EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111249/2019

Held in Glasgow on 17 February 2020

Employment Judge I McPherson

Ms Valerie Joyce	**Claimant** **Represented by:** **Mr Stewart Healey - Solicitor**
The Beeches Home Care Agency Ltd	**Respondents** **Represented by:** **Mr James Steele - Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

(1) Having heard oral submissions from parties' representatives, at this Hearing, the Tribunal, in terms of **Rule 48 of the Employment Tribunals Rules of Procedure 2013**, converted the listed Final Hearing into a Preliminary Hearing, to consider the respondents' opposed **Rule 20** application intimated on 17 February 2020 to be allowed an extension of time to lodge a late ET3 response defending the claim.

(2) Further, having heard both parties' representatives, and thereafter proceeded to deliver oral judgment, the Tribunal **granted** the respondents' opposed application made at this Hearing , under **Rule 20 of the Employment Tribunals Rules of Procedure 2013**, for an extension of time for presenting their ET3 response and, having done so, the Tribunal **allowed** the ET3 response submitted late for the respondents at this Hearing to be accepted by the Tribunal, and the case

to proceed as defended on both liability and remedy, noting that the respondents' representative confirmed at this Hearing that section 7 of that ET3 response had been completed in error, and that the respondents are not seeking to bring an employer's contract claim against the claimant.

(3) The Tribunal **instructs** the clerk to the Tribunal to serve a copy of the now accepted ET3 response on the claimant's representative, and on ACAS, when issuing this Judgment to both parties' representatives.

(4) Further, the Tribunal **ordered** that the claim and response shall be listed for a two hour Case Management Preliminary Hearing, in private, before Employment Judge Ian McPherson, whom failing another Employment Judge, sitting alone, at the Glasgow Employment Tribunal, on **Thursday, 26 March 2020**, starting at 10.00am, to determine further procedure, including listing the case for Final Hearing on dates to be hereinafter assigned by the Tribunal in the proposed listing period of **June, July or August 2020,** listing the case for full disposal, including remedy if appropriate.

(5) Case management orders made by the Tribunal, in terms of **Rule 29 of the Employment Tribunals Rules of Procedure 2013,** for completion and return of further and better particulars of the respondents' specific grounds of resistance to the factual and legal basis of the claim, and for both parties' representatives to complete and return Case Management Preliminary Hearing agendas, as originally issued with Notice of Claim sent by the Tribunal on 4 October 2019, are made under separate cover, in a separate written Note and Orders of the Tribunal, issued along with this Judgment.

(6) In respect of the respondents' undertaking given at this Hearing, and in terms of **Rules 75(1), 76 (1)(a) and (c) and (2), and 78(1)(e) of the Employment Tribunals Rules of Procedure 2013,**the Tribunal **orders** that the respondents shall, **within 7 days of this Preliminary Hearing**, pay to the claimant's solicitors, at Livingstone Brown, by BACS transfer,

the sum of **Five hundred and forty pounds (£540.00),** being £450 plus VAT**,** as the agreed amount of legal expenses incurred by the claimant in respect of her solicitor's preparation for and attendance at this Hearing, such expenses being acknowledged by the respondents as due and payable by them on account of their negligent failure to defend the proceedings at any earlier stage, being unreasonable conduct of the proceedings, and the listed Final Hearing has been postponed or adjourned on their application, and that less than 7 days before the listed Final Hearing.

REASONS

Introduction

1. This case called before me on the morning of Monday, 17 February 2020, at 10.00am, for a Final Hearing, further to Notice of Final Hearing issued by the Tribunal to both parties on 19 December 2019.

2. Following ACAS early conciliation between 14 and 28 August 2019, the claimant, represented by her solicitor, Mr Stewart Healey, from Livingstone Brown, Solicitors, Glasgow, presented an ET1 claim form to the Employment Tribunal on 26 September 2019, complaining that she had been unfairly dismissed by the respondents from her job as a carer on 31 May 2019, and further complaining that she was discriminated against on the grounds of disability, and that she was owed notice pay. In the event that her claim was to be successful, the claimant sought an award of compensation from the Tribunal.

