Appeal No. **UKEAT/0059/06/ZT**

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 24 February 2006

Before
HIS HONOUR JUDGE PETER CLARK
(SITTING ALONE)

BRITISH SCHOOL OF MOTORING APPELLANT

MR C FOWLER RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES
For the Appellant MR M FODDER (Of Counsel)
Instructed by: Croner Consulting Litigation Department
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Croner House
Wheatfield Road
Hinckley
Leicestershire LE10 1YG
For the Respondent MR A MIDGLEY (Of Counsel)
Instructed by: Messrs Wills Chandler Solicitors
76 Bounty Road
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SUMMARY
Practice and Procedure - appearance/response; review; costs

No response entered - review application dismissed summarily under R.35(3) ET Rules of Procedure. Factors for exercise of discretion not considered. Case remitted for full review hearing.

Cost in appeal to be paid by Appellant. Appeal unnecessary, failure to enter response caused by default of Appellant and its advisers.

HIS HONOUR JUDGE PETER CLARK

1. This case has been proceeding before the Reading Employment Tribunal. The parties are Mr C Fowler, Claimant and British School of Motoring Ltd (BSM), Respondent. I shall so describe the parties. This appeal is brought by the Respondent against a decision of a Chairman, Mrs J Hill, dated 20 December 2005, rejecting what was treated as an application by the Respondent for a review of a direction by the Tribunal dated 5 December 2005, that since no response had been received; the Respondent could take no part in the proceedings.

Background
2. The Claimant was employed by the Respondent as manager of their Reading branch. On 26 October 2005 he presented a claim form to the Tribunal complaining of Unfair Dismissal and Wrongful Dismissal. It was his case, amplified in further Details of Complaint lodged at the Employment Tribunal on 3 November that he was summarily dismissed for alleged misconduct, namely responsibility for the theft of bankings at the branch, on 26 July 2005. He denied any wrongdoing and raised issues of procedural failures on the part of the Respondent, including a failure to engage with the Statutory Disciplinary Procedure, rendering the dismissal automatically unfair.

3. No response was entered and on 5 December the Tribunal issued the direction which I have mentioned. On 12 December, a Ms Andrea Airey, describing herself as an HR Consultant wrote to the Tribunal on notepaper headed ‘Norwich Union, an Aviva company', from an address in York, giving the case reference for Mr Fowler's claim. Ms Airey later explained, in a letter to the Claimant's solicitors dated 29 December, responding to an enquiry as to Norwich Union's involvement, that BSM is a part of RAC plc. RAC plc had been acquired by Aviva plc and was in the process of being integrated into the Norwich Union Insurance division.

4. On 12 December Ms Airey wrote:
"Dear Sir I Madam,
I am writing further to your letter dated 5 December 2005, stating that our response to the claim raised by Mr C Fowler had not been received.
We were copied into a letter dated 3 November to Willis Chandler Solicitors. confirming that the contents of their letter of 2 November had been noted and would be copied to us.
On 1 December, having received no correspondence from you we contacted your office to be advised that the documents had been sent to our Feltham address on 30 November. Unfortunately, these were never received and we have had no detail of when our response to the claim had to be filed.

In light of this, we would like to request that you now serve the documents on us and confirm when we have to respond by. Can you please send all future correspondence to Ms Airey."

5. That letter was placed before the Chairman, Mrs Hill; she treated it as a review application and directed the Tribunal Secretariat to obtain the Claimant's comments by a letter dated 15 December.

6. The Claimant's solicitors promptly responded on 16 December objecting to the Respondent's application. Without further recourse to the Respondent, the Chairman issued her decision on 20 December, dealing with the mater on paper without a hearing and thus, I infer, exercising her powers under Rule 35(3) of the Employment Tribunal Rules of Procedure 2004.

The Chairman's decision

7. Based on the material before her the Chairman found the Respondent's explanation for failure to lodge a response implausible. She found that the Respondent must have been aware of the claim from correspondence both with the Claimant's representative and from the Tribunal. The Respondent knowingly shut its eyes to the obvious. It would not be in the interest of justice to allow further time for a response to be entered. The application for review was duly rejected.

