THE EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms Gillian Ferguson	KC Property Management UK Ltd

JUDGMENT

1. I refuse the respondent's application for an extension of time to file a response.

2. Under Rules 70-72 of the Employment Tribunal Rules of Procedure 2013, (the Rules) I refuse the respondent's application for reconsideration of the Judgment of Employment Judge Aspden made on 27 May (sent to the parties on 15 June) 2020 because there is no reasonable prospect of the original decision being varied or revoked.The case will be listed for a 2 hour remedy hearing by telephone.

REASONS

1. The respondent has applied for an extension of time to file a response and reconsideration of a judgment, on liability only, that a claim of unfair dismissal is well founded, made under Rule 21 in circumstances where no response had been presented.

2. I begin with the facts gleaned from the Tribunal file.The claimant was employed as a cleaner by a business she named as "Spotless Commercial Cleaning" (Spotless), latterly at a school. Spotless lost the cleaning contract on or about 11 November 2019, prior to which the claimant was told her employment would transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) (TUPE) to "Focus Cleaning" (Focus) which was to take over the cleaning of the school. Regulation 4 of TUPE includes
(1) … a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and ***assigned to the organised grouping of .. employees*** *that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.*
(2) Without prejudice to paragraph (1), …on the completion of a relevant transfer—
(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.
(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of .. employees that is subject to a relevant transfer, is a reference

to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

3. The fundamental point is the transfer itself does not terminate the contract , even if one or both parties want it to. Regulation 18 says there can be no contracting out of TUPE other than in circumstances none of which seem to apply in this case. Regulation 7 includes
(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is -

(a) the transfer itself, or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

(3) Where paragraph (2) applies—

(a) paragraph (1) shall not apply;

(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)

(i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or

(ii) in any other case the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

An ***economic, technical or organisational*** **(**ETO) reason must entail and necessitate a change in the numbers of the workforce or in the functions of members of the workforce**.** The claimant's case is she was told by someone from Focus she names as "Kim", she would not be employed . She accepts there was mention of her not having a CRB, now called DBS (Disclosure and Barring Service) check but that was a problem which she asserts could easily have been addressed**. Kim said she would "get back to" the claimant about this but never did despite the claimant trying to email her.**

4. The claim was presented on 1 January 2020 following Early Conciliation (EC) from 28 November 2019 to 28 December 2019 against a respondent described on the claim form and EC Certificate as " Focus Cleaning". The address given for it was "The Angel Guest House , Newcastle-upon-Tyne NE16 3DW". The claim was served by post to that address on 17 January 2018. A response was due by 14 February. None were received. The claim papers were never returned by Royal Mail. I call this "Contact 1".

5.The file was referred to Employment Judge Aspden who noticed the claimant had not given the date she started work for Spotless and, as a claim for unfair dismissal requires two years

continuous employment she caused a letter to be sent to the claimant asking for such date and whether the address she had given, with no street name, was complete. This letter was copied to the respondent. I call this "Contact 2".

6. The claimant emailed her start date as 1 February 2017 and the full address as Focus Cleaning, 6 Front Street, Swalwell, Newcastle NE16 3DW The file was referred to Employment Judge Johnson who directed a letter to the claimant saying Focus Cleaning appeared to be only a trading name. This letter was copied to the respondent at the original service address. I call this "Contact 3".

7. The claimant emailed to say she had no more contact information or knowledge of who traded as "Focus Cleaning". The file was referred to me and I found the Angel Guest House is at 6 Front Street, Swalwell, Newcastle NE16 3DW which is also the registered office shown at Companies House for KC Property Management UK Ltd, a company of which the register shows Ms Kim Moore to be a person with significant control. I directed a letter to the claimant, which was sent on 3 March copied to the respondent, erroneously at the original service address. I call this "Contact 4".

8. The hearing was listed for 5 May but due to the Covid 19 Pandemic was converted by the Regional Employment Judge to a telephone hearing notice of which was sent to the claimant and respondent on 28 April. I call this "Contact 5".