3. The claim was accepted by the Tribunal on 4 October 2019, and a copy of the claim was served on the respondents, on that date, requiring them to lodge an ET3 response at the Glasgow Tribunal office by 1 November 2019. In that Notice of Claim, and Notice of Preliminary Hearing, it was explained to the respondents that if their response was not received by 1 November 2019, and no extension of time had been agreed by an Employment Judge before that date, then they would not be entitled to defend the claim.

4. It was further explained that, where no response was received or accepted, an Employment Judge might issue a Judgment against them without a Hearing and they would only be allowed to participate in any Hearing to the extent permitted by an Employment Judge.

5. Further, that Notice of Claim and Notice of Preliminary Hearing, sent to both parties by the Tribunal on 4 October 2019, stated that if a response was accepted, a Case Management Preliminary Hearing would be held by an Employment Judge sitting alone, and Friday, 10 January 2020, at 2.00pm, was allocated for that Preliminary Hearing to be conducted in private. Both parties were sent Preliminary Hearing agendas for completion and return, by the claimant's solicitor no later than 21 days before that Preliminary Hearing, and by the respondents no later than 7 days before that Preliminary Hearing.

6. No ET3 response form having been received, by the due date of 1 November 2019, or at all, on 5 November 2019, the case file was referred to Employment Judge Rory McPherson, as duty judge, for further direction. He did not consider it appropriate to issue a Default Judgment under **Rule 21 of the Employment Tribunal Rules of Procedure 2013** and, instead, he instructed that the case be listed for a Final Hearing before an Employment Judge sitting alone, and he further directed that standard Case Management Orders be issued for the purpose of that Final Hearing.

7. In furtherance of Employment Judge Rory McPherson's instructions, the Case Management Preliminary Hearing listed for Friday, 10 January 2020, at 2.00pm, was postponed, and relisted as a Final Hearing, and Notice of Final Hearing was issued to both parties by the Tribunal on 6 November 2019, assigning Friday, 10 January 2020, at 2.00pm for that Final Hearing, where one hour was set aside for its full disposal, including remedy if appropriate.

8. That Notice of Final Hearing was sent to the respondents, for information only, and it stated that the respondents were entitled to attend the Final Hearing but would only be able to participate to the extent permitted by the Employment Judge who would hear the case.

9. Further, on 11 November 2019, Employment Judge Claire McManus signed standard Case Management Orders, for the purpose of that Final Hearing, which were issued to the claimant's solicitor. In terms of standard order no. 3, the claimant was ordered to send to the respondents, and copy to the Tribunal, within the following 21 days, a written statement with supporting documentation setting out her Schedule of Loss, detailing the remedy she sought from the respondents, if her claim succeeded, and showing how much was sought in respect of each complaint with a detailed explanation of how each sum was calculated, together with details of any benefits received, summary of jobs applied for, etc, and details of any other efforts made by her to minimise her loss.

10. Thereafter, by letter dated 25 November 2019, from Mr Healey at Livingstone Brown, to the Glasgow Tribunal office, he sought clarification of the length of the hearing, given the Notice of Final Hearing, stated, at one point, that one hour had been set aside for its full disposal, although, at a later point, it referred to one day.

11. Following referral to Employment Judge Mark Whitcombe on 26 November 2019, he directed that he thought the case required a full day and, accordingly, a fresh date listing stencil was issued to the claimant's solicitor, following which, it no longer being able to accommodate a one day Final Hearing on 10 January 2020, fresh Notice of Final Hearing was issued by the Tribunal to both parties, on 19 December 2019, setting aside one day for the case's full disposal, including remedy if appropriate.

12. That Notice of Final Hearing was sent to the respondents, for information only, on the same basis as the previous Notice of Final Hearing issued to them on 6 November 2019.

Final Hearing before this Tribunal

13. When this case called before me, shortly after 10.00am, the claimant was in attendance, represented by her solicitor, Mr Healey. The respondents were not in attendance, nor represented, which, given no ET3 response had been lodged on their behalf, was not unexpected. Mr Healey, the claimant's

solicitor, lodged a Bundle of Documents, comprising 10 documents in total, including a Schedule of Loss, seeking a total award of compensation from the respondents in the sum of **£18,403**.

14. From my pre-read of the case file, and quick perusal of the Bundle provided to the clerk for my use, I started the Final Hearing by raising a number of questions of clarification for Mr Healey, as the claimant's solicitor.

