EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110665/2019

Held in Glasgow on 16 December 2019

Employment Judge: W A Meiklejohn

Mr Saqib Sheikh	**Claimant** **In Person**
Digitas LBi Limited	**Respondent** **Represented by:** **Mr R Bradley - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent's application under Rule 20 contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 for an extension of time for presenting their response is granted and their ET3 response form is accepted.

REASONS

1. This case came before me for a preliminary hearing on the issue of whether the time limit for accepting the respondent's response to the claimant's claim should be extended. The claimant appeared in person and Mr Bradley appeared for the respondent. I had bundles of documents from both sides to which I will refer by tab number in the case of the claimant's bundle prefixed by "C" and by page number in the case of the respondent's bundle prefixed by "R".

Background

2. The claimant submitted his ET1 claim form to the Employment Tribunal (in Scotland) on 6 September 2019 (C11/R1-15). At section 2.2 of the form the claimant gave the respondent's address as 51 Timber Bush, Edinburgh EH6 6QH which, at that time, was the respondent's registered office. Although the claimant worked for the respondent in London, he did not complete section 2.4 of the claim form which is worded *"If you worked at a different address from the one you have given at 2.2 please give the full address"* followed by boxes in which the work address should be inserted.

3. On 12 September 2019 the Tribunal wrote to the respondent at the Edinburgh address provided by the claimant giving notice of the claim and enclosing the ET3 response form (C12/R16-19). The Tribunal's letter advised that the deadline for submitting the response was 10 October 2019.

4. When the deadline for submitting the ET3 response form passed without that form having been received, the Tribunal wrote to the respondent again on 22 October 2019 (C14/R20-21) making reference to the fact that there had been no response to the claim, that the Tribunal would require to consider how much should be awarded by way of compensation and seeking comments on the claimant's request to transfer the case to London. This letter was copied to the respondent's London address (as stated above).

5. According to the witness statement of Ms J Eggo, submitted by Mr Bradley, the respondent first became aware of the claim on 25 October 2019. Ms Eggo is Director of Employee Relations for Publicis UK which, in common with the respondent, is a member of the Publicis Groupe. Ms Eggo's statement narrated that the Tribunal's letter of 22 October 2019 had been forwarded by the Edinburgh office to an HR Business Partner in the respondent's London office who had passed it to Ms Eggo.

6. Ms Eggo emailed the Tribunal on 25 October 2019 (R22) stating that the respondent had not received the *"claim correspondence"* and requesting *"extra time to have the opportunity to respond"*. The Tribunal then wrote to the respondent on 31 October 2019 (R23-24) enclosing a copy of the

claimant's ET1 claim form and advising that the respondent *"should submit an ET3 and the reason it is late".*

7. On 4 November 2019 the respondent's solicitors emailed the Tribunal (C15/R25-26) requesting an extension of time to present the respondent's response to the claimant's claim and attaching the ET3 response form which the respondent sought to submit (R27-40). The claimant objected (C17/R48-51) and so this preliminary hearing was scheduled.

Rule 20

8. So far as relevant this provides 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 sought 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 why the application is opposed.

(3) An Employment Judge may determine the application without a hearing…."

Submission for respondent

9. Mr Bradley referred to ***Kwik Save Stores Ltd v Swain and others [1997] ICR 49*** and intimated that he would address (a) the reason for the delay in submitting the response, (b) the seriousness of the delay, (c) the merits of the response and (d) the balance of prejudice.

10. Dealing firstly with the reason for the delay, Mr Bradley said that the respondent employed some 250 people in London and only 13 in Edinburgh. At the time when the notice of claim was sent to the respondent they were about to relocate from the Timber Bush address to an address in George

Street, Edinburgh. Their office manager who dealt with incoming mail had been placed at risk of redundancy on 31 July 2019, had not taken this well and, according to Ms Eggo's statement, had *"stopped carrying out her duties effectively"*. The office manager's redundancy was confirmed on 18 September 2019 and she left on the same date.

