EMPLOYMENT TRIBUNALS

Claimant: **Mr A Hassan**
Respondent: **Physio Medicine Ltd**

Heard at: **London Central (by video)** **On: 2 June 2021**
Before: **Employment Judge Elliott**

Appearances
For the claimant: **In person**
For the respondent: **Mr K Chehal, senior litigation consultant**

JUDGMENT ON RECONSIDERATION

The Judgment of 16 December 2019 is revoked.

REASONS

1. This decision was given orally on 2 June 2021. The claimant requested written reasons.

2. On 8 June 2019 the claimant Mr A Hassan presented a claim for unfair dismissal, race discrimination, for direct discrimination, harassment and victimisation, holiday pay, unlawful deductions from wages and breach of contract. He also claims that there was a failure to provide him with a written pay slip.

3. The claimant gave his dates of service in his ET1 as from 24 June 2018 to 12 January 2019. He had 6.5 months service. He worked for the respondent either an accountant or a credit controller. The is in dispute.

4. The ET1 was served by letter dated 17 September 2019 with the date for the ET3 to be received by 15 October 2019. A case management hearing was listed for 6 November 2019. The full merits hearing was listed from 11 to 13 March 2020.

5. On 16 December 2019 I gave a default judgment in this case under Rule 21 of the Employment Tribunal Rules of Procedure 2013 in the absence of a Response to the claim (ET3).

This hearing

6. This hearing was due to take place remotely on 7 April 2021 but was postponed on the claimant's application because he was unable to participate effectively in a remote hearing. It was re-listed for an in person to accommodate the claimant.

The issue for this hearing

7. The issue for this hearing was whether to revoke the Rule 21 Judgment dated 16 December 2019 and sent to the parties on 30 December 2019.

Documents for the hearing

8. There was an electronic bundle of 127 pages and also a paper bundle as this was an in person hearing. The claimant had sought a postponement on grounds that the respondent had not sent him the bundle. I refused this application because I noted that the bundle had been sent to the claimant and the tribunal on 26 March 2021 in preparation for the hearing as originally listed as a remote hearing on 7 April 2021. I told the parties that this was the bundle that the tribunal would use for this hearing.

9. The claimant made an application to reconsider the refusal of the postponement application because he said he was sent different bundles. I said that I would only rely on the bundle sent on 26 March 2021 and in the circumstances I would not postpone this hearing. I did not consider it proportionate for the parties to incur the time and cost of returning on another day.

The background

10. The ET1 in this case was served by letter dated 17 September 2019 with the date for the ET3 to be received by 15 October 2019. A case management hearing was listed for 6 November 2019. The full merits hearing was listed from 11 to 13 March 2020.

11. I saw an application from the claimant dated 18 November 2019 seeking a default judgment and following up on an earlier application dated 4 November 2019. On 4 November 2019 at 17:16 hours the claimant's 4 November application for a default judgment was forwarded by Ms Roza Ferenczi, the Managing Director to their representative Peninsula. She also forwarded the 18 November application asking what she needed to do. The claimant had copied his applications of 4 and 18 November 2019 to Ms Ferenczi.

12. On 3 December 2019 Ms Ferenczi chased up with the tribunal copies of the documentation relating to the claim because she had not seen the ET1.

13. On 12 December 2019 Peninsula as representative for the respondent wrote to the tribunal requesting a copy of the ET1 and they applied for an extension of time for the ET3. They said the address of the respondent most likely to have been incorrect when the ET1 was served by the tribunal. The respondent's

correct is Office 1045, 10th floor, 1 Ropemaker Street, London EC2Y 9HT and not 1109a, 11th Floor, 88 Wood Street, London, EC2V 7RS being the address used when the judgment was sent to the parties on 30 December 2019.

14. The respondent is a small physiotherapy and osteopathy practice employing "approximately 1 employee" (ET3 Grounds of Resistance paragraph 19). There are a number of self employed individuals who provided services to the respondent.

15. On Monday 16 December 2019 I gave a default judgment in this case under Rule 21 of the Employment Tribunal Rules of Procedure 2013 in the absence of a Response to the claim (ET3). I had not seen the correspondence from the respondent dated 12 December 2019. It is often the case (pre-pandemic certainly) that correspondence might not be linked to the physical file in a matter of four days, particularly when there was a weekend intervening. I am therefore unsurprised that I had not seen the respondent's application.

16. The respondent said in their application, that they moved to a new location in June 2019 as their landlord moved out of the office block with all the tenants from two large office floors.