15. As per document 7 in his Bundle, being a print from Companies House, I stated that the search conducted by the Tribunal, on the online Companies House website, similarly disclosed that the Beeches Home Care Agency Limited (Company No SC181289) is an active company, with a registered office address at 1 Moorfield Lane, Gourock, Inverclyde, PA19 1LN. That was the name of the respondents on the ACAS early conciliation certificate, and on the ET1 claim form presented to the Tribunal.

16. I commented, however, that from some of the other documents in the claimant's Bundle, in particular the letters at documents 1, 2, 3 and 4, being letters of 17, 21 and 31 May 2019, they had a letter heading simply stating "***The Beeches***", and an address of "***The Beeches Home Care Agency, Suite 1 Midholm, 2 Hillview Drive, Clarkston, Glasgow, G76 7JD"*** and that those letters did not disclose that the employer was a limited company, contrary to the requirements of the Companies Act.

17. Further, I noted, from the 9 wage slips, provided at document 6 in the claimant's bundle, that they were in the name of "***The Beeches Home Care Agency",*** but without the addition of the "***Limited***", and they gave the Midholm, Clarkston, address. Similarly, I stated that, from a search of the online Care Inspectorate website, Beeches Home Care Agency Limited was shown as having a service address at Midholm, Clarkston, and a Joy Currie was shown as the manager

18. I further noted, from the copy letter of dismissal, dated 31 May 2019, included in the claimant's Bundle as document 4, that Joy Currie had issued the letter of dismissal issued to the claimant, to which Mr Healey advised that the respondents' registered office address was that used in the ET1 claim form,

that address is where the claimant trained, but he further explained that she worked in individual client's homes, from time to time.

19. Mr Healey queried whether he would need to proceed with this Final Hearing, or have the claim form reserved on the respondents at that Midholm, Clarkston address. He advised that there had been no contact by the respondents with the claimant, or him as her solicitor, since the Tribunal proceedings were raised.

20. I referred Mr Healey to the terms of **Rules 86 and 90 of the Employment Tribunals Rules of Procedure 2013,** and stated that I was satisfied, the ET1 claim form having been served on the respondents' registered office, and that claim form, and subsequent Notices of Final Hearing, not having been returned as gone away, or undelivered, that service was proved, there being no evidence to the contrary.

21. I enquired of him as to whether he was ready to proceed with the claimant's evidence at this Final Hearing. Mr Healey stated that he was conscious that, the respondents still being in existence as a limited company, but not having lodged an ET3 response defending the claim, that while a copy of the Tribunal's judgment would be sent to them, there remained a possibility that they might seek reconsideration of that judgment, on the basis that they had not received proper service of the claim form.

22. Mr Healey further stated that the claimant was employed by the limited company, although he accepted that neither the payslips, nor letters lodged in the claimant's Bundle, referred to it as a limited company, and, when he confirmed that the Beeches Home Care Agency Limited was the claimant's employer, the claimant produced, as much to his surprise, as to mine, an ID badge, and lanyard, in the name of "***Karma Healthcare***", giving the claimant's name ("Val Joyce") and security number 0000852, with the words "***Beeches Home Care"*** on the lanyard.

23. In light of this disclosure by the claimant, Mr Healey requested, and I granted, him an adjournment of half an hour to allow him to investigate, and take instructions from the claimant.

24. Before adjourning proceedings, at around 10.47am, I clarified with Mr Healey certain issues arising from my pre-read of the paper apart to the ET1 claim form. He confirmed that the word "***purses"*** in paragraph 5 should read "***purposes***"; that the words "***the client***" in paragraph 14, should state ***"the claimant",*** and that the reference in paragraph 25, to the claimant's comments as described in paragraph 15, should have referred to paragraph 14.

25. Further, Mr Healey confirmed that the claim of unfair dismissal, and disability discrimination, was being insisted upon by the claimant, in terms of the various statutory provisions referred to at paragraphs 24 to 30 of the ET1 paper apart, and that paragraph 30 should be read, given its terms of "***something arising in consequence of her disability***", as being a complaint by the claimant in terms of **Section 15 of the Equality Act 2010**.

26. Further, in respect of the two "***disclosures***" relied upon by the claimant, as being protected disclosures, paragraph 24 relates back to paragraph 7, and the oral disclosure, in February 2019 to the claimant's manager, Joy Currie, while the disclosure at paragraph 14 referred to an oral disclosure, again to Joy Currie, the claimant's manager, who chaired a staff meeting held sometime in early May 2019.

27. When this Hearing resumed at around 11.25am, the claimant's solicitor, Mr Healey, advised me that he had spoken with a Mrs Dhesi, the respondents' managing director, and he stated that she had accepted that the respondents were formerly the claimant's employer, that they had located the Tribunal's paperwork, and they would be defending the claim, and that while Blair & Bryden, Solicitors, Greenock, were their usual solicitors, they had not managed to get through to them as yet.

28. To save costs for his client, recognising that the respondents would likely seek an extension of time to defend the proceedings, Mr Healey raised the question of whether or not the Final Hearing should be postponed. In discussion with him, I stated that it might be appropriate to convert the Final Hearing into a

Preliminary Hearing to allow the respondents to appear, or instruct solicitors to appear, and make a **Rule 20** application to lodge a late ET3 response.

29. Following a further short adjournment, where Mr Healey left, to make a further telephone call to Mrs Dhesi, when he returned, shortly before 11.35am, he stated that Mrs Dhesi would email the Tribunal. I adjourned the Final Hearing, at that stage, to await communication from Mrs Dhesi.

Application by Respondents for postponement of the Final Hearing

30. By email from Kelly Dhesi, managing director of the respondents, sent to the Glasgow Tribunal office at 12 noon, on 17 February 2020, she stated as follows:

> "***As the respondent we fully intend to submit a defense*** (sic) ***in the case 4111249/2019. It is our position that the claimant was not discriminated against not*** (sic) ***was the claimant unfairly dismissed. We have not responded to this claim due to losing the paperwork during an office refurbishment. Due to this may we request a delay to the final hearing in order for our legal representation to submit a formal defense*** (sic) ***in the above claim. Postponement of the final ET hearing would afford us the opportunity to provide our side of the story and ensure a just outcome."***

31. That email, sent by Mrs Dhesi from a Karma Healthcare Limited email address, was not copied to the claimant's solicitor, as required by **Rule 92**. When it was brought to my attention, I instructed the Tribunal clerk to provide a hard, paper copy to Mr Healey, the claimant's solicitor, for his information, and I also instructed that a response be sent by the Tribunal, to Mrs Dhesi, by email, and copied to Mr Healey.

32. The Tribunal's reply, written on my instructions, referred to Mrs Dhesi's email, that the Final Hearing had called before me at 10am that morning, and Mr Healey, the claimant's solicitor, had advised me of his telephone conversations with her, and that the Final Hearing had then been postponed

to 2.00pm that afternoon to allow the respondents to appear, and/or instruct Blair & Bryden Solicitors, Greenock, to appear and make a **Rule 20** application to be allowed to lodge a late ET3 response.

33. A copy of **Rule 20** was attached to the Tribunal's email reply, for Mrs Dhesi's assistance, and she was asked to consult with her solicitors urgently, and confirm if they/she would be attending at 2pm, and to send/bring a completed ET3 response form.

Final Hearing converted into Preliminary Hearing

34. When the case was due to call again at 2.00pm, there was still no appearance by, or for the respondents, although a telephone call had been received by the tribunal administration advising that they were *en route*. Mr Steele attended, while Mrs Dhesi, was parking their car, and he provided to the Tribunal clerk a completed ET3 response form, which I had the clerk copy for myself, the Tribunal's case file, and Mr Healey, before this now Preliminary Hearing started at around 2.25pm.

35. At that stage, Mrs Dhesi stated that the respondents were first aware of the Tribunal Hearing earlier that morning when Mr Healey had phoned her, and she confirmed that she, and Mr Steele, were both directors of the company, and that its registered office was at 1 Moorfield Lane, Gourock, the address provided by the claimant in the ET1 claim form.