11. Between 11 September 2019 and 11 October 2019 (the relocation to George Street taking place on the latter date) the respondent employed a temporary receptionist in Edinburgh and this person took over the responsibility of dealing with incoming mail. The respondent had no record of receiving the original notice of claim (the implication being that the notice of claim had not reached their Edinburgh office or, perhaps more likely, had arrived but had not been forwarded to their London office). The respondent became aware of the claim only when the Tribunal's letter of 22 October 2019 was forwarded.

12. Having requested and received a copy of the claim form from the Tribunal the respondent instructed solicitors who emailed the Tribunal on 4 November 2019 with the respondent's ET3 (C15/R25-40). In that email the respondent's solicitors stated that *"Due to an administrative error, the Notice of Claim was not sent to either the Respondent's HR or Legal team in London in time for the Respondent to respond to the claim or apply for an extension of time"*. Mr Bradley said that the *"administrative error"* was a reference to the claimant having omitted to complete section 2.4 of the ET1 claim form.

13. Turning to the seriousness (ie the length) of the delay, Mr Bradley submitted that there had been little or no delay by the respondent. Ms Eggo had contacted the Tribunal seeking *"extra time"* immediately upon becoming aware of the claim. Within a week of receiving a copy of the ET1 the request for an extension of time attaching the proposed ET3 had been submitted. The request had been made some 25 days after the original deadline for responding to the claim which was not, Mr Bradley argued, a substantial delay. The respondent had dealt with the matter as quickly as possible once it became aware of the claim.

14. Moving on to the merits of the claim, Mr Bradley submitted that the onus was on the claimant to make out all of his heads of claim. As originally pled, these were claims of direct sex discrimination, harassment and victimisation and a claim for holiday pay. It was apparent from the ET3 that the respondent had statable answers to the discrimination claims; each was a triable issue. There was no detail of the holiday pay claim. In terms of his agenda the claimant appeared also to be asserting a claim of disability discrimination which gave rise to issues of whether the claimant satisfied the statutory definition of disability and whether the respondent knew, or ought to have known, of his disability. The respondent had answered the disability discrimination claims as best they could but more detail was required.

15. Finally, Mr Bradley addressed the balance of prejudice. He referred to the quotation from ***Costellow v Somerset County Council [1993] 1 WLR 256 in Kwik Save*** –

"a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate."

16. Mr Bradley submitted that there were clearly issues of fact about which evidence needed to be heard. It was in line with the Tribunal's overriding objective to deal with cases fairly and justly (a reference to Rule 2) that the issues should be litigated and decided after the hearing of evidence. This was particularly so when the claimant had stated that he was seeking compensation of £100,000 (per section 3.2 of his agenda – page R59).

17. Mr Bradley argued that while the claimant had been prejudiced by the delay between 10 October 2019 and 4 November 2019, he had in terms of his agenda anticipated the need for evidence by listing 13 proposed witnesses (R72). If the application to extend time was not granted the respondent would be unable to defend itself and so the balance of prejudice favoured the respondent.

Submissions for claimant

18. The claimant argued that the respondent was a large organisation with 47 offices spread across 5 continents. It had a robust postal management system. It was therefore hard to believe that the original correspondence from the Tribunal had not been opened and circulated, particularly where it had been sent to the respondent's registered office.

19. The claimant pointed out that the respondent had taken almost double the amount of time originally allocated to respond to the claim. Granting the application to extend time would cause further delay. The respondent had been aware that the claimant intended to go to the Tribunal from the ACAS early conciliation process. The date of notification had been 7 July 2019 and the ACAS certificate had been issued on 7 August 2019 (C10).

20. The claimant referred to his grievances, arguing that the respondent only responded to his first grievance when he submitted his second grievance. This demonstrated a pattern of behaviour, of deliberate delay, on the respondent's part.

21. The claimant had, when invited to do so, submitted an objection to the respondent's application for an extension of time (C17/R48-51) and I took cognisance of this.

Decision

22. I reminded myself of the terms of Rule 20. I was satisfied that the respondent had complied with Rule 20(1). The application for an extension of time had been presented in writing and copied to the claimant. It had set out the reason why the extension was sought. It had been accompanied by the proposed ET3.

23. I had some difficulty with Mr Bradley's assertion that the *"administrative error"* referred to in the respondent's solicitors' email of 4 November 2019 was the claimant's omission to complete section 2.4 of his ET1. I considered that if the failure on the part of the respondent to submit its ET3 timeously was due to *"administrative error"* that error was the breakdown of whatever system the

respondent had in place for dealing with incoming mail at its registered office in September 2019.

