THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE ELLIOTT (sitting alone)**

BETWEEN:

Ms P Young

Claimant

AND

Andrews International Ltd

Respondent

ON: **15 March 2017**

Appearances:

For the Claimant: **Mr M Egan, counsel**

For the Respondent: **Mr M Lee, counsel**

JUDGMENT ON RECONSIDERATION AND COSTS

The Judgment of the Tribunal is that:

1. The judgment of 10 January 2017 is revoked.
2. The respondent shall pay the claimant's costs in the sum of **£4,800.**

REASONS

1. This judgment was delivered orally on 15 March 2017.
2. By a claim form presented on 11 November 2016 the claimant Ms Priyanka Young claimed constructive unfair dismissal, disability discrimination including associative disability discrimination, detriment for having made a

protected disclosure and age discrimination.

The background history

3. The ET1 was served on the respondent in the normal way with a date for the response given as by 13 December 2016. A telephone preliminary hearing for case management was listed for 10 January 2017.

4. On 19 December 2016, no response having been received, the claimant applied for judgment under Rule 21. Also on 19 December 2016, no response having been filed with the tribunal, the claimant was asked, on the instructions of Regional Employment Judge Hildebrand, to complete a schedule of loss and file this with the tribunal by 29 December 2016.

5. On 27 December 2016 Mr James Blatz of the respondent sent an email to the tribunal, for the attention of the ACAS officer Mr Paul Roberts (who is not part of the Employment Tribunal Service) saying that he responded by email to Mr Roberts of ACAS on 4 December 2016.

6. I considered the matter on 29 December 2016 and on my instructions a letter was sent to the parties stating that no response to the proceedings had been received by the due date of 13 December 2016 and the claimant was entitled to a default judgment. No schedule of loss appeared to have been received by the claimant by 29 December 2016 as ordered by the Regional Judge. The letter to the parties also stated that if the respondent had filed a response, then documentary proof was required. The telephone hearing for 10 January 2017 was vacated.

7. The schedule of loss was filed at 15:40 hours on 29 December 2016 and had not been seen by the judge when the instructions were given for the tribunal's letter of that date. It is clear that the claimant complied with the direction to file a schedule of loss.

8. On 4 January 2017 Mr Blatz for the respondent filed an ET3 seeking an extension of time. He said he had responded to ACAS for mediation but was not aware that he needed to respond directly to the tribunal. The ET3 response was brief and the respondent asked for a week to file a more in-depth response.

9. No ET3 having been filed in accordance with Rule 16 by 13 December 2016, judgment was entered under Rule 21(2) on 10 January 2017.

10. A remedy hearing was listed for 15 March 2017. The Notice of Hearing was dated 16 January 2017.

11. On 27 January 2017 solicitors instructed for the respondent made an application under Rule 71 for reconsideration of the Rule 21 judgment. The remedy hearing was converted to deal with the issues set out below.

The issues

12. The issue for the tribunal was whether to confirm, vary or revoke the Rule 21 Judgment made on 10 January 2017.

13. If the reconsideration application was unsuccessful, the issue for the tribunal was that of remedy following the judgment.

14. If the application succeeds, the issue for the tribunal is to make case management orders and identify the issues for the full merits hearing.

15. Whether to order that the respondent pay the claimant's costs of this application, based on the claimant's application made on 28 February 2017.

Witnesses and documents

16. The tribunal heard from the claimant and from Mr James Blatz, Senior Regional Director, Global Human Resources for the respondent.

17. There was a bundle of documents of 193 pages.

18. I had written submissions from both parties to which they spoke. These were fully considered even if not expressly referred to below.

Findings of fact

19. The ACAS Early Conciliation certificate shows that the claimant made formal contact with ACAS under the EC procedure on 31 October 2016. The EC certificate was issued on 7 November 2016.

20. The claimant instructed her solicitor Mr Carmody in this matter in about September 2016 and on the claimant's instructions he engaged in correspondence both open and without prejudice with the respondent. Mr Carmody was in correspondence with Ms Melanie Finch an HR manager in London office and with Mr James Blatz whose job title is that of Senior Regional Director Global Human Resources who is based in Seattle, Washington, USA.

21. Mr Blatz accepts in evidence (statement paragraph 12) that he understood that a claim was likely to result if settlement was not reached. He tells the tribunal and I accept and find that he had every intention of responding to any such the claim.

