



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Fernley

**Respondents:** 1. Integra People Limited  
2. Candor Payroll Accountancy Services Limited (in liquidation)

**Heard at:** Prestatyn **On:** 13 March 2020

**Before:** Employment Judge Sharkett  
(sitting alone)

## REPRESENTATION:

**Claimant:** No Appearance

**Respondents: (1)** Ms T Harding (Finance Director) & Mr G Higgins (HR  
Manager)

**(2)** No Appearance

## JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The first Respondent's application to have time extended to submit an ET3 out of time succeeds.

## REASONS

2. This Preliminary Hearing was listed by Employment Judge Beard to determine whether the first respondent's ET3 should be accepted as it has been served out of time.
3. This matter has been ongoing for some time, with the claimant's ET1 having been filed on 15 June 2018. The background and history of this claim is that it is the claimant's case that he was contracted to work via the first respondent who is an agency. He worked as a joiner and received his pay via the second respondent with whom he also had a written contract of employment. The

claimant's work terminated on 9 March 2018 and on 20 April 2018 he contacted ACAS naming the first respondent as the party to his complaint. A certificate of early conciliation was issued in respect of the claimant and the first respondent on 20 April 2018. It is the first respondent's case that it did not receive any communication from ACAS in respect of this period of early conciliation. I will return to this matter later as it is relevant to the matter to be determined at this Preliminary Hearing.

4. On 13 April 2018 the claimant commenced early conciliation through ACAS with the second respondent; a separate certificate of early conciliation was issued in respect of this respondent on 20 April 2018. It is not known whether there was any communication through ACAS with the second respondent as a response has not been entered, and no information has been provided by the claimant.
5. The claimant issued proceedings against the first and second respondent on 15 June 2018. The claims are for breach of contract (notice pay), payment in lieu of holiday accrued but not taken at the date of termination and, unlawful deduction of wages. It is not clear what the claim is in relation to unlawful deduction of wages as it would appear to relate to deductions for tax and national insurance. The claimant will need to provide further detail of this, but the information is not needed for the purposes of this preliminary hearing.
6. The claimant brings claims against both respondents on the basis that he was contracted to work through the first respondent and received his pay through the second respondent, an umbrella company of the first respondent. It is the first respondent's case that the claimant was not employed by the first respondent, it merely introduced him to the second respondent. The employment status of the claimant is not an issue to be determined by this Tribunal but will need to be so if the application before this tribunal is successful today.
7. Although the claimant maintains that the second respondent remains an active company there is documentary evidence that an insolvency practitioner was appointed on 2 November 2018 and that it is now in liquidation. It is not clear whether the claimant continues to pursue his claims against the second respondent or if he has obtained the permission of the appointed administrator. What is clear is that the second respondent has not entered a response to the claimant's ET1.
8. The purpose of this Preliminary Hearing is to determine whether time should be extended to allow the first respondent's ET3 to be accepted.
9. The claimant's representative has notified the Tribunal that it will not be attending today, but it has made written submission by letter to the Tribunal of 11 March 2020 which was also copied to the first respondent.
10. The first respondent has not provided written submissions but I have heard from Ms Harding and Mr Higgins and have had sight of correspondence between the first respondent with both the Tribunal and ACAS.

11. As mentioned above this matter has been ongoing for some time and there has been some delay in starting this hearing today due to the difficulty in obtaining documents which would enable me to reach a fair decision. The respondent has not produced a bundle of documents but has been able to produce correspondence relevant to the proceedings. The confusion has arisen because a letter from the claimant's representative makes reference to a further ET3 being served in October 2019. Having had sight of the documentary evidence I am satisfied that the first respondent initially submitted a response which was not on the prescribed form and was also out of time on 8 October 2018. This response was rejected by Employment Judge Howden Evans on 2 November 2018 because it was not on the correct form and was out of time. In accordance with the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules) the first respondent was notified of the rejection.
12. By letter of 6 November 2018, the first respondent asked for a reconsideration of the decision to reject its response, submitted an ET3 and asked that time be extended to allow the ET3 to be accepted. A first preliminary hearing was postponed by Employment Judge Cadney in November 2018, with a further adjournment by Employment Judge Beard in July 2019. A preliminary hearing listed in August 2019 was vacated because of lack of judicial resource with listing of 13 March 2020 being the first date available that was convenient to all parties.

## The Law

13. In accordance with rule 15 of the Employment Tribunal (constitution and Rules of Procedure) Regulations 2013 (the Rules), once a claim has been accepted by the employment Tribunal it shall send a copy of the claim form, together with a prescribed response form, to each respondent with a notice which includes information on:
  - (a) whether any part of the claim has been rejected; and
  - (b) how to submit a response to the claim, the time limit for doing so and what will happen if a response is not received by the Tribunal within that time limit.

Whether or not the documents have been served in accordance with rule 15 of the Rules depends on an assessment of all the facts (*Campbell v Jamie Stevens (Kensington) Ltd EAT 0097/19*).

14. Once the documents are received by the named respondent, it must complete and return the response on the prescribed form (ET3) within 28 days of the date on which it was sent to the respondent by the tribunal. If the response is not submitted on an ET3 or if it does not contain the information required under Rule 17 (1)(b) (i) (ii) and (iii), it will be rejected and returned to the respondent with the reasons why and an explanation of the steps the respondent can, take including how to apply for an extension of time for submitting an ET3 and/or a reconsideration of the rejection.

