EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Marcus McKeown	AND	Mitie Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 14 November 2018

EMPLOYMENT JUDGE N J Roper

Representation:
For the Claimant: Mrs D Sockett, Unison
For the Respondent: Mrs Louise Mankan of Counsel

JUDGMENT ON APPLICATION FOR RECONSIDERATION

The judgment of the tribunal is that the respondent's application for reconsideration is allowed, and the administrative decision to disallow the respondent from taking part in these proceedings is hereby revoked, and the respondent's notice of appearance is accepted.

REASONS

1. The respondent has applied for a reconsideration of the administrative decision dated 7 September 2018 which was sent to the parties on 7 September 2018 ("the Decision"). The grounds are set out in its letter dated 17 September 2018. That letter was received at the Tribunal office on 17 September 2018.

2. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). 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.
3. 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.
4. The grounds relied upon by the respondent are these. The claimant issued these proceedings claiming unfair dismissal only and they were presented on 25 July 2018. The respondent asserts that it did not receive a copy of the claimant's originating application or other information relating to these proceedings. It was therefore unaware of the 28 day time limit for submitting a response because it was unaware of the proceedings. The first occasion upon which the respondent says it was aware of these proceedings is when it received the letter and administrative decision of the tribunal (the Decision dated 7 September 2018) was on 12 September 2018. It immediately requested the relevant claim form from the Tribunal office and submitted its response within three working days as best it could given its limited knowledge of the proceedings. The proposed response raises a potentially strong defence to the claimant's unfair dismissal claim, which may also be time barred in any event. The respondent also makes an application for its response to be accepted out of time.
5. The claimant opposes the respondent's application on the grounds that the address was correctly entered by the claimant on the relevant application form and that the respondent should have received the papers in the normal way. In addition, the claimant says that the respondent was aware of potential proceedings by reason of the ACAS Early Conciliation process, which it failed to engage. However, the claimant is unable to challenge the respondent's assertion that it never received the original proceedings because it has no direct first-hand information or knowledge of the same.
6. The position is analogous to a judgment being entered under Rule 21 against the respondent. 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.
7. 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?

8. 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.
9. Applying these principles in this case, there is a credible explanation from the respondent as to the delay in filing its notice of appearance, which was subsequently filed without any undue or prejudicial delay and which raises a strong potential defence to the claimant’s claim. Balancing the possible prejudice to each party, to allow the late response will deny the claimant the windfall of a successful claim when there has been no prejudicial delay and the claimant is still able to argue his claim on the merits before a full hearing. On the other hand to disallow the respondent’s application and to deny its defence will cause greater prejudice and hardship to the respondent who will then have been denied the opportunity of defending the claim on its merits.
10. Accordingly, in my judgment the balance of prejudice favours the respondent and I allow its application for reconsideration pursuant to Rule 70 because it is in the interests of justice to do so. The respondent’s late response is therefore accepted out of time, and the matter will now proceed to determine the other preliminary matters which have been listed today.

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Employment Judge N J Roper
Dated 14 November 2018

Judgment sent to Parties on

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For the Tribunal Office