EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms B Gryzakowska	**v**	**UK Skills Supply Ltd**

Heard at: Watford **On**: 25 June 2018

Before: Employment Judge George

Appearances

For the Claimant: Ms M Lappa, Lay Representative
For the Respondent: Mr A Aamodt, Counsel

JUDGMENT

1. The judgment entered for the claimant against the respondent on 25 January 2018, as set out in paragraph 3 of the order which was sent to the parties on 15 February 2018, is confirmed.

2. The case is listed for a remedy hearing on 28 January 2019 at 10 o'clock with a time estimate of one day to determine the issues set out in paragraph 4 of the case management summary of 25 January 2018.

3. For the avoidance of doubt, judgment having been entered when the respondent had failed to put in a response, the claim is not part-heard and does not need to be reserved to EJ George.

4. Case management orders follow these reasons.

REASONS

1. The remaining respondent has applied for reconsideration of the judgment which I entered in their absence on 25 January 2018 on the basis that they did not receive the notice of hearing and did not receive notice of the claim. The details of the claim form are set out in brief in the case management summary of that date and I do not repeat them here. At that hearing, the claimant settled against the second respondent and I hereafter refer to the first respondent as "the respondent".

2. The respondent received that judgment, which was posted to the same address as previous correspondence, applied for reconsideration of that judgment on 27 February 2018. This was resisted by the claimant's representatives and the notice of reconsideration hearing was sent out on 26 March 2018 converting what was otherwise going to be a remedy hearing to a reconsideration hearing.

3. At the start of this hearing there was an application for it to be postponed on the basis that the claimant's principal representative, Mr Kozik who had represented her at the 25 January hearing was unavailable. While travelling in Poland he had been taken ill with an upper respiratory tract infection and high fever as certified by the doctor's certificate which was emailed to the tribunal on Friday 22 June 2018. The application for a postponement was resisted by the respondent.

4. I rejected the application for a postponement. The issues on the reconsideration were fairly narrowly defined and principally concerned whether I was satisfied with the respondent's explanation for their failure to participate in the claim previously. The applicable procedural rule is Rule 30A of the Employment Tribunal Rules of Procedure 2013. When, as here, an application is made less than 7 days before the hearing, is not consented to by the other party, and was not due to an error of the tribunal, then the Tribunal may only order a postponement where there are exceptional circumstances. Ms Lappa argued that there were such exceptional circumstances. However, although I accepted that Mr Kozik had been taken ill and was unable to travel back to the U.K. for the hearing, I accepted Mr Aamodt's submissions that, the circumstances needed to be judged in the context of the availability of the written submissions and the representation by Ms Lappa, who while not a legal professional, has academic legal qualifications and was able to represent the claimant's interests. Taken as a whole, the circumstances could not be described as exceptional.

5. The respondent adduced in evidence a statement by Robert Dass and relied upon a skeleton argument submitted by Mr Aamodt. He drew my attention to the wording of rule 70 which says that a tribunal may reconsider a judgment when it is in the interests of justice to do so and pointed out that, under the previous drafting in the Rules previous incarnation, it was expressly provided that there could be a reconsideration where a judgment was made in the absence of a party or where there had been no notice of the hearing. The respondent's case is that the tribunal proceedings did not come to their attention and so the notice of the hearing of 25 January 2018 did not come to their attention and that was the reason for their non-attendance. The question for me was whether I accept that account and accept that it provided them with a reasonable explanation for their failure to participate in the proceedings prior to receiving the judgment against them.

6. Mr Dass is a manager at the respondent and provides managerial support and assistance to the business and has done so for the last three years. He was cross-examined on his statement which he adopted in evidence. Amongst other things he explains that the address used by the tribunal, Crystal House, is the respondent's registered address. The tribunal directed

the notice of claim form and notice of hearing (which were both sent out together on 10 October) and also the Rule 21 notice notifying the respondent that they had not sent in their response within the stipulated period (which was sent on 6 December) to the company's registered office. Mr Dass explained that the respondent also has a trading address which is located relatively nearby. Mr Dass explains at paragraph 14 of his statement that trading address is the address which the claimant attended at and all communications to her came from that address.

7. He explains that very little mail goes to the registered office which also houses other businesses. It is received by reception at Crystal House and then is distributed to the relevant locked post box for the business in question and,

> "We have a key for this box as does the security guard. I normally collect the mail from Crystal House but sometimes this may be done by our assistant manager. If we have not collected the mail by 11am the security guard at Crystal House would bring the mail to us at Unit 7. The security guard would usually visit us twice a day as he assists with the car park. If there had been any post in UK Skills post box it should have made it to us."

8. He then explained that he distributes the post. In his oral evidence he explained that the judgment was received by him in this way, when the post was brought to him. He had been very surprised to receive and then instructing solicitors to take action to seek to have the judgment set aside.

9. By a combination of Rules 86 and 90 of the Rules of Procedure 2013, if a party is served by post to the address given in the claim form then it shall, unless the contrary is proved, be taken to have been received by the addressee in the ordinary course of post. When, as here, documents are sent by the tribunal by first class post they are presumed to have arrived two working days after the date of posting. It was, very fairly, accepted by the respondent that, in the present case, this creates a rebuttable presumption that there has been good service. There is no suggestion that the correspondence was incorrectly addressed. The registered office is an appropriate address for the company. Mr Dass said that very little correspondence comes there and mentioned correspondence from the HM Revenue & Customs or Companies House. It is accepted that the judgment was received when addressed in that way.