22. The proceedings were served on the respondent's London office at Juniper Drive, Battersea Reach, London SW18. The claimant had quite correctly used the respondent's registered office and the proceedings were served in the normal way by post to that address. Mr Blatz accepts that the proceedings were served at the London office.

23. The proceedings were seen by Ms Finch in the London office and she sent them on to Mr Blatz as she said they had "no established procedure in place".

24. Mr Blatz instructed Ms Finch to send him the papers she had received and that all communications on this matter should be via himself. Ms Finch sent the ET1 and accompanying documents served by the tribunal, to Mr Blatz by email on 16 November 2016 (page 104A). She told Mr Blatz she had not read them but simply scanned them and put them in the envelope and said where this had been left.

25. The papers served on the respondent make clear the date upon which a response is to be received at the tribunal; in this case 13 December 2016. The Notice of Claim states "If a response is not received by that date and no extension of time has been applied for and given, or if the respondent indicates that it does not contest any part of the claim, a judgment may be issued and the respondent will only be entitled to participate in any hearing to the extent permitted by the Employment Judge who hears the case." The words are clear.

26. The documents state the postal and email address of the London South Employment Tribunal. Other than being marked at the end "cc ACAS" there is no reference to ACAS and no contact information is given for ACAS.

27. Mr Blatz's evidence was that he thought that the claim could only be resolved through ACAS and the claim would only proceed if ACAS was not able to resolve the dispute. He says that this misunderstanding was partly based on the way in which employment disputes are dealt with in the USA. He does accepts (statement paragraph 3) that the instructions from the tribunal were clear.

28. Mr Blatz said that he did not understand that ACAS and the Employment Tribunal were separate bodies. On 16 November 2016 he sent the paperwork to his in-house Counsel Mr Paul Lutz saying that the response was due on 13 December 2016 and referred to making an initial response on-line to the "ACAS judge".

29. I find that Mr Blatz did genuinely confuse ACAS and the employment tribunal. I find that the only reason he can have done so was because of a failure to properly and carefully read the papers that had been sent to him.

30. Mr Blatz was copied in to Mr Carmody's email to the tribunal of Monday 19 December 2016 stating that no response had been received to the claim and seeking judgment under Rule 21. ACAS was not copied in to this email. The email was titled "Application for Judgement – Rule 21(2)". Mr Blatz was on Christmas holidays when this email arrived. This is a corporation and arrangements for cover ought to be made. I find that if Mr Blatz had considered this email carefully it would have been perfectly clear that this was not a communication with ACAS.

31. Mr Blatz continued, mistakenly, to pursue his communications with ACAS.

32. Mr Blatz said that "the company did not receive the judgment of 12 January 2017". He has picked up on the date it was sent to the parties, although the date of the judgment is 10 January 2017. It was sent in the normal way by post to the respondent's registered office. It is unsurprising that it was not sent to him in the United States. There was no mechanism for notifying Mr Blatz in the United States of this judgment as there was no ET3 and no address for service other than the address given in the ET1.

33. Mr Blatz spoke to a tribunal clerk on 4 January 2017. Given the circumstances the clerk suggested to Mr Blatz that he make an application regarding his ET3 for, as he puts it, "an urgent out of time consideration of the Company's response". Mr Blatz also referred to it as an "extraordinary out of time application". This is not terminology generally used at the tribunal. It may be that the clerk referred to a reconsideration application but I can make no finding on exactly what he was told.

34. On 4 January 2017 Mr Blatz sent a form of ET3 seeking an extension of time for the ET3. He said he had responded to ACAS for mediation but was not aware that he needed to respond directly to the tribunal. He accepts that the draft ET3 response he filed was brief. He asked for a week to file a more in-depth response. It is not disputed that no such in depth response or more detailed draft ET3 has ever been submitted.

35. By 4 January 2017 the date for filing the ET3 had passed and the claimant had applied for judgment under Rule 21, to which the claimant was entitled under that Rule in the circumstances.

36. Mr Blatz received the Notice of Remedy hearing and it was at this point that he instructed solicitors, Wedlake Bell, to deal with the matter. I have not been told the precise date upon which that firm was instructed.

37. The application for reconsideration was made by solicitors on 27 January 2017. The Rule 21 judgment was sent to the parties on 12 January 2017. It is one day out of time under Rule 71 which provides that it shall be presented in writing within 14 days of the date on which the original decision was sent to the parties. The solicitors say in their letter of 27 January that the Notice of Remedy Hearing was dated 16 January and they argued that because of this the application for reconsideration was within time.

