EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104709/2018

Held in Chambers in Glasgow
On 22 October 2018

Employment Judge: Ms M Robison

Mr M McGarth	**Claimant** **Written submissions**
Actavo Network & In Home Division	**Respondent** **Written submissions**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. The judgment of the Employment Tribunal dated 30 July 2018 is revoked, and will be remade.
2. The ET3 is allowed, although late.
3. This case will be listed for a standard case management preliminary hearing to be conducted by telephone conference call on Friday 9 November.

REASONS

Background

1. In this case a default judgment was issued under rule 21 of the Employment Tribunals Rules of Procedure 2013 (the ET Rules) on 30 July 2018, the claimant having lodged a claim for unlawful discrimination on 16 May 2018, and the respondent having failed to lodge a defence within the requisite 28 days.
2. By e-mail dated 13 August, an Emma Rodger, HR Manager with the respondent, intimated their intention to apply for a reconsideration of that judgment.
3. The Tribunal then wrote to the respondent on two occasions seeking confirmation of their intention to make a reconsideration application. The respondent's solicitors made the appropriate formal application by letter dated 14 September seeking an extension of time to lodge the ET3 and enclosing draft grounds of resistance. The claimant responded by e-mail dated 16 September opposing the application.
4. The application for extension of time to lodge the ET3 having not formally been lodged until 14 September, I was prepared to grant an extension of time under rule 5 of the Employment Tribunal Rules of Procedure to allow the application to be considered outwith the requisite 14 days, not least given the fact that there was an informal intimation of the respondent's intention on 13 August, as intimated in the letter to parties dated 21 September.
5. In that letter the parties were advised that, in terms of rule 72, I was inclined to grant the reconsideration application. Parties indicated that they were content for the reconsideration application to be determined without an oral hearing.
6. I consequently came to consider the respondent's application for a reconsideration of the default judgment at this hearing in chambers, based on the written representations received, specifically the respondent's letter dated 14 September and draft grounds of resistance, the claimant's response to that dated 16 September 2018, and further representations from the claimant dated 4 October 2018.

The relevant law

7. Rule 20 relates to applications for extension of time for presenting a response, and states as follows:

(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 ought 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.

8. Rule 21 concerns the effect of non-presentation of a response, and states:

(1) where on the expiry of the time limit in rule 16 no response has been presented or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply;

(2) An employment judge shall decide whether on the available material (which may include further information which the parties are required by a judge to provide) a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the judge shall issue a judgment accordingly. Otherwise a hearing shall be fixed before a judge alone;

(3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the judge.

In **Kwik Save Stores Ltd v Swain and others** 1997 ICR 49, a case which concerns the refusal to grant an extension of time to lodge an ET3, allowing

the employer's appeal, the EAT held that the respondent had to explain the non-compliance with the equivalent rule of the 1993 rules and the basis on which it was sought to defend the case on its merits; and that the Employment Judge in the exercise of discretion 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 them against each other, and to reach a conclusion which was objectively justified on the grounds of reason and justice; balancing the possible prejudice to each party.

Deliberations and decision

9. In their written submissions of 14 September, the respondent's representatives relied on the principles laid down in the case of **Kwik Save**, and submitted as follows:

10. With regard to the explanation for and nature of the delay, they explained that there was a breakdown in communication between the respondent's Glasgow office and the respondent's in-house legal department based in Dublin, with each believing the other was dealing with the response to the ET1. This was a genuine mistaken with no deliberate intention to fail to respond. With regard to the balance of prejudice, the respondent submitted that this falls heavily in favour of granting the application, and while the claimant will suffer some minor delay, this cannot be said to amount to material prejudice, since granting the application still means his complaint will be heard whereas the respondent would be denied the opportunity to prove it has paid the claimant his full entitlement.

11. With regard to the merits, the respondent's position is set out in the ET3, and the respondent will argue that the claimant had been paid in full, and that the respondent did not understand the rationale for the sums claimed and believed that the claimant had misunderstood how the pay system worked.

12. In his e-mail of 16 September the claimant (quite reasonably) raised issues about the timing of the reconsideration application which I dealt with under rule 5, as set out in the letter of 21 September.

13. He also expressed surprise about the reasons for their failure to lodge the document in time, and suggested that, given the size of the organisation, their

reasoning “beggars belief”. While clearly some criticism of the respondent’s systems are valid, I had no reason to believe that this was anything other than a genuine mistake.

14. In that e-mail he also went into the merits of the claim, including detailed concerns about the respondent’s procedures and processes. When he was invited to present further written submissions, he took that opportunity in the letter of 4 October, which includes further details on the merits of his claim and the demerits of the response.

15. While it cannot be said that the merits of the defence are irrelevant, the question of the merits of the claim is secondary at this stage. As the respondent’s solicitor pointed out it is important that the claim has “some merit”, but the bar is not set very high at this stage in proceedings.

16. This is because detailed questions of the merits of the claimant’s claim and the respondent’s defence are matters for consideration at any final hearing on those questions, and a decision at this stage in the respondent’s favour only opens the door for them to present those arguments in response to the claimant’s claim. The claimant will have the opportunity to lead evidence and make those submissions at any subsequent final hearing on the merits.

17. Further, I accepted the respondent’s submission that the balance of prejudice favours allowing the defence to be lodged, because to refuse to do so will deny the respondent any opportunity to present its defence, whereas the only prejudice to the claimant, should the Tribunal go on to uphold his claim, will be a short delay. I have therefore decided that the balance of prejudice favours granting this application.

18. Thus the ET3 is allowed, although late, and the judgment is set aside in terms of rule 21(4) and will be remade.

Next steps

19. The next step in the procedure is that this case will be set down for a hearing on the merits, at which evidence will require to be led and any relevant documents produced. The claimant has previously expressed concern about the location of that hearing. Given that the claimant is a litigant in person, this

is a matter which can first be discussed at a case management preliminary hearing held by telephone conference call.

20. A telephone case conference call to discuss this and other case management issues will therefore be set for one hour commencing 11.30 on Friday 9 November 2018. Parties will be forwarded information relating to that. In the event that day proves unsuitable for either party, they should contact the Tribunal to request an alternative.

Employment Judge: M Robison
Date of Judgment: 26 October 2018
Entered in register: 02 November 2018
and copied to parties