36. When asked about the reference in her email, of 12 noon, to ***"losing the paperwork during an office refurbishment",*** Mrs Dhesi explained that just before Christmas, on some date in December 2019, correspondence from the tribunal was received at the respondents' registered office, and it was something to do with a date for Hearing, and a Preliminary Hearing, as she recalled matters. She explained that the correspondence received was misplaced by a new member of staff, employed as a PA to herself as managing director.

37. Having heard Mrs Dhesi's explanation, I stated that, from the timeline evident from me, from perusal of the Tribunal's case file, it appeared to me that the timeline was as follows: -

- ACAS Early Conciliation – 14–28 August 2019;
- ET1 – presented on 26 September 2019 – served on the respondents on 4 October 2019, with Notice of Claim and Notice of Preliminary Hearing;
- Notice of Final Hearing, issued to both parties on 6 November 2019;
- Case Management Orders issued to the claimant's solicitor on 11 November 2019;
- Notice of Final Hearing issued to both parties, on 19 December 2019, intimating Monday, 17 February 2020 at 10am, for 1 day for full disposal, including remedy if appropriate.

38. When, having intimated this timeline, I enquired of Mrs Dhesi whether she was sure that paperwork had first been received sometime in December 2019, she stated that she was not sure. She recalled getting two letters, one referring to a Hearing on 17 February 2020, and another letter saying something about a Preliminary Hearing.

39. She then stated that she had received the Tribunal's letters of 4 October and 19 December 2019, and confirmed that the respondents had taken no action after receipt of the Notice of Claim sent to them on 4 October 2019. Looking at the letters of 4 October and 19 December 2019, which she had brought with her to the Tribunal, Mrs Dhesi accepted that, on page 1 of the Notice of Claim dated 4 October 2019, it was clearly stated that a response should be lodged by 1 November 2019, and she accepted that the respondents did nothing by that date.

40. Mrs Dhesi further added that they did not get any letter of 6 November 2019 saying that there would be a Final Hearing on 10 January 2020, at 2pm, for 1

hour, but she did accept that they had received the subsequent Notice of Final Hearing issued on 19 December 2019.

41. At this stage, Mr Steele started to speak, as their representative, and to make some observations. He stated that the respondents were "***negligent"***, and that is why they were not here at the Tribunal for the 10am start. He further stated that the respondents further sought to defend this case. When I stated that only one person could act as the respondents' representative, he stated that he would be acting as their representative at this Preliminary Hearing, ang going forward, until they secured legal representation, and Mrs Dhesi agreed that was the case.

42. Looking at the draft ET3 response form which he had tendered, on arrival at the Tribunal earlier that afternoon, I asked Mr Steele why there was no answer at section 3.1, about whether or not the respondents agreed with the details given by the claimant in the ET1 claim form about early conciliation with ACAS.

43. In reply, Mr Steele stated that he had been filling in the ET3 response form in the car while Mrs Dhesi was driving here to Glasgow, and he was not aware of all of the detail to give a lucid response. That said, he accepted that the respondents were aware that ACAS were involved, and that both he and Mrs Dhesi were aware of ACAS early conciliation.

44. Asked about his response to section 6.1, where it was ticked that the respondents intended to defend the claim, and the brief narrative set out in handwriting, he stated that the respondents dispute liability, for all the matters complained of by the claimant. As per his handwritten defence, "***the claim is not based on fact. The claimant's behaviour was damaging to the company and detrimental to the wellbeing of staff."***

45. When asked about section 7 of the ET3 response (employer's contract claim), where it was ticked that the respondents wished to make an employer's contract claim in response to the claimant's claim, Mr Steele stated that had been ticked in error, and he apologised, and clarified that the respondents did <u>not</u> want to countersue the claimant.

46. Where, at section 8, his details were inserted as the respondents' representative, Mr Steele stated that while the respondents operate from the 2A Hillview Drive, Clarkston address, the respondents are content that in this Tribunal claim, their address for service remains as per the ET1, namely 1 Moorfield Lane, Gourock.

47. Asked about the copy wage slips produced by the claimant, and letters to the claimant from the respondents, Mr Steele stated that the wage slips should say "***Limited"*** at the end of the employer's name, and he confirmed that the respondents are a limited company.

48. Similarly, as regards the letter heading, he explained that the respondents' manager and co-ordinator, who had both written to the claimant, were working from a template, and he accepted that template was not correct, insofar as it did not show the name of the company, or that it was a limited liability company at all. He further accepted that the company appeared not to be complying with the requirements of the Companies Act in that regard.