38. This is plainly wrong when reading Rule 71. Time ran from 12 January, the date upon which the judgment was sent to the parties. Even if the solicitors did not have this document, they were on notice to its existence and I had no evidence to show that they had even requested a copy of the judgment from the tribunal. They say that "if there was an additional order dated 12 January" they did not receive it and were not aware of it.

39. It is quite clear under the Rules as to the date from which time runs and I find that it was slapdash on the solicitors' part to fail to take steps to

ascertain the position. It was clear there was a judgment as this gave rise to the Notice of Remedy Hearing.

40. Mr Blatz candidly states in his evidence in relation to the failure to enter an ET3 on time: "*I fully accept that this was my error, for which I apologize".* He says that the error was genuine and there was no intention to disregard the legal requirements of the tribunal.

41. The parties go into some detail in their evidence about the merits of the claim. There are very serious allegations made by the claimant against at least two members of the respondent's staff. Allegations of both disability and age discrimination are made plus whistleblowing detriment.

42. Both sides made submissions as to prejudice. In summary form the claimant submits that the prejudice to her is additional stress and impact on her health. The respondent says that a contested hearing would be stressful for the claimant and that is a consequence of bringing proceedings. The respondent says that this is not a meritorious claim from their perspective and it would create windfall for the claimant if she were to succeed on a default judgment. The respondent submits that the delay is only a 2-month delay to the proceedings and it does not in their submission cause substantial prejudice to the claimant.

The law

43. 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.

44. The EAT in ***Kwik Save Stores Ltd v Swain 1997 ICR 49***, Mummery J held (under the Rules and using the terminology then in place) that "it was incumbent on a respondent applying for an extension of time for serving a notice of appearance before a full hearing on the merits had taken place to put before the industrial tribunal all relevant documents and other factual material in order to explain both the non-compliance with rule 3 of the Industrial Tribunals Rules of Procedure 1993 and the basis on which it was sought to defend the case on its merits; that an industrial tribunal chairman, in exercising the discretion to grant an extension of time to enter a notice of appearance, had 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 them one against the other, and to reach a conclusion which was objectively justified on the grounds of reason and justice".

45. In relation to costs, they do not follow the event in employment tribunal proceedings and an award of costs is the exception and not the rule (Mummery LJ in ***Barnsley Metropolitan Borough Council v Yerrakalva 2012 IRLR 78***).

46. The power to award costs is contained in Rule 76 of the Employment Tribunal Rules of Procedure 2013 which provides that:

> *1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;*

47. The Court of Appeal held in ***Barnsley Metropolitan Borough Council v Yerrakalva 2012 IRLR 78*** that the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there was unreasonable conduct in bringing and conducting the case and in doing so, to identify the conduct, what was unreasonable about it and what effects it had. There does not have to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

Conclusions

48. The test in Rule 70, which applies to judgments under Rule 21, is whether it is necessary in the interests of justice to reconsider the original judgment. This gives the tribunal a wide discretion. The interests of justice have to be seen from both sides.

49. On the timing of the reconsideration application, it is a day out of time and I have not had a particularly satisfactory explanation for this. However, I exercise my case management powers to extend time by one day, as I find it is a very short delay and I find that it does not of itself cause prejudice to the claimant. I consider that the failings of the solicitors in this respect in failing to ascertain the relevant date, should not be visited upon the respondent. I take account of the overriding objective in making this decision.

50. I have considered the respondent's reason for the failure to submit a response in time. I have found that Mr Blatz's explanation and reasons were genuine although mistaken. He acted relatively promptly on 4 January 2017 and submitted a draft form of ET3. Although this is brief, it complies with the minimum requirements of Rule 16 and makes clear the claim is contested. It refers to the claimant fabricating a story around "*something that did not happen*". It makes clear that there is considerable factual dispute on matters where the burden of proof lies with the claimant, both as to discrimination under section 136 Equality Act and for constructive dismissal.

51. It would have been helpful if under Rule 20 the respondent had submitted the in-depth response that it wished to rely on. Again I find this a very

loose approach by the respondent's solicitors. However, Mr Blatz's draft complies with the Rules and if unrepresented, would have been likely to lead to a request for further and better particulars.

52. Although there must be respect for and adherence to the Rules with which in this case the respondent did not comply for mistaken but genuine reasons, I find that the interests of justice are not served by awarding compensation to the claimant on a default basis without a full consideration of the merits of the case. Findings need to be made for example as to whether the claimant made protected disclosures as defined in the Employment Rights Act 1996 and whether she suffered detriment as a causal consequence of making any such disclosure and whether the alleged acts of discrimination took place.