9. That hearing was conducted by Employment Judge Aspden. The respondent did not dial in to it but the claimant did. Employment Judge Aspden amended the name of the respondent to that shown above and a three page case management summary detailing all her reasoning was sent to it at 6 Front Street, Swalwell, Newcastle NE16 3DW on 14 May . I call this "Contact 6". On reading it , the respondent should easily have seen what it had to do if it wanted to defend the claim. It made no contact.

10. The claimant answered some questions put to her by email. When no response has been entered an Employment Judge is required by rule 21 to decide on the available material whether a determination can be made and, if so, obliged to issue a judgment which may determine liability only or liability and remedy. On 27 May Employment Judge Aspden gave judgment under Rule 21 on liability only. This was sent to the claimant and the respondent on 15 June. In a covering letter the respondent was told it could still be heard at the remedy hearing to the extent permitted by the Judge. I call this "Contact 7".

11. I now deal with the law. A claim may be validly served on a limited company at its registered office. In Zietsman and Du Toit t/a Berkshire Orthodontics-v-Stubbington the question on the appeal was whether an Employment Tribunal was entitled to conclude Mr Du Toit had been properly served with the proceedings posted to an address from which he no longer traded. In that case the tribunal was dealing with a partnership rather than a company but comments on appeal by His Honour Judge Peter Clark are just as valid. He accepted Mr DuToit had no actual notice of the proceedings. Whether he was deemed to have notice was the question. The 1993 Employment Tribunal Rules were to be read in conjunction with Section 7 of the Interpretation Act 1978 (see Migwain Ltd-v-TGWU 1979 ICR 597and T & D Transport-v-Limburn 1987 ICR 696, which provides *"Where an Act authorises or requires any documents to be sent by post (whether the expression 'serve' or the expression 'give' 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be affected by properly addressing, prepaying, and posting a letter*

containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

12. Rule 20 provides
(1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reason why the extension is sought and shall, ***except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible*** *and if the respondent wishes to request a hearing this shall be requested in the application.*
(2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.
(3) An Employment Judge may determine the application without a hearing.
(4) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside.

13. Ms Kim Moore on behalf of the respondent emailed the Tribunal on 17 June saying she had received a letter dated 15 June "*This is the first letter I have received so I am confused as to how a judgment could be made without me as respondent having the opportunity to provide information*" . The 2013 Rules include
70. A Tribunal may, .. . 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.*
71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and ***shall set out why reconsideration of the original decision is necessary.***
72.(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers there is ***no reasonable prospect*** *of the original decision being varied or revoked … the application shall be refused and the Tribunal shall inform the parties of the refusal.*

14. Employment Judge Johnson directed a letter to the respondent saying she must complete a response form a copy of which he ordered be enclosed. Ms Moore did so on 25 June repeating what she had said in her letter of 17 June that the claimant was dismissed because she could not produce a DRB check. Essentially she now wished to run a defence on liability . Even if that were the reason, it is hard to see how she will be able to argue she followed any fair procedure. On liability her argument is weak. She also says she wishes to assert the claimant refused an offer from her to work elsewhere and found another job quickly. Those points would go to how much compensation the claimant should be awarded by way of remedy and on those points the respondent may be heard.

15.Limited Companies may use trade names and such names are often the only ones people dealing with it knows.Swalwell is a small area where there will be only one Angel Guest House with that postcode. Letters do occasionally go astray but rarely are they not returned by the Royal Mail when posted by the Tribunal which on each envelope shows a return address. For Contacts 1,2,3,4,5 and 6 not to have reached the registered office and come to Ms Moore's attention is not credible. If by any chance they all went astray this claim should be deemed to have been validly served on the respondent by posting to its registered office as early as Contact 1.

16. In my judgment, there is no reason to extend time for filing the response. The only ground for reconsideration in the words of Rule 70 is ***it is necessary in the interests of justice.*** There is no reasonable prospect of any Employment Judge finding that where the history of the proceedings shows the respondent has taken no steps to contact the Tribunal until it received a judgment under Rule 21 that it would be necessary in the interests of doing justice **to both parties** to allow a respondent which gives every appearance of having ignored earlier contact to require the claimant to "start from scratch" months after the claim was presented.

Employment Judge T.M. Garnon

Judgment authorised by the Employment Judge on 4 August 2020.