49. When I asked him about the amount of compensation being sued for by the claimant, as per document 10, in the claimant's Bundle, in the amount of **£18,403**, Mr Healey provided him with a copy of the Bundle to peruse and, in reply, Mr Steele stated that he had not seen this Schedule of Loss before (which was consistent with Mr Healey's statement that it had not been sent to the respondents, despite the Tribunal's earlier case management order).

50. Further, Mr Steele also stated that if the respondents could not defend the claim on the basis of disputing liability, then they would certainly want to defend it on the matter of any remedy to be awarded to the claimant by way of compensation payable by the respondents.

Relevant Law

51. As the respondents were not legally represented, and both Mr Steele and Mrs Dhesi advised me that they had no knowledge of Employment Tribunal practice or procedure, or the relevant law, I advised them that, consistent with my **Rule 2** duty to deal with the case fairly and justly, I could inform them, in

general paraphrased terms, of the applicable legal test for a **Rule 20** application, and then invite Mr Steele's comments, by way of addressing the factors identified in the judgment of Mrs Justice Simler DBE, then President of the Employment Appeal Tribunal, in **Grant v Asda [2017] UKEAT/0231/16/BA,** and reported at **[2017] ICR D17**.

52. At that stage, reading from my printed copy of the EAT's judgment in **Grant v Asda,** I referred to paragraph 16 (repeating the terms of Rule 20, which had been set forth in the Tribunal's email to the respondents in reply to Mrs Dhesi's email at 12 noon), then I paraphrased Mrs Justice Simler's paragraph 17, referring to earlier case law in **Kwik Save Stores Limited v Swain [1997] ICR 49** and, at paragraph 18, the judgment of Mr Justice Mummery in **Pendragon PLC t/a (CD Brammall Bradford) v Copus [2005] ICR 1671**.

53. I then read from the remainder of that paragraph 18, stating that the EAT had ruled that the earlier judgments still applied with equal force to the current Employment Tribunal Rules 2013, and detailed, by reading the third sentence of that paragraph 18, the relevant factors which an Employment Tribunal should take into account in deciding whether or not to allow an extension of time to lodge a late ET3 response.

54. For ease of reference, I reproduce here the full text of paragraphs 17 and 18 from **Grant v Asda**:

> ***"17. Again, unlike its predecessor, Rule 20 permits an application for an extension of time after the time limit has expired. Rule 20 is otherwise silent as to how the discretion to extend time for presenting an ET3 is to be exercised. Guidance on the approach to be adopted by tribunals in exercising their discretion was given in Kwik Save Stores Ltd v Swain [1997] ICR 49 EAT, a case concerning a respondent's application for an extension of time under the Employment Tribunal Rules 1993. Mummery J gave guidance at pages 54 to 55:***
>
> ***"The discretionary factors***

The explanation for the delay which has necessitated the application for an extension is always an important factor in the exercise of the discretion. An applicant for an extension of time should explain why he has not complied with the time limits. The tribunal is entitled to take into account the nature of the explanation and to form a view about it. The tribunal may form the view that it is a case of procedural abuse, questionable tactics, even, in some cases, intentional default. In other cases it may form the view that the delay is the result of a genuine misunderstanding or an accidental or understandable oversight. In each case it is for the tribunal to decide what weight to give to this factor in the exercise of the discretion. In general, the more serious the delay, the more important it is for an applicant for an extension of time to provide a satisfactory explanation which is full, as well as honest.

In some cases, the explanation, or lack of it, may be a decisive factor in the exercise of the discretion, but it is important to note that it is not the only factor to be considered. 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 is 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 granting the extension of time, but it is not always decisive. There may be countervailing factors. It is this process of judgment that often renders the exercise of a discretion more difficult than the process of finding facts in

dispute and applying them to a rule of law not tempered by discretion.

It is well established that another factor to be taken into account in deciding whether to grant an extension of time is what may be called the merits factor identified by Sir Thomas Bingham MR in Costellow v Somerset County Council [1993] 1 WLR 256, 263:
"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."