53. I have considered whether the entering of judgment without a hearing of all the evidence in what appears to be a heavily contested and disputed case, is in the interests of justice or results in a denial of natural justice. I have also considered in this context the overriding objective in Rule 2 of the Employment Tribunal Rules of Procedure 2013. This requires tribunals to seek to give effect to this objective to deal with cases fairly and justly whenever it exercises a power conferred by the Rules.

54. I find that the balance of prejudice lies in favour of the respondent. If I were not to set aside the judgment the claimant would secure a windfall of compensation on substantially disputed matters. She suffers a 2-month delay in her proceedings. It is stressful to most claimants to go through any sort of litigation and whilst I entirely sympathise with the health issues, this unfortunately is often a consequence of bringing proceedings.

55. Based on my findings above the judgment of 10 January 2017 is revoked.

Costs application

56. The claimant applied for costs under Rule 76(1)(a) set out above, on grounds that the respondent had acted unreasonably. I had a schedule of costs from the claimant and I heard submissions from both sides.

57. My finding of fact was that Mr Blatz failed to properly and carefully read the papers served on the company; papers that he accepts were clear. I find that the default judgment has been entered because of a failure to properly and carefully read papers which are court proceedings with consequences and that this amounts to unreasonable conduct which crosses the threshold under Rule 76(1)(a). Had the papers been carefully considered by the respondent, whether by Mr Blatz or his in-house counsel, then this hearing would not have been necessary. It is unreasonable for this hearing to have taken place.

The amount

58. The costs claimed were £5,716 plus VAT. The claimant is not VAT

registered so it is right to award the VAT to the receiving party.

59. The respondent said that work done on the merits of the case in the claimant's witness statement which are not properly recoverable and the amount claimed was too high. I asked the respondent, given that I was going to make an award of costs, having made the threshold decision, how much they considered reasonable. The respondent submitted that it should be no more than £3,000 + VAT.

60. Submissions were made as to whether it was appropriate for the claimant to claim for the attendance of her solicitor Mr Carmody as well as for counsel. It was submitted that it was necessary for Mr Carmody to attend as he was due to give witness evidence. There was only one point on which the respondent wished to cross examine Mr Carmody. This was not known until the day of the hearing, when the point was in any event conceded by Mr Carmody so his evidence was not then necessary.

61. The costs I award must be both reasonable and proportionate. I asked the claimant if they had a reply to the respondent's submission of £3,000 and the claimant replied with £4,700 + VAT.

62. I find that Mr Carmody's attendance was justified. It was not known until the start of his hearing that his evidence was not going to be challenged.

63. Taking account of proportionality, that this is a summary assessment and the figures put forward by both sides, I award the claimant £4,000 + VAT making a total sum of £4,800 inclusive of VAT.

CASE MANAGEMENT SUMMARY

Listing the hearing

1. After all the matters set out below had been discussed, we agreed that the hearing in this claim would be completed within 8 days. It has been listed at London South Employment Tribunal, Croydon to start at 10am or so soon thereafter as possible on **12 February 2018**. The parties are to attend by 9.30 am. The hearing may go short, but this allocation is based on the on the claimant's intention to give evidence and call 2 further witnesses and the respondent's intention to call 6 witnesses.

2. The hearing will be to determine liability only. The tribunal will require deliberation time and remedy if applicable is to be determined separately. The claimant is nevertheless required to disclose documents as to remedy as ordered below.

The issues

3. The parties had very helpfully prepared an agreed list of issues. It remains subject to the claimant identifying the legal obligation upon which she relies under section 43B(1)(b) ERA 1996 and this is ordered below by way of further particulars.

4. I also raised with the claimant my understanding of the law in relation to reasonable adjustments and associative disability discrimination and the claimant is also ordered below to say whether such a claim is relied upon and if so on what legal basis.

5. The parties are to include the list of issues in the pleadings section of the hearing bundle.

Judicial mediation

6. Both parties are interested in Judicial Mediation. They are represented by solicitors and counsel who have explained the Judicial Mediation scheme to them. The parties are aware that it is for the Regional Employment Judge to decide whether a case is suitable for Judicial Mediation.

