sides this morning I was referred to a number of authorities: ***Outasight VB Ltd v Brown UKEAT/0253/14***, ***Pendragon plc (t/a CD Bramall Bradford) v Copus [2005] ICR 1671*** and ***Thornton v Jones* 2011 UKEAT/0068**, which in turn refers to ***Kwik Save Stores v Swain [1997] ICR 49***. I have also considered the provisions of Rule 70 of the Tribunal Rules. The test I am applying is whether or not it is in the interests of justice to reconsider the default judgment. I also bear in mind the overriding objective and the need to consider cases justly without unreasonable delay and avoiding unnecessary expense.

6. The key question before me is what is just in this instance. The Respondent's explanation for the delay in responding to the Claimant can be summarised as follows. Mr Leroy Reid suffers from ill health. He is 80 years old and in the past 12 to 15 months he has received radiation therapy, suffered a road accident in Florida and has had corrective eye surgery for what appeared to be significant vision problems. He is the senior partner of a small accountancy practice with two offices in South London. Mr Reid attends only one of those offices, in Brighton Road. He has had long periods of absence over the last year because of his ill health.

7. Mr Reid has two business partners neither of whom, for reasons that are difficult to understand, took responsibility for dealing with the papers relating to the Claimant's claim during Mr Reid's absence from the office. Mr Reid's evidence was that they did not want to worry him whilst he was unwell. That may well be true. The two partners in question were not here to give evidence and so I make no finding on that point but as Mr Wills submitted, a partnership entails joint responsibility and joint liability and there is no doubt in my mind that the other two partners should have taken action in respect of the Claimant's claim and dealt with them promptly. Mr Wills goes further however and submits that the failure of the other two partners to act in accordance with their duties as partners in a partnership precludes them from making an application that is founded on the interests of justice. I do not agree with that submission and whilst the internal organisation of responsibilities within Leroy Reid & Co seems to leave something to be desired, the Respondent is not in my view thereby precluded from asking the Tribunal to consider whether it is just for the default judgment to stand.

8. The authorities suggest a spectrum of malfeasance in cases where a Respondent has failed to respond to a claim, with procedural abuse and intentional default at one end and a genuine misunderstanding or accidental or understandable oversight of the other. The other factors that may be taken into account in addition to the reasons put forward by the Respondent in default include the length of the delay and the ostensible merits of the Respondent's case as far as those can be ascertained from the draft response. In this instance I confirmed to the parties that I would not be giving weight to the detailed factual matters

referred to in the draft response or in paragraphs 9 to 16 of Mr Reid's statement and would only give weight to the broad outline of the Respondent's defence as set out in the application for reconsideration of 9 September as those were the matters of which the Claimant had had proper notice before today's hearing.

9. The third matter that I must weigh is the balance of prejudice to the parties. As Mr Justice Mummery held in ***Kwiksave Stores v Swain*** it is a serious matter for a Respondent to be held liable because of a procedural defect for a wrong that he may not have committed. That is particularly the case where the wrongs of which the Respondent is accused include race discrimination.

10. Taking each of the factors that I need to weigh in turn, the Respondent's reasons seem to me to fall somewhere in the middle of the spectrum that I described. Mr Reid's partners could be characterised as potentially well meaning but plainly misguided. Mr Wills was right to point out that the Respondent is not a litigant in person - it is a professional practice and the partners ought to have known better than to leave Employment Tribunal correspondence unattended for such a long period of time. But that is not the only factor. Considering next the question of delay, there was a three and a half months delay in submitting the application for reconsideration after the Claimant originally submitted her claim. Three months of that are attributable to the same factors as the Respondent is relying on as its reasons for not having submitted a response in the first place. The final two weeks are attributable to an inexplicable tardiness by the Respondent's solicitors in acting upon Mr Reid's instructions when he gave them at the end of August. However I agree with Ms Carse that that tardiness should not be laid at the Respondent's door.

11. Overall whilst the delay is not inconsiderable it does not seem to me that it is so long as to prejudice the possibility of a fair hearing and I take the view that delay is not in this instance a determining factor. The most important factor in my view is the balance of prejudice and here I accept Ms Carse's submission that the prejudice to the Respondent of allowing the default judgment to stand significantly outweighs the prejudice to the Claimant in setting it aside. It is right to say that if the Claimant's claims have merit she has a chance of success at a full merits hearing. If on the other hand the default judgment is not lifted the Respondent loses all chance of defending itself against serious accusations that may have serious implications for its business. Weighing all these factors I find that the interests of justice require that the default judgment is set aside and the Respondent given an extension of time to file its response which must now deal with without delay. It was agreed that the Respondent would submit its response on Monday 27 February 2017.

12. The Respondent has however conduct itself unreasonably by not dealing with the Claimant's claim sooner than it did. The Claimant may, if so advised, make an application for the costs of the hearing and any other

costs which she has incurred as a result of the Respondent's default. That application will be dealt with at the full merits hearing of the claim.

13. A telephone preliminary hearing should now be listed to deal with matters of case management and to identify the issues in the case including any issues as to costs.

Employment Judge Morton
Date: 21 March 2017