17. The respondent said that they became aware of the claim when they received correspondence from the claimant in November 2019, making an application for a default judgment. The claimant said: "*The Respondent having failed to enter a Response*". On receipt of this correspondence the respondent said that they contacted the tribunal by email on 18 November 2019, 20 November 2019 and 3 December 2019. The respondent's case is that they did not receive the default judgment sent on 30 December 2019. The claimant denies that three emails were sent to the tribunal. He says there was only one. I saw the 3 December 2019 email seeking copies of the papers, giving their new address. This email was not copied to the claimant.

18. The respondent's representative made an application to the tribunal on 12 December 2019, by email, copied to the claimant, seeking copies of the papers including the Claim Form (ET1). The claimant's position was that as this application was made on 12 December 2019 and the judgment was made on 16 December 2019, the judgment "covered" the application and his claim should succeed.

19. On 2 January 2020 the ACAS officer informed Ms Ferenczi about the default Judgment.

20. On 8 February 2020, the respondent received the ET1 and the tribunal asked for the claimant's comments on the application submitted on 12 December 2019 by no later than 24 February 2020. Judgment had already been issued, although the respondent was not aware of this.

21. On 18 February 2020 the respondent made an application for a postponement of the full merits hearing due to commence on 11 March 2020. They said that

they did not receive the ET1 until 8 February 2020 because of the change of business address. They submitted a draft ET3.

22. On 24 February 2020 the claimant strongly resisted the respondent's application. He said that the respondent was aware of the ET1 and knew because of Early Conciliation that he was going to bring a claim. He said that the respondent was using the Wood Street EC2 address as late as 4 November 2019 in Ms Ferenczi's email footer. He said that the respondent had not acted with expediency. He complains that the respondent did not copy him on correspondence with the tribunal. He says that the respondent said they sent 3 emails to the tribunal when they had only sent one. He said it was not in the interests of justice to set aside the Judgment and that the delay would have an impact on memory and evidence.

23. On 26 February 2020 the respondent's representative at Peninsula spoke to the Tribunal's administration and was informed that the full merits hearing listed for 11 March 2020 for 3 days had been postponed and dates to avoid should be submitted. The representative was informed that Peninsula was not on record with the tribunal. Also on 26 February 2020 the respondent's representative sent a request by email for correspondence from the tribunal confirming that the final hearing for this matter had been postponed and that Peninsula are not on record to act for the respondent.

24. On 27 February 2020, the respondent company, rather than Peninsula, received a call from the tribunal who explained that the final hearing had been postponed. The respondent's position is that they were not informed of any default judgment. The respondent was informed by ACAS that a default judgment had been issued.

25. The application to set aside the default judgment was made on 5 March 2020.

26. By a letter dated 10 March 2020 Regional Employment Judge Wade apologised to the parties for the delay in responding to the respondent's applications and said that the hearing on 11 March 2020 would be to consider the respondent's application to set aside the Rule 21 Judgment and whether the respondent should be allowed to defend the claim out of time. Later on 10 March 2020 Employment Judge Spencer postponed the hearing on the respondent's application because they had not been given due notice of the hearing.

27. The pandemic unfortunately intervened. The tribunal has been a very paper based system and like many organisations had to adapt during the pandemic to electronic and remote ways of working. The tribunal building was not staffed in the normal way and systems had to change considerably. Not all files and systems worked in the way that the tribunal would have wished and accepts that this was very frustrating for parties.

28. On 18 August 2020 the respondent chased up a Reconsideration hearing and again chased this up on 8 December 2020.

29. The respondent did not receive a copy of the default judgment until 5 March 2021 but was aware it existed, having been informed by ACAS on 2 January 2020.

30. The Reconsideration hearing was originally listed for 7 April 2021 and was postponed to accommodate the claimant so that it could take place as an in person hearing.

The respondent's registered office address

31. On 18 December 2019 the respondent's registered office changed from an address in London W4 to City Point Building 1 Ropemaker Street London EC2Y 9HT.

32. When the proceedings were issued, the registered office was an address in London N1. When the proceedings were served on the respondent, its registered office was in London W4.

33. The address used in the ET1 was 1109A, 11th Floor, 88 Wood Street, London EC2V 7RS which was not the company's registered office but it's place of business until June 2019.

The submissions

34. The respondent submits that it has been denied natural justice by a judgment being issued when they had not seen the claim. They have submitted a draft ET3 with their application and say they have an arguable defence. They say that they are prejudiced in this regard and that the claimant would receive an unjustified windfall of compensation by proceeding to a Remedy hearing.

35. They submit that there will be no prejudice to the claimant in the granting of their application and that the delay in the proceedings is not such which has eradicated witness memory or available evidence. A fair hearing remains possible. They say that they acted promptly once becoming aware of the matter.

36. The respondent said there were jurisdictional issues, the claimant does not have two years service on the unfair dismissal claim and it was submitted that some of the money claims were out of time. The respondent said that the victimisation claim may also be out of time.