7. Both parties will receive further notification from or on behalf of the Regional Employment Judge.

Other matters

8. If the Tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.

9. I made the following case management orders by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. **Further information / Response**

   1.1. On or before **22 March 2017** the claimant shall provide to the respondent with a copy to the tribunal, the following further and better particulars of the claim:

      1.1.1. The legal obligation relied upon for the purposes of section 43B(1)(b) ERA 1996, by reference to the relevant statutory provision or otherwise.

      1.1.2. Whether a claim for reasonable adjustments by association with the claimant's son is pursued and if so on what legal basis?

1.2. On or before **3 May 2017** the respondent has leave to file a fully pleaded response to the claim which shall also set out the response to the further particulars ordered above.

2. **Disclosure of documents related to disability**

2.1. On or before **12 April 2017** the claimant is ordered to disclose to the respondent by list and copy all medical records held by her GP and her son's GP and from any hospital consultants and/or hospital records, for the period from 16 May 2016 to 28 October 2016, including notes, whether manual or on computer, of attendances by the claimant (or where applicable her son) referrals to other medical or related experts, reports back from such experts, test results or other examinations or assessments. They must be related to her spinal condition and RSI condition and in relation to her son, the conditions of autism and global development delay. The claimant may disclose earlier medical records if she chooses to do so, the relevant period for consideration by the tribunal is from 16 May 2016 to 28 October 2016.

2.2. For the avoidance of doubt, the claimant need only disclose medical records in relation to her spinal condition and her RSI condition and of her son's autism and global development delay conditions information related to other conditions may be redacted from the disclosure.

2.3. On or before **12 April 2017** the claimant is to serve on the respondent with a copy to the tribunal a disability impact statement setting out the effect upon her condition(s) on her ability to carry out normal day to day activities in the period is from 16 April 2016 to 28 October 2016. No disability impact statement is sought by the respondent from the claimant's son at this stage.

2.4. On or before **3 May 2017** The respondent is ordered to notify the claimant and the Tribunal whether, having considered the medical records and disability impact statement, it concedes that the claimant is or was at the material time a disabled person, identifying the disability and the period and/or the extent of any remaining dispute on these issues. It is not enough for the respondent to say simply that disability is "not admitted".

2.5. If disability is not admitted, the parties have leave to apply to the tribunal for a further telephone preliminary hearing for further orders for expert reports if considered necessary and appropriate to any medical issue(s) remaining in dispute.

3. **Disclosure of documents**

3.1. The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list and copy documents so as to arrive on or before **31 July 2017**. This includes, from the claimant, documents relevant to all aspects of any remedy sought.

3.2. Documents relevant to remedy include evidence of all attempts to find alternative employment: for example a job centre record, all adverts

applied to, all correspondence in writing or by email with agencies or prospective employers, evidence of all attempts to set up in self-employment, all pay slips from work secured since the dismissal, the terms and conditions of any new employment.

3.3. This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.

3.4. The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

4. **Bundle of documents**

4.1. It is ordered that the respondent has primary responsibility for the creation of the single joint bundle of documents required for the hearing.

4.2. To this end, the claimant is ordered to notify the respondent on or before **11 September 2017**. of the documents to be included in the bundle at their request. These must be documents to which they intend to refer, either by evidence in chief or by cross-examining the respondent's witnesses, during the course of the hearing.

4.3. The respondent is ordered to provide to the claimant a full, indexed, page numbered bundle to arrive on or before **29 September 2017.**

4.4. The respondent shall include in the bundle the agreed list of issues next to the pleadings section.

4.5. The respondent is ordered to bring sufficient copies (at least five) to the Tribunal for use at the hearing, by 9.30 am on the morning of the hearing.

5. **Witness statements**

5.1. It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.

5.2. The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.

5.3. The facts must be set out in numbered paragraphs on numbered pages, in chronological order.

5.4. If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.

5.5. It is ordered that witness statements are exchanged so as to arrive on or before **12 January 2018.**

6. **Updated schedule of loss**

6.1. On or before **12 January 2018** the claimant shall serve on the respondent an updated schedule of loss.

7. **Cast list and chronology**

7.1. The respondent is ordered to prepare a cast list, for use at the hearing. It must list, in alphabetical order of surname, the full name and job title of all the people from whom or about whom the Tribunal is likely to hear.

7.2. The claimant is ordered to prepare a short, neutral chronology for use at the hearing.

7.3. These documents should be agreed if possible. If they are not agreed, the party who created the document shall state within in the items which are not agreed. The parties do not have leave to submit separate documents.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

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Employment Judge Elliott

Date: 15 March 2017