



EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

Mr F Ardesi (1)
Mr A McGoff (2)

AND

Respondent

Humanity Torbay

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter

ON

22 October 2018

EMPLOYMENT JUDGE N J Roper

Representation:

For the Claimants: In person

For the Respondent: Mr P Maratos, Consultant

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 two Rule 21 Judgments in favour of the Claimants are revoked.

RESERVED REASONS

1. The respondent has sought a reconsideration of the two judgments entered under Rule 21 dated 17 July 2018 (one for each of the two claimants) which were sent to the parties on 19 July 2018 (“the Judgments”), and has made an application for an extension of time to serve its response. That application and outline grounds were first set out in its e-mail letter dated 27 July 2018. That letter was received at the tribunal office on 27 July 2018. The respondent has subsequently served more detailed grounds and its response to the claims on 10 August 2018 and 24 August 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 background to these claims is as follows. The claimants submitted a joint application to this tribunal dated 9 May 2018 claiming unfair dismissal, discrimination on the grounds of race, breach of contract in respect of notice pay, unlawful deduction from wages, and for accrued but unpaid holiday pay. The respondent was required to submit its response by 26 June 2018 but failed to do so. The Judgments were then entered for the claimants and this hearing was listed to determine the appropriate remedy. The respondent then made an application for reconsideration of the Judgments and for its proposed late response to both claims to be accepted.
6. The respondent is a Community Interest Organisation which was established in 2017 and is a registered charity. Its objects are to assist homelessness and poverty in the Torbay area. It accepts that it received the claims from the tribunal office and a manager namely Mr Mason was dealing with the preparation of the response to the claims. Unfortunately as a result of considerable family difficulties he suffered a breakdown and has now left the respondent. Apparently he informed others within the respondent’s organisation that the claims had been defended, but he had failed to submit a response. Immediately upon receipt of the Judgments the respondent replied to the effect that they thought that the claims had been dealt with by way of a response and applied for late acceptance of their response. They subsequently sought advice and a detailed response was served on 10 August 2018 and more detailed submissions seeking reconsideration of the

Judgments and seeking leave to submit the late response were received on 24 August 2018.

7. The response submitted by the respondent's raises an arguable defence to the entirety of the claimants' claims. In the first place it denies that the claimants were employees, and asserts that they were volunteers. In addition, neither claimant can have sufficient continuity of service to bring a claim for unfair dismissal. The claims for discrimination and the other monetary claims are denied. The respondent says that it terminated the relationship lawfully and reasonably when the claimants delayed undertaking the necessary DBS checks, and that various safeguarding concerns had arisen following their voluntary work.
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) there is a reasonable explanation for the respondent's delay in submitting its response, and the delay has been minimal; (ii) there is considerable potential merit in the respondent's defence, which could well defeat some or all of the claimants' claims; and (iii) the balance of prejudice favours revoking the Judgments because failure to do so would afford the claimants a potentially unjustified windfall

of compensation where liability is contested and the respondent would be significantly prejudiced in failing to be in a position to seek to dispute the claims, whereas allowing the revocation of the Judgments is less prejudicial to the claimants because they still have the opportunity for their claims to be heard in detail on the merits and they have not suffered any prejudicial delay.

12. Accordingly I allow the application for reconsideration pursuant to Rule 70 because it is in the interests of justice to do so, and the Judgments are 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.

Employment Judge N J Roper
Dated 22 October 2018

Judgment sent to Parties on