15. An application for reconsideration of the rejection must be made within 14 days of the date on which the notice of rejection was sent to the respondent by the tribunal. If the appropriate application is not submitted or successful, Rule 21 will apply.
16. Rule 19 makes provision for an application for the reconsideration of a Tribunal's decision to reject a response. The grounds upon which a reconsideration under Rule 19 can be made are if the decision to reject was wrong or if the defect on the response has been rectified. If any defect has been rectified it will be deemed to have been presented to the Tribunal on the date rectified. Whether an application for an extension of time may then also be necessary will depend on the date on which the response is deemed served.
17. Rule 20 provides that when making an application to extend time, including where the 28 day time limit has already expired, the respondent must copy the claimant into the written application and explain why an extension is required. In determining its discretion to allow or refuse an extension of time the tribunal should have regard to all the factors of the case and the overriding objective to deal with matters fairly and justly. In exercising the discretion the judge should have regard to the guidance in *Kwik Save Stores v Swain & others 1997 ICR 49 EAT* (Kwik Save) which requires a tribunal to consider the reasons why an extension is being sought, the balance of prejudice to one party as against the other in either allowing or refusing the application and, the merits of the respondent's defence.
18. The response of the first respondent was rejected because it was not on the correct form, did not contain the requisite information and was out of time. The ET3 submitted on 6 November 2020 does contain the minimum information required under Rule 17 (1)(b) (i)(ii) & (iii). It remains however, out of time notwithstanding that the defect in the original response has been rectified as of 6 November 2018. At the time of requesting a review of the decision to reject its response, the first respondent also made an application to extend time to submit an ET3.
19. When exercising my discretion whether or not to allow an extension of time, I have regard to the guidance in *Kwik Save* as set out above. Ms Harding the finance director of the first respondent and Mr Higgins, the HR manager have explained to me that the ET1 served on the address at Parc Menai, Bangor was not received and nor has it been to date. Ms Harding explained that the address at Parc Menai are serviced offices operated by contractors appointed by local government. The first respondent no longer occupies this address but that when it did it did not always have a physical presence there as it was a satellite office. Ms Harding explained that post for the first respondent should have been received by the receptionist employed by the serviced offices and delivered to the first respondent. She does not know why this did not happen but assures me that it was not received by them. She explained that the first she knew of the claim against the first respondent was when she was contacted by ACAS by telephone. It was at this time that she asked that ACAS send the claim form to her. I have had sight of the email correspondence between Ms Harding and ACAS which confirms ACAS sent a

copy of the ET1 to Ms Harding in October 2018. Ms Harding accepts that she dealt with the matter badly but claims that she was not properly aware of what was required of her and thought that as she was of the opinion that the claimant had never been employed by the first respondent, the letter to the Tribunal of 8<sup>th</sup> October 2018, would be sufficient. She followed the letter up by telephoning the employment tribunal to confirm that it had been received and it was only when she received notification of the rejection of the response that she took advice from HR through Mr Higgins and became aware of what she needed to do. She explained that she had not previously contacted HR because she did not think to do so given that in her mind the claimant had never worked for the first respondent. I note that the request for a review of the decision to reject the response was made quickly after the notification of the rejection had been received along with the submission of the ET3 and an application for time to be extended.

20. The claimant objects to the first respondent's application to extend time to allow for an ET3 to be submitted, for the reasons given in a letter of 11 March 2020. I have had regard to those objections and in addition to the matters above, the fact that the registered office of the first respondent is the same as the business address given for the second respondent i.e. 4a Olympic Park. For the avoidance of doubt the second respondent did not file a response and in November 2018 it was placed in liquidation. Mr Higgins explained to me that whilst the two respondents shared the same address and worked from the same building, they operated as separate businesses with separate staff. Both confirmed there was no cross over or sharing of staff and that neither of them had any involvement with the second respondent. Whilst I accept that this may be so, I am aware from the documents before me that both respondents shared the same statutory directors.
21. Whilst under the Rules it is no longer necessary for a respondent to provide an explanation of why a response was not submitted in time it is of course relevant to why an application to extend time has been made. This is not however the only consideration. It is necessary to consider the prejudice either party may suffer if the application is either allowed or rejected. The claimant had reached a stage where an employment judge was about to issue a Rule 21 Judgment which would have resulted in moving to an assessment of remedy only. The position of the first respondent in those circumstances would be that it may be required to pay compensation to the claimant which perhaps would not have been awarded if the respondent was not found to liable for payment of the monies claimed.
22. Before reaching a conclusion I also have regard to the merits of the respondent's defence. It is the case of the first respondent that it did not employ the claimant and therefore cannot be responsible for any monies he claims to be owed. I find that the identity of the claimant's employer is less than clear given that there is a written contract of employment between the claimant and the second respondent in the papers provided. It would be an unjust enrichment for the claimant to make an award of compensation against a respondent who was not liable for the payment of monies owed. Allowing time to be extended to allow the first respondent to submit the ET3 would prejudice the claimant only to the extent that it will take longer to receive any

award of compensation for monies properly payable to the claimant, whereas the potential prejudice to the first respondent would be the requirement to pay compensation that was in reality the potential responsibility of another.

23. In the circumstances I find that whilst the first respondent should have taken a far more responsible and professional approach to the handling of this matter at an early stage, and I have made that known to those who have been here from the first respondent refusing the application far outweighs the potential prejudice to the claimant in allowing it, for the reasons I have given above.

24. The first respondent's application succeeds.

25. The response of the first respondent is accepted and a final Hearing has now been listed for 7 September 2020 where the employment status of the claimant will be dealt with as a preliminary issue by an employment Judge sitting alone.

Employment Judge Sharkett

Date: 24 March 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON 26 March 2020

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FOR THE TRIBUNAL OFFICE

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