10. Mr Dass was cross-examined about a grievance letter which the claimant says was sent by the Royal Mail Signed For service but to which she received no response. Ms Lappa produced a photograph proof of postage bearing a postcode and the first line of the address which I accept shows that it was sent to the respondent's trading address. That proof of postage bears a reference number which correspondence to that on a screenshot of the signature for the signed for document. That tends to suggest that the grievance letter dated June 2017 was accepted on behalf of the respondent.

11. The respondent's account is that they have no knowledge of this grievance although their position on this is a little bit unclear. Mr Dass appeared to accept in evidence that the name of the individual who appeared to sign for

the grievance letter may have been one of the girls who worked for them but was vague about that.

12. I am not persuaded that the claim form and the Rule 21 notice were not received by the respondent in the ordinary course of posting. I accept that it is possible that they did not come to Mr Das' attention personally but the failure on the part of the organisation to action the grievance letter or even have any record of it leads to the inference that the administration system for handling the respondent's post is not as rigorous as Mr Dass seeks to persuade me. Essentially his evidence is that post delivered to the registered office should have been collected by him personally or should have been brought to him by an assistant manager (from whom we have no evidence) or by a security guard.

13. Mr Aamodt argues that it is not improbable that post has gone astray within the Royal Mail system (and not been returned as undelivered). I take into account what he says in paragraph 20 of the skeleton argument, but it seems to me that it is more accurate to say it is not impossible that it should go astray. He sets out some data in that paragraph where he refers to the number of complaints made in a year and the number of those which relate to undelivered items of mail. However he provides no comparison with the numbers of postal items delivered each year in total. That would give some sense of the scale of undelivered post nationally. Had he done so then arguably it might be possible to judge how probable it is that post goes astray. However here I am asked to accept that two items directed to an address were not delivered but a third was delivered. I have concluded can give no weight to those statistics.

14. I have not been persuaded that the proceedings were not received by the respondent and have concluded that the reason why they failed to attend the hearing on 25 January 2018 was more likely that an administrative failure meant that the notice of the proceedings did not come to the attention of the appropriate individual within the organisation. It seems more than likely that that is what happened with the grievance letter which suggests that there are administrative failings within the respondent's organisation.

15. I therefore have to go on to consider whether it is in the interests of justice to reconsider the judgment, that being my conclusion about the reason why the respondent failed to attend and failed to put in an appearance prior to that hearing.

16. The interests of justice mean that justice has to be done to both parties. On the one hand, the respondent has not had the opportunity to defend the claim on the merits although still has the opportunity to defend it with regard to liability. So far as the merits of the defence are concerned I have considered the draft ET3 that has been proffered by the respondent and was received by the tribunal on 17 April 2018. I do not take lightly that the consequence of the judgment of 25 January is that there is a finding of victimisation against them.

17. The defence to the victimisation claim is that although they accept that the claimant potentially falls within s.41 of the Equality Act 2010 and therefore

that the tribunal has jurisdiction to consider a victimisation complaint by her, they deny that she made a protected act and they deny that any complaint by her was a reason for the termination of the agreement under which she worked. They also deny that she was a worker entitled to statutory sick pay.

18. I do not make a judgment on the merits at this time for obvious reasons but suffice it to say that it cannot be said that there are no reasonable prospects of this defence succeeding. It is a defence that has some cogency.

19. On the other hand the claimant has the benefit of a judgment in proceedings which were commenced in September 2017. Through no fault of her own she has had a substantial delay in achieving some satisfaction of it. If the application for reconsideration were to succeed, then it would be a further 6 months before a hearing could be listed which would be about 15 months after proceedings were started and 18 months after the events in question. The respondent seeks reconsideration on grounds which I find were caused by its own administrative failures. Weighing those things up I consider that it is not in the interests of justice for the judgment to be revoked.

20. I therefore confirm the judgment and list it for a remedy hearing. I originally listed it for ½ day but having decided that, taking into account that this will be heard by a full panel which may lengthen the time needed for deliberation, it should be listed for a full day's hearing.

21. I have, on my own initiative, made the following case management orders:

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. On or before **3 August 2018** the parties shall disclose to each other all documents by list in their possession, power or control that relate to any of the remaining issues in the case.

2. On or before **3 August 2018** the Claimant shall serve on the Respondents and the Tribunal a updated schedule of loss setting out details of the claim for compensation and showing how it has been calculated.

3. On or before **5 October 2018** the parties shall exchange witness statements containing all of the evidence each witness (including the parties themselves) intends to give in respect of all the remaining issues in dispute. The witness statement must be a full and complete account of all evidence relied on. Additional evidence will only be permitted at the Hearing in exceptional circumstances. The witness statement must be prepared in numbered paragraphs and in chronological order. Each party shall bring five copies of any witness statement on which they intend to rely to the first day of the hearing.

4. On or before **3 September 2018** the parties shall agree a single indexed and paginated bundle of documents. The Claimant shall be responsible for preparing the bundle and for bringing sufficient copies (five) to the hearing.

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CONSEQUENCES OF FAILURE TO COMPLY

(1) Any person who without reasonable excuse fails to comply with an Order to which Section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under Rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement, (b) striking out the claim or the response, in whole or in part, in accordance with Rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with Rule 74-84.

(3) You may apply under Rule 30 for this Order to be varied, suspended or set aside.

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Employment Judge George

Date: 28 June 2018 ……..

Sent to the parties on: .....

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For the Tribunal Office