EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103661/2019

Held in Dundee on 14 June 2019

Employment Judge I McFatridge

Mr A Tarvit	**Claimant** **Represented by:** **Mr Thornber,** **Consultant**
SSE Electricity Ltd	**Respondent** **Represented by** **Mrs Miller,** **Scottish Engineering**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the ET3 response received by the Tribunal from the respondent on 15 May 2019 be accepted although late.

E.T. Z4 (WR)

REASONS

1. I gave oral reasons to the parties on the day and the following written reasons simply repeat and expand upon those previously given.

2. The claimant in this case claims that he was unfairly constructively dismissed by the respondent and that he was unlawfully discriminated against on grounds of disability. The claim was registered and a copy sent to the respondent in the usual way. The respondent required to lodge their response with the Tribunal no later than 9 May 2019. On 8 May 2019 the respondent submitted a response by e-mail. Box 2.3 on the ET3 form which was meant to be completed with the respondent's address was left blank. Rule 17 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states

> "(1) The Tribunal shall reject a response if –
>
> …..
>
> (b) it does not contain all of the following information –
>
> (i) the respondent's full name;
>
> (ii) the respondent's address;
>
> …..
>
> (2) The form shall be returned to the respondent with a notice of rejection explaining why it has been rejected. The notice shall explain what steps may be taken by the respondent, including the need (if appropriate) to apply for an extension of time, and how to apply for a reconsideration of the rejection."

The response lodged was referred to an Employment Judge who decided that it should be rejected under Rule 17 and returned to the respondent. The ET3 response was returned in a letter dated 14 May 2019. On 15 May 2019 the respondent's representative wrote to the Tribunal enclosing a further copy of the response with the missing information completed together with a letter seeking an extension of time. It was explained that the letter rejecting the response was only received by the respondent on 15 May. The application for

reconsideration was made under Rule 19. The respondent also applied for an extension of time for presenting the response lodged on 15 May.

3. The respondent requested in their letter that the application for extension of time be granted without a hearing. The claimant's representative objected to this and the parties were advised that the hearing would take place immediately before the case management preliminary hearing which had already been fixed to take place on 14 June. On 14 June both parties made full submissions. They also referred to their written submissions in the matter which are contained in the respondent's letter of 15 May 2019 with attached ET3 response, the e-mail from the claimant's representative dated 16 May 2019 and the further letter from the respondent's representative to the Tribunal and the claimant's representative dated 20 May 2019. The respondent also referred to the cases of

S Richardson v U Mole Ltd UKEAT/0179/05/LA
R Crouch v Ant Marketing Ltd & Others UKEAT/0031/11/LA
Pestle & Mortar v Turner UKEAT/0652/05
SKS Ltd v Brown UKEAT/0245/07
S Thornton v E Jones UKEAT/0068/11/SM

She also referred to the well-known case of ***Kwik Save Stores Ltd v Swain***. The claimant's representative referred to the balance of prejudice in this case and to the formidable hurdles which are put up before a claimant seeking to lodge a late claim in terms of section 111 of the Employment Rights Act. Rather than repeat the full submissions I will deal with them below.

Discussion and decision

4. It appeared to me that this was a case where the response had been correctly rejected by the Tribunal under Rule 17. The respondent's address is one of the few pieces of information which it is mandatory to include and it is clear that through inadvertence it had not been included. The respondent's representative could give no real explanation as to why this had happened other than that this was the first time it had ever happened to her and she

intended to ensure that it was the last. It was also clear to me that the moment the respondent's representative became aware of the situation she made the appropriate application to the Tribunal in terms of Rule 19. She had provided the necessary information. In my view this case was clearly one of those falling within Rule 19(4). It was my view that whilst the original rejection was correct the defect had been rectified and the response could therefore be treated as presented on the date that the defect was rectified. This is 15 May. Unfortunately that date was outwith the time allowed for submitting the response. I therefore required to decide whether or not to extend time in terms of Rule 20.

5. The cases which were lodged by the claimant in relation to the extension of time all related to the old Rules where it was specifically stated that the Tribunal required to apply a just and equitable test. The new Rules are silent as to the test to be applied. It was therefore my view that I required to approach the matter in terms of the overriding objective. It was my view that the leading case of ***Kwik Save v Swain*** was still relevant in setting out the matters which I required to take into account in exercising my discretion and indeed the general approach which I should take.

6. I agreed with the respondent's agent that essentially there were three matters which were relevant here. The first was the reason for the error. I accepted that this was one of these inexplicable errors which simply occur from time to time. There was no good explanation for it but the Rules provide for the possibility of reconsideration and extension of time limits simply because this is the kind of thing which sometimes happens. I also note that in the ***Pestle & Mortar*** case it was specifically accepted that no good reason had been provided for the delay which in that case was considerably greater than in the present case. Despite this the extension of time was still allowed because of the other two factors which required to be taken into consideration. The second factor I have to take into consideration is whether or not there is a stateable defence to the claim. It was absolutely clear to me that the defence narrated by the respondent was stateable and would provide a full or partial defence to the claim. The third matter which I required to take into

consideration was the balance of prejudice. In my view all that the claimant will lose if I allow the extension of time is the windfall benefit of obtaining a judgment in his favour without requiring to prove his claim. On the other hand if the response is allowed then the claimant will still be able to succeed in his claim if it is well founded. On the other hand the prejudice to the respondent is substantial. I would agree with the EAT in the ***Pestle & Mortar*** case that the refusal of the extension of time would be draconian. The respondent would face the possibility of requiring to pay a substantial sum by way of compensation without the opportunity of contesting the claim. I had absolutely no doubt that in this case the balance of prejudice strongly favours me allowing the extension of time. I also consider that the overall background including the fact that the respondent immediately applied to rectify the defect and applied for an extension of time militates in favour of the respondent. It is therefore my view that the ET3 be accepted at its second presentation. The effect of this is that it is deemed to have been accepted on 15 May when the defect was rectified. I grant an extension of time to enable it to be accepted in time on that date.

Employment Judge: **Ian McFatridge**
Date of Judgment: **26/06/2019**
Date sent to parties: **26/06/2019**