Thus, if a defence is shown to have some merit in it, justice will often favour the granting of an extension of time, since otherwise there will never be a full hearing of the claim on the merits. If no extension of time is granted for entering a notice of appearance, the industrial tribunal will only hear one side of the case. It will decide it without hearing the other side. The result may be that an applicant wins a case and obtains remedies to which he would not be entitled if the other side had been heard. The respondent may be held liable for a wrong which he has not committed. This does not mean that a party has a right to an extension of time on the basis that, if he is not granted one, he will be unjustly denied a hearing. The applicant for an extension has only a reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner. That will involve some consideration of the merits of his case." (Original emphasis)

18. The approach set out by Mummery J was subsequently adopted in relation to the 2004 Rules in Pendragon plc (t/a CD Bramall Bradford) v Copus [2005] ICR 1671 EAT. In our judgment, it applies with equal force to the 2013 Rules. So, in exercising

this discretion, tribunals must take account of all relevant factors, including the explanation or lack of explanation for the delay in presenting a response to the claim, the merits of the respondent's defence, the balance of prejudice each party would suffer should an extension be granted or refused, and must then reach a conclusion that is objectively justified on the grounds of reason and justice and, we add, that is consistent with the overriding objective set out in Rule 2 of the ET Rules."

55. While **Rule 20 (3)** provides that an Employment Judge may determine a **Rule 20** application without a Hearing, I explained to both parties that, as both were in attendance and represented, and consistent with the Tribunal's overriding objective, under **Rule 2**, to deal with cases fairly and justly, including avoiding delay, and saving expense, it would be appropriate to proceed forthwith to consider the respondents' **Rule 20** application to the Tribunal at this Preliminary Hearing.

Submissions for the Respondents

56. In opening his oral submissions to me, Mr Steele stated that there was no acceptable defence in terms of the respondents not doing the preparatory work for this hearing, and he further stated that "***we were negligent***". He added that, if the respondents had prepared properly, they would have defended their actions robustly, and had they prepared properly, they would have presented a completely different picture of the claimant, and subsequent events.

57. Accepting that the ET3 response form was a bare denial, Mr Steele added that he had read the claimant's ET1 claim form that morning, and the 30 paragraphs in its paper apart, and in completing the ET3 response, he was trying to write in the car, while in motion, and that was a relevant factor for the Tribunal to take into account as regards the brevity of the ET3 response tendered, partly typed, and partly handwritten. Had he had more time, he added that he was sure he would have written a more detailed response on behalf of the respondents.

58. Further, Mr Steele stated that he could not defend why the respondents had not done that after receipt of the Notice of Claim sent on 4 October 2019. On the matter of prejudice, he stated that it was unfair for the respondents not to give as much information as possible to give a more balanced picture for the Tribunal to be able to make a decision on the claimant's case, and he accepted that the claimant is prejudiced by the delay to date.

59. As regards prejudice to the respondents, Mr Steele stated that the respondents had not done their preparatory work, and they had not adhered to the timetable set out by the Tribunal, for an ET3 response by 1 November 2019. With time passing on, he accepted that he could see why the claimant would see prejudice to her if the ET3 response was allowed in late, but he submitted that the respondents have a "***true and just argument***" to present to defend the claim brought against them.

60. He further stated that it would be just and fair to let the respondents in, albeit they were lodging their ET3 response late. In closing, Mr Steele stated that the respondents had been remiss in adhering to the timetable presented to them on three occasions by the Tribunal, but emphasised that the letters from the Tribunal had been genuinely misplaced, and the dates had not been put in the company diary. Finally, he stated, he had only become involved at around 11.15am that morning, after Mr Healey had phoned, and had spoken with Mrs Dhesi.

Reply for the Claimant

61. Having heard from Mr Steele, for the respondents, I then invited Mr Healey, the claimant's solicitor, to address me, and explain his position in relation to the respondents' application for an extension of time under **Rule 20**.

