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EMPLOYMENT TRIBUNALS

Claimant: Mrs I Rizq
Respondent: Greenmantle Care Home Limited
Heard at: East London Hearing Centre
On: 11 February 2019
Before: Employment Judge Brook (sitting alone)

Representation

Claimant: Mr Maqsood (Counsel)
Respondent: Mr A Rozicki (Counsel)

JUDGMENT ON EXTENSION OF TIME

Upon hearing the oral evidence of Mrs Rokeya Hussain and the submissions of Counsel for each Party, and upon abridging time for the hearing of the Respondent's Application to extend time for the service of the Grounds of Resistance it is ordered that:

1. An extension of time is granted to the Respondent for service of Grounds of Resistance in the draft format lodged with the Tribunal today;
2. The Respondent is to pay the Claimant's cost of today in the sum of £1500.00 plus VAT, payment to be made within 28 days;
3. The matter is relisted for 10:00am on 13 May 2019, with a half day time estimate, as an open preliminary hearing to consider any further applications by either Party, any such application to be made in accordance with the applicable notice provisions, and to give such directions as are necessary for the future conduct of the matter.

4. Other matters

4.1 Public access to employment tribunal decisions

4.2 All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

4.3 Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

4.4 Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

4.5 You may apply under rule 29 for this Order to be varied, suspended or set aside.

REASONS

1. This matter came before the Tribunal today listed for case management though in the event it became the hearing of the Respondent's applications to abridge and to extend time for the service of Grounds of Resistance. The Claimant was represented by Mr Maqsood of Counsel and the Respondent was represented by Mr Rozicki of Counsel. I am grateful to each of them for their clear and cooperative handling of the matter. Mr Rozicki had been instructed at the eleventh hour and over the weekend prepared a draft List of Issues which, through no fault of his, was only handed to Mr Maqsood earlier today through the Respondent's Solicitors, Irwin Mitchell, also instructed at the last minute but in sufficient time to produce a comprehensive and detailed draft Grounds of Resistance. There was general agreement that until and unless the Respondent made application to serve these draft Grounds of Resistance out of time, these now being some two months overdue, then no further progress could be made in the matter. The draft Grounds had been served on the Claimant by Irwin Mitchell solicitors on 8 February, that is to say last Friday, and from his initial reading of the same Mr Maqsood accepted that though the facts and matters set out therein were denied, these Grounds raised triable issues.

Respondent's Applications

2. It emerged that Mr Maqsood, quite understandably, was principally concerned that the Respondent's delay had put the Claimant to the unnecessary cost of today's Hearing which, listed as it was for case management, could not proceed until the

Tribunal first considered an application from the Respondent to extend time for the service of Grounds. No such application was before me and for such an application to be heard today it would first require an application to abridge time. Mr Maqsood did not resist my suggestion that it was in the interest of the overriding objective that I abridge time and that the application be heard today, indeed he helpfully agreed that he was content for the matter be dealt with in that way and prepared to resist the substantive Application. This was the only practical use that might be made of the time available today and the matter would in any event need to be relisted for case management at another time, the scope of which would be affected by the outcome of the Application to extend time. Accordingly I abridged time for hearing the Application. Mr Roicki called Mrs Rokeya Hussain, the Respondent's proprietor, to give evidence as to the reason for the delay in serving Grounds and be cross examined on the same. As it was accepted the draft Grounds disclosed triable issues the remaining issues focused on whether prejudice to the Claimant and the reasons for delay were such that to grant an extension was in the interest of justice.

Evidence

3. Mrs Hussain's evidence was to the effect that she had received the Tribunal's enquiry made on behalf of Employment Judge Foxwell dated 14 December 2018 expressly asking the Respondent whether it was seeking an extension of time in which to serve the ET3 but that she had no knowledge of the later enquiry to same effect from Employment Judge Pritchard. Be that as it may, the reason she gave for the Respondent not serving Grounds of Resistance within time related solely to difficulties the Respondent had experienced with its legal expenses insurers. The Respondent had changed insurers in June last year and when the current litigation arose those new insurers declined to cover the legal costs on the basis that it was, in effect, in relation to a pre-existing matter. Mrs Hussain had then contacted her insurance brokers and, after some discussion, the brokers had persuaded the previous insurers, that is to say the insurers of before June 2018, to cover legal expenses though only from after the outcome of today's Hearing. Mrs Hussain had then privately instructed solicitors Irwin Mitchell who promptly produced the draft Grounds of Resistance dated 8 February and instructed Mr Rozicki to represent the Respondent today, producing a draft List of Issues over the weekend. In short Mrs Hussain relied upon the difficulties caused by her legal expenses insurers as explaining the delay. She accepted that this delay had led to this application and that the Claimant had been put to expense that would not otherwise have arisen in that the case management of the case, in whatever form it went forward, could not proceed today.