The Appeal

8. There has been a considerable history in this case, including a second unsuccessful review application to the Tribunal, and a number of differing accounts given by those representing the Respondent, Croner Consulting, as to the Respondent's state of knowledge about the proceedings started by Mr Fowler. It is in the event unnecessary for me to recount the ins and outs of that matter. Mr Fodder, who has been recently instructed and appears on behalf of the Respondent today, and to whom I am particularly grateful for his candour, now accepts on behalf of the Respondent that the form ET1, together with the form ET2 informing the Respondent that a response was required within 28 days of the date of that letter; namely 1 November 2005, was sent under Rule 2 of the 2004 Rules by the Tribunal to the Respondent. In that sense, Mrs Hill's observation that the explanation given Ms Airey was implausible was correct.

9. However, there are procedural points raised in support of the appeal which require careful consideration. In particular, the point is made that having deemed the letter from Ms Airey as an application for a review, whilst the Chairman quite properly obtained the comments of the Claimant's side, the Tribunal did not then go back to the Respondent for a reply. It seems to me, in circumstances where the Tribunal Chairman was effectively making a finding rejecting the account given in the letter of 12 December, before doing so on paper without a hearing, at the very least an opportunity to respond ought to have been given to the Respondent as a matter of simple fairness.

10. The appeal does not end there. Mr Fodder submits that looking at the Chairman's reasons she has not followed the guidance given by Burton P in Moroak v Cromie [2005] IRLR 535, applying the earlier guidance of Mummery P in Kwik Save v Swain [1997] ICR 49, that when reaching a review decision it is necessary to take account of all relevant factors, including the explanation or lack of it, for the delay; the merits of the defence and balancing the possible prejudice to the parties of allowing or refusing an extension of time for entering a response.

11. It is a feature of this case that no defence on the merits of the claim was advanced Ms Airey in her letter of 15 December, although a proposed form ET3 was lodged with the second application for review which, as Mr Midgley accepts, gives rise to an arguable defence. Again, an opportunity to reply, it seems to me, was essential as a matter of fairness. Additionally, Mr Fodder invokes the judgment of Rimer J in Maresco v Motor Insurance Repair Research Centre [2005] ICR 197. In particular, at paragraph 30, Rimer J referred to Rule 3.9 of the civil procedure rules which is headed 'Relief from Sanctions' and sets out at letters (a) to (i), the factors which the Court ought to take into account on an application for relief from sanction. Rimer J took the view, and I respectfully agree, that those principles applicable to the civil courts apply equally to an application for relief from sanction in the Employment Tribunal. Again, the importance of weighing the prejudice to the respective parties is highlighted.

12. Despite Mr Midgley's valiant attempt to sustain the approach of the Chairman, in circumstances where I am quite satisfied there has been a catalogue of errors by the Respondent, or its advisers, I draw no distinction between the two, I am driven to conclude that it was wrong in law for the Chairman first of all to deal with the matter without recourse to the Respondent and, secondly, in all the circumstances not to direct a review hearing under Rule 36. The further material which has been placed before me, including two unsigned witness statements from Croner's staff who at various stages have handled this case, persuades me that this is not a case in which I can deal with the matter using my powers under section 35 of the Employment Tribunals Act 1996. It seems to me a case in which a full review hearing should take place before a different Tribunal.

13. In arriving at that conclusion, I have been very conscious of the prejudice suffered by the Claimant in having to defend these appeal proceedings. Rule 34(A) of the EAT Rules provides that:
"where it appears to the Appeal Tribunal that any proceedings brought by the paying party were unnecessary× the Appeal Tribunal may make a costs order against the paying party."

14. I have formed a very clear view that these appeal proceedings were unnecessarily caused by the errors on the part of the Respondent or its advisers. Had this case been dealt with properly in the first instance when the proceedings were served and sent in good time to the Respondents' representatives; none of this would have happened.

15. The Claimant's solicitors have put before me a schedule of costs totalling £5,509.08. Mr Fodder, in the course of his submissions, realistically acknowledged that it would not be right to resist an application for costs in that amount, and I shall so order.

16. It follows that this appeal is allowed. The matter will be remitted to a fresh Employment Tribunal for a full review hearing. The Respondent will pay the Claimant's costs in this appeal in the sum stated.