37. The claimant argued that the respondent was aware that he was bringing a claim because Early Conciliation had failed.

38. The claimant said he sent a Schedule of Loss to the respondent on 14 October 2019 which was copied to the tribunal and this should have alerted the respondent to the proceedings. He says that on 3 November 2019 he copied the respondent on his Case Management Agenda and that on 4 November 2019 he copied them on his request for a default judgment. The claimant's case is that the respondent chose not to participate in the proceedings.

39. The claimant said that the respondent was aware of the ET1 and knew because of Early Conciliation that he was going to bring a claim. He said that the respondent was using the Wood Street EC2 address as late as 4 November 2019 in Ms Ferenczi's email footer. He said that the respondent had not acted with expediency. He complains that the respondent did not copy him on correspondence with the tribunal. He says that the respondent said they sent 3 emails to the tribunal when they had only sent one. He said it was not in the interests of justice to set aside the Judgment and that the delay would have an impact on memory and evidence.

The relevant law

40. **Rule 70** of the Employment Tribunal Rules of Procedure 2013 provides that a tribunal may, either on its own initiative 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.

41. The respondent relied on ***Kwik Save Stores Ltd v Swain 1997 ICR 49 (EAT)*** which sets out some principles in relation to seeking an extension of time for an ET3. The tribunal has to take account all relevant factors, including the explanation or lack of explanation for delay, the merits, weighing and balancing one against the other and reach a conclusion that is objectively justified on the grounds of reason and justice.

Conclusions

42. I gave the default Judgment on 16 December 2019. I would not have done so, had I been aware that the respondent had not had sight of the Claim Form and that the registered office address of the company had not been used.

43. I do not agree with the claimant's written argument that the judgment of 16 December 2019 "covered" the application of 12 December 2019, because I had not seen this when I gave the default judgment. The tribunal system is such that it relied at the time on a predominantly paper based system and the emails were not always linked to the file within such a time period, which included a weekend (14 and 15 December 2019).

44. The claimant complains that the respondent has been "*evasive*" about the address of the company. When dealing with a corporate entity, a limited company, it is necessary to use in legal proceedings, its registered office, which may be different, as in this case, to the place of business.

45. When the claim was issued and served, its registered office was not the Wood Street address used by the claimant in his Claim Form. This is enough on its own for me to be satisfied that the claim was not properly served or sent to the respondent.

46. Just because parties go through Early Conciliation does not mean that a claim will necessarily follow. Just because Early Conciliation has taken place and

failed, does not mean that a prospective claimant will definitely go on to bring a claim. It is not automatic and bringing proceedings is a big step which some prospective claimants may find too stressful. I find that just because the parties went through the Early Conciliation process, does not mean that the respondent was bound to consider that a claim would follow.

47. I have to consider the wider picture. I find that the claim was not validly served at the registered office and the respondent did not have notice of the claim. In early December 2019 Ms Ferenczi of the respondent was chasing up a copy of the claim. The respondent was represented by Peninsula and I take the view on a balance of probabilities, that a professional representative would not fail to file an ET3 if it had notice of and a copy of the ET1. The respondent needed a copy of the ET1 in order to prepare the ET3 and I find that they did so within a few days of receiving a copy. The ET1 was sent to the respondent on 7 February and received on 8 February. The draft ET3 was submitted 10 days later on 18 February 2020.

48. I find that the respondent did not fail to act expeditiously. Once they had sight of the ET1 they took instructions and prepared and submitted a drat ET3 within a matter of a few days.

49. A claim for unlawful discrimination including victimisation and harassment is a very serious matter. I find that it is in the interests of justice for the case to be heard and for the respondent to have the opportunity to answer the allegations at trial. I agree with the respondent's submission that a default judgment, in circumstances where the claim was not properly served on the registered office address and when the judgment was granted without my knowledge of a prior application made on 12 December 2019 for an extension of time, would result in an unjustified windfall for the claimant.

50. So far as the delay is concerned, this is unfortunate and has been partly down to the systems at the tribunal and partly due to the pandemic. The key witnesses are likely to be the claimant and Ms Ferenczi. Ms Ferenczi as the key respondent witness has had legal representation since late 2019 and I find on a balance of probabilities she will have been advised to preserve all relevant documentary records. She has given instructions in order for the ET3 to be prepared in February 2020. I take the view that memories are not likely to be faded to such an extent that justice will be impaired and there will be documentary records to support the witness evidence.

51. In these circumstances the Judgment of 16 December 2019 is set aside and the case continues.

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Employment Judge Elliott

2 June 2021

Sent to the parties on:

07/06/2021.

For the Tribunal: