EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss Kirsty O'Neill	AND	Tesco Stores Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 21 May 2018

EMPLOYMENT JUDGE N J Roper

Representation:

For the claimant: Mr T Falcao, Solicitor
For the respondent: Mr T Adkin of Counsel

JUDGMENT ON APPLICATION TO RECONSIDER RULE 21 JUDGMENT

The judgment of the tribunal is that the respondent's application for reconsideration is allowed and the Judgment dated 22 December 2017 is revoked.

REASONS

1. The respondent has sought a review of the judgment entered under Rule 21 dated 22 December 2017 which was sent to the parties on 17 January 2018 ("the Judgment"), and has made an application for an extension of time to serve its response. The grounds are set out in its e-mail letter dated 23 January 2018. That letter was received at the tribunal office on 23 January 2018.

2. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2015 ("the Rules"). Under Rule 21(2) judgment can be issued where no response has been presented within the time limit in Rule 16, or

a response has been rejected and no application for reconsideration is outstanding, or the respondent has stated that no part of the claim is contested.

3. Under Rule 71 an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received within the relevant time limit.

4. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.

5. The grounds relied upon by the respondent are these. The claimant issued these proceedings on 12 November 2017 alleging unfair dismissal and disability discrimination, and they were served by the Tribunal office on the respondent's head office. The respondent asserts that they were never received, and that although it had been contacted by ACAS under the Early Conciliation process, and therefore would have known of a potential claim at least, it had no notification of these proceedings until it received the Judgment. That was after 17 January 2018 (when the Judgment was sent to the parties) and it responded immediately on 23 January 2018 applying for reconsideration, and indeed seeking information about the claim about which it knew nothing other than the Judgment. The respondent requested a copy of the claim, but unfortunately it took some time for the tribunal office to respond to this request. On receipt of a copy of the claim, the respondent immediately responded with its Notice of Appearance and detailed Grounds of Resistance. The respondent's case is simply that it did not receive the original claim: there is no suggestion of delay or negligence on the part of the respondent or its advisors.

6. Furthermore, the respondent asserts that it has a strong defence to the serious allegations of unfair dismissal and disability discrimination. The allegations of gross misconduct which were upheld and which resulted in the claimant's dismissal were that the Claimant had made inappropriate sexual comments; had shown colleagues pornographic material during working hours; had acted in a bullying manner towards colleagues; and had failed to rota/schedule staff correctly. In addition, the claimant's disability discrimination claim relies on a stress related impairment and the claim is general and unparticularised. The respondent asserts that the claimant is not disabled, and that it did not know or ought reasonably to have known that the claimant was disabled. It asserts that the balance of prejudice clearly lies in favour of allowing the respondent to challenge the claimant's claim by way of a full hearing.

7. The claimant opposes the respondent's application. She asserts that the papers must correctly have been served on the respondent's head office, and that it also knew of her claim because of the ACAS Early Conciliation process. The respondent failed to respond as it should have done. She asserts that the balance of prejudice lies in her favour, because of the delay already encountered during the respondent's internal procedures, and revoking the Judgment would cause further delay, all of which adversely affects her disability. She asserts that refusing the application is in accordance with the overriding objective in that it will save time and expense and "avoid the unnecessary formality of a hearing".

8. Under the previous Rules of Procedure (relating to the review of what were called Default Judgments) the EAT gave guidance on the factors which tribunals should take into account when deciding whether to review a default judgment in Moroak t/a Blake Envelopes v Cromie [2005] IRLR 535. The EAT held that the test that a tribunal should apply when considering the exercise of its discretion on a review of a default judgment is what is just and equitable. In doing so, the EAT referred to the principles outlined in Kwik Save Stores Ltd v Swain and others [1997] ICR 49.

9. In the Kwik Save decision, the EAT held 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". The case established that an Employment Judge should always consider the following three factors. First, the explanation supporting an application for an extension of time. The more serious the delay, the more important it is that the Employment Judge is satisfied that the explanation is honest and satisfactory. Secondly, the merits of the defence. Justice will often favour an extension being granted where the defence is shown to have some merit. Thirdly, the balance of prejudice. If the employer's request for an extension of time was refused, would it suffer greater prejudice than the employee would if the request was granted?

10. I have also considered the case of Pendragon Plc (trading as C D Bramall Bradford) v Copus [2005] ICR 1671 EAT which confirms that in conducting a reconsideration of a Rule 21 Judgment (formerly a review of a default judgment under the previous Rule 33) an Employment Judge has 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 the possible prejudice to each party, and to reach a conclusion that was objectively justified on the grounds of reason and justice.

11. Applying these principles in this case, I find first that there is a valid explanation supporting the application. For whatever reason the original claim seems not to have been received by the respondent. It is not a case

of delay or negligence on the part of the respondent or its advisors, and the respondent acted immediately in seeking to remedy the problem as soon as it knew of the Judgment. Secondly the defence to the claim clearly has potential merit. There is clearly an arguable defence to both the unfair dismissal claim (on normal principles) and the disability discrimination claim (given that disability is denied and the alleged discrimination is vague and not yet particularised). Thirdly, the balance of prejudice lies in favour of the respondent. Although some delay will have been caused, the delay is no more than a few weeks, and a fair trial of the issues is still possible. It would not be in the interests of justice to allow the Claimant the windfall of the Judgment when her serious allegations are denied and are capable of being considered on the evidence at a hearing of the matter.

12. Accordingly I allow the application for reconsideration pursuant to Rule 70 and the Judgment is hereby revoked. I also allow the application for an extension of time and the respondent's response is accepted. Case management orders will follow so that the matter progresses.

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Employment Judge N J Roper
Dated 21 May 2018

Judgment sent to Parties on
26 May 2018

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