4. It was put to Mrs Hussain by Mr Maqsood that she could at any time, as indeed she had done for today's purposes, have privately instructed lawyers so as to comply with the time limit for the service of Grounds of Resistance. Mrs Hussain accepted this and further admitted that she was aware there were time limits but had hoped that the difficulties would be resolved sooner than they were and that the proper persons to meet the Respondent's costs of litigation was one or other of the insurers. Mrs Hussain also accepted that, by email to the Tribunal dated 9 December 2018, Ms Donna Dale had indicated that the delay was "because I was on holiday" but that this was in truth a small part of the reason and that the underlining issue was the difficulties with insurers. Ms Dale was an HR consultant whom Mrs Hussain had brought in for the purpose of these proceedings though it transpired she had no experience in pleading

what turned out to be the required detailed and comprehensive defence. Ms Hussain was not herself capable of drafting such a document and described herself as “medical not legal” and that she ‘would not know where to start’. It was for these reasons that she had, albeit late in the day, privately instructed Irwin Mitchell and Counsel. As to the merits Mrs Hussain said it was very important that the Respondent defended this claim as she had always believed herself to be a fair person, that it had been the Claimant who had bullied her and not the other way around, and that the Claimant was one of two people who had really tried to “destroy my business”. All that said Mrs Hussain accepted that if time was extended then there would be an adverse cost consequence on the Respondent because “I’m to some extent to blame”.

Submissions

5. Each Counsel made submissions and, to his credit, in his submissions Mr Maqsood accepted that the draft Grounds, though the assertions were denied, disclosed an arguable defence and he concentrated on the wasted costs to his Client as being the real prejudice. For the Respondent Mr Rozicki drew attention to the principles in *Kwik Save Stores Limited v Swain* [1997 EAT ICR 49 Cor: Mummery J], that there was merit in the defence which he submitted was “plainly arguable”, which seemed already to be common ground, and importantly that there was little or no prejudice to the Claimant save that of wasted costs. The Respondent, through Mrs Hussain, had not sought to hide the explanation or her fault for the delay and I was invited to take judicial notice that such mishaps can happen and that Mrs Hussain did not start out to flout the time limits. In all the circumstances it was not in the interests of justice that the Respondent be pushed away from defending liability on the merits, particularly where it was accepted that the prejudice was that of wasted costs which Mrs Hussain recognised (albeit only ‘partly’) was for the Respondent to make good.

6. In my extemporary Judgment I noted that, though a lay person, Mrs Hussain is a person of business and as such can be expected to have some, albeit perhaps sketchy, grasp of legal procedures and the need to comply with the same. She was plainly aware that time limits were in play and it behoved her to take legal advice at the earliest opportunity, had she done so then it is very likely that the need for today’s application would not have arisen. Instead, she took what might be called the “commercial route”, namely to see if she could resolve the legal expenses insurance position and thus save the cost of privately instructing solicitors. In the event this has turned out to be a false economy. I do not accept that her stated difficulties amount to a reasonable excuse, not least because Judge Foxwell had expressly asked the Respondent if it sought an extension of time which was ignored. That said there is little or no prejudice to the Claimant save that of the wasted costs of today and, even on a cursory reading of the draft Grounds of Resistance, it raises triable issues to all aspects of the claim. Taking all of this into account it seems to me that it is in the interest of justice that an extension of time be granted.

7. Accordingly the draft Grounds of Resistance placed before the Tribunal today are accepted as lodged today and the matter will proceed to a further Case Management Hearing at 10:00am on 13 May 2019 with a half day time estimate. Messrs Irwin Mitchell are now on the record as representatives of the Respondent and if there is any further change in that representation then the Respondent is required to

notify the Tribunal accordingly. Mr Rozicki requested this next Hearing be listed on an open basis as he anticipates the Respondent will wish to make applications, very probably on the basis of whether Claimant has complied with the ACAS requirements in relation to the current claim. Be that as it may I am satisfied that the Claimant should not bear any of her costs of today, it certainly being no fault of hers, and order that the Respondent pay the Claimant's costs of today which I am told are £1500.00 plus VAT. This sum is to be paid to the Claimant within 28 days.

Employment Judge Brook

28 March 2019