24. Having said that, the fact that the claimant did not complete section 2.4 of his ET1 was in effect the catalyst for the events which followed. The notice of claim was sent to the only address for the respondent which the claimant provided. It arrived at a time when the respondent's arrangements for dealing with incoming mail appear to have been less robust than normal, based on what Mr Bradley told me as recorded at paragraphs 10 and 11 above.

25. There is nothing in Rule 20 which lays down any particular test to be applied when dealing with an application for an extension of time. It is therefore a matter for the Tribunal's discretion, which should be exercised in line with the overriding objective. At the time when ***Kwik Save*** was decided by the Employment Appeal Tribunal in 1996 the applicable provision was Rule 3(5) in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 1993 in terms of which the employer who had failed to submit a response in time had to *"show cause"* when seeking an extension. However, I was satisfied that the matters to be considered were as per ***Kwik Save*** (which had been followed in Thornton v Jones UKEAT/0068/11/SM).

26. The reason for the respondent's delay in submitting their ET3 was because the claimant's ET1 did not reach the right person within their organisation before the time limit specified in the notice of claim expired. I believed that this was, on the balance of probabilities, due to a number of factors. These were (i) the claimant's failure to complete section 2.4 in his ET1, (ii) the breakdown in the respondent's system for forwarding mail and (iii) the coincident timing of the respondent's Edinburgh office relocation. It did not make sense to treat this as deliberate delay by the respondent because (a) they had acted promptly when they became aware of the claim and (b) absent their response they would have found themselves excluded from defending a claim of potentially significant value. I was satisfied that the respondent had provided a reason which, in terms of dealing with the case fairly and justly, supported the argument for extending time.

27. The delay by the respondent was not in my view substantial. They had acted quickly when they became aware of the claim. Given that the weekend of 2/3 November 2019 fell between the date the respondent received a copy of the claimant's ET1 on 31 October 2019 and the date when the application under Rule 20 was submitted on 4 November 2019, it was hard to see how they could have taken less time to do so.

28. I was satisfied that the grounds of resistance contained within the ET3 which accompanied the respondent's Rule 20 application disclosed statable defences to the claims advanced in the claimant's ET1. I agreed with what Mr Bradley said on this point - see paragraph 14 above.

29. Turning to the balance of prejudice, I reminded myself of what the Employment Appeal Tribunal said in ***Kwik Save*** –

"The process of exercising a discretion involves taking into account all relevant factors, weighing and balancing them one against the other and reaching a conclusion which is objectively justified on the grounds of reason and justice. An important part of exercising this discretion is to ask these questions: what prejudice will the applicant for an extension of time suffer if the extension is refused? What prejudice will the other party suffer if the extension is granted? If the likely prejudice to the applicant for an extension outweighs the likely prejudice to the other party, then that is a factor in favour in (sic) granting the extension of time, but it is not always decisive."

30. While I understand it will be disappointing for the claimant to see his position change from having a claim to which no response has been submitted to having one to which there is a response, that puts the claimant in the position he must realistically have expected when submitting his claim. I agree with Mr Bradley that the prejudice to the claimant lies in the delay which has occurred in getting to the point where there is a response to the claim. That delay, while unfortunate, has not been substantial.

31. The prejudice to the respondent if not allowed to defend the claim in my view outweighs the prejudice to the claimant. The respondent has a statable defence to the claims brought by the claimant. A *"procedural default"* per

Costellow has occurred. It would not be just for the respondent to lose the right to defend itself because of that. Given the claimant's assessment of the value of his claims, there could be significant financial consequences for the respondent if not permitted to resist those claims.

32. Accordingly, my decision is to grant the respondent's application under Rule 20 for an extension of time to submit their response, and to allow that response to be accepted.

Transfer to London

33. The claimant wishes the case to be transferred to be dealt with in London. The respondent is in agreement (R41). The appropriate action to transfer the case should now be taken.

Employment Judge: W A Meiklejohn
Date of Judgement: 30 December 2019

Entered in Register,
Copied to Parties: 13 January 2020