62. He opened by stating that the application was opposed, and stated that the respondents had clearly received paperwork from the Tribunal, and done nothing with it at the time, and then there had been a refurbishment, and then they had just forgotten about matters. He further stated that the ET3 response should have been submitted after the 4 October 2019 Notice of Claim was clearly served on them, and their failure to do so, by 1 November

2019, or to date, showed a ***"significant disregard to the seriousness of the proceedings".***

63. Further, added Mr Healey, the balance of prejudice leans towards the respondents, if decree and judgment is granted against them for the significant sum of compensation sought in the claimant's schedule of loss. In the event that the Tribunal were to decide to allow in the late ET3 response, Mr Healey stated that the claimant would be seeking expenses for this full day's Hearing, which would have been entirely avoided, if the ET3 had been presented earlier, and that he felt that an award of expenses to the claimant for the legal expenses incurred would help restore some balance of prejudice to her.

64. Developing his submission, Mr Healey then stated that there was a need for further specification of the defence, because what is stated in the ET3 lodged lacks information, and so fair notice, and the claimant, while seeking to have the **Rule 20** application refused by the Tribunal, would be seeking an order for further and better particulars, should the Tribunal decide, in exercising its discretion, to accept the late ET3 response. If the Tribunal decided that the respondents should only be allowed to participate in a Remedy Hearing, then he suggested that the respondents should seek advice from their solicitor, Mr Harvey, at Blair & Bryden.

65. At this point, Mr Steele, the respondents' representative, stated that the respondents seek to defend both liability and remedy, and as regards legal expenses incurred by the claimant for what would be a wasted Final Hearing date, he stated that the respondents accepted responsibility for such wasted costs.

66. When I asked Mr Healey if he could summarily assess those expenses, he stated initially that might be around £350, plus VAT, but later stated that it was £450 plus VAT, to which Mr Steele stated that the respondents accepted that amount as the legal expenses due to the claimant's solicitor, and he gave an undertaking on the respondents' behalf to pay that sum to Livingstone Brown, if the Tribunal allowed in the late ET3 response for the respondents.

67. Thereafter, Mr Healey stated that he accepted that if the late ET3 response was allowed by the Tribunal, then he accepted the need to list the case again for a Case Management Preliminary Hearing, and for both parties to complete and return to the Tribunal, with copies to each other, completed Preliminary Hearing agendas for that purpose.

68. Mr Steele stated that the respondents would undertake to pay the claimant's legal expenses, by BACS transfer, within 7 days of the date of this Preliminary Hearing. I noted that undertaking given to the Tribunal.

69. As regards further procedure, Mr Healey stated that he would be leaving Livingstone Brown, week commencing 24 February 2020, and, as such, he gave an undertaking to complete and return the claimant's PH agenda, within 7 days of this Preliminary Hearing.

70. After discussion about availability of parties, and representatives, it was mutually agreed to fix **Thursday, 26 March 2020**, at 10am, for up to 2 hours, for a personal attendance Case Management Preliminary Hearing in front of me, for the purposes of judicial continuity if possible, which failing, another Employment Judge sitting alone and in private.

71. Further, Mr Healey suggested that I should make an order for the respondents to lodge further and better particulars within 14 days documenting the legal and factual basis of their resistance to the claim.

72. Given the bare denial in the ET3 response, which was accepted by me, granting an extension of time to the respondents, by oral judgment given at this Hearing, I stated that I regarded further and better particulars as being entirely appropriate, and it was important to emphasise to both parties that all their cards should be placed face up, with full disclosure of their legal and factual arguments, in the ET1 and ET3, as read with any further and better particulars to follow, and all questions asked in the preliminary hearing agenda to be answered, in full, with no replies of "***to be confirmed***" or "***to be advised"*** except for very good cause to be shown.

73. Finally, it was agreed that, at that Case Management Preliminary Hearing, it would be appropriate to seek to list the case for Final Hearing in the proposed listing period of **June, July or August 2020**, with which both parties' representatives agreed. I stated that, along with this judgment, I would dictate, and have issued to them, under separate cover, a separate written Note and Orders of the Tribunal. This I have now done.

74. In closing this Preliminary Hearing, at around 3.35pm, I emphasised, particularly to Mr Steele for the respondents, the consequences of failure to comply with any further Orders of the Tribunal. Mr Steele noted my warning, and confirmed that he and Mrs Dhesi would seek to make early contact with Mr Harvey, the respondents' solicitor at Blair & Bryden.

Employment Judge: I McPherson
Date of Judgement: 20 February 2020

Entered in Register,
Copied to Parties: 25 February 2020