Case No: 2602191/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Beri**

Respondent: **LGCT International Limited**

Heard at: **Nottingham (by telephone)** **On:** **29 June 2020**

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

Representation
Claimant: Mr M Williams, Counsel
Respondent: Mr P Gorasia, Counsel

JUDGMENT

The Judgment of the Tribunal is that the Respondent's application for an extension of time in which to submit its response is dismissed.

REASONS

This Hearing

1. The purpose of this Hearing is to consider the Respondent's application for an extension of time in which to file its response to the Claimant's claims, which would, if granted, have the effect of setting aside the default judgment given on 26 September 2019 by Employment Judge Camp which awarded the Claimant the total sum of £7,300.52.

2. The Respondent did not file a response to the claims until 16 March 2020, almost 7 months out of time, and now seeks an extension of time under rule 20 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2014 ("the rules").

The Factual Background

3. The Claimant submitted his claim form to the Tribunal on 1 August 2019 after a period of Early Conciliation. This provided that he had been employed by the Respondent at its office in Long Eaton as a Floor Trading Manager from 1 April

2019 to 23 May 2019 when he was dismissed without notice by email stating he had failed to pass his probation. He was never paid by the Respondent during or

after his employment and he claimed unpaid wages, notice pay, holiday pay and for failure to provide itemised payslips. His account is that on 30 April 2019 he was told that the Long Eaton office was closing due to a security breach by two former employees and that he should go home and await further instructions. On 1 May 2019 he was told his salary for April 2019 would be paid.

4. The claim was sent by post on 6 August 2019 by the Tribunal to the Respondent's then registered office at Regus, Second Floor, Berkeley Square House, London W1J 6BD. The Respondent states this was a serviced office facility, unstaffed and used for meetings. The Tribunal letter notified the Respondent that a response should be sent to the Tribunal by 3 September 2019 if it wished to defend the claim.

5. The Respondent did not submit a response within that time limit. Its case is that it never received the claim form due to "some internal issues" with Regus which resulted in Regus not accepting any post for the Respondent. Consequently, the Respondent was unaware of the claim and the first it heard about it was on 4 March 2020 when the Bailiffs attended the Respondent's new premises in Long Eaton, the Claimant having registered the Tribunal's default judgment in the civil courts with a view to recovering the amount awarded to him.

6. The Respondent's account is that the Claimant was dismissed verbally on 1 May 2019 (although it claims the dismissal took effect on 30 April 2019) by a former employee of the Respondent, Mr Alex Green. The reason allegedly given for the dismissal was that the Claimant had failed to pass his probation. The Claimant contends that Mr Green did not dismiss him on that date and the first time he was aware of his dismissal was an email from the Respondent sent on 23 May 2019

<u>The Law</u>

7. Rule 20 provides that

(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 sort and shall …. be accompanied by a draft of the response which the respondent wishes to present …. "

8. In Kwik Save Stores Ltd v Swain and others 1997 ICR 49, EAT, the EAT said, "The process of exericising 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" It further set out three matters which should always be considered:

(i) The employer's explanation as to why an extension of time is required. The more serious the delay, the more important it is that the employer provide a satisfactory and honest explanation. A judge is entitled to form a view as to the merits of such an explanation.

(ii) The balance of prejudice. Would an employer, if its request for an extension of time is refused, suffer greater prejudice than the employee would suffer if the extension is granted?

(iii) The merits of the defence. If the employer's defence is shown to have some merit, justice will often favour the granting of the extension to avoid the employer being held liable for a wrong it did not commit.

The Evidence

9. In addition to the grounds supporting the application, I had before me a letter from the Claimant objecting to it, a statement of Mr Luke Wilson, a director of the Respondent, and a 75 page bundle of documents supporting the application. References to page numbers in this judgment are to page numbers in that bundle.

Consideration

10. The Respondent relies on two principal issues in its application for an extension of time for filing the response. The first is that the Claimant was dismissed by Mr Alex Green on 30 April 2019 for failing his probation and the second is that it was not aware of the proceedings until 4 March 2020 when the Bailiff attended its new Long Eaton office to enforce judgment which the Claimant had registered in the civil courts. I firstly consider the respondent's explanation for not responding to the claim within the prescribed time limit.

11. The explanation as to why the response was not submitted in time is set out in Mr Wilson's statement dated 22 June 2020. I take no account of his argument that the Claimant was aware of Mr Wilson's email address and could have corresponded with him by using that means of communication. It is not for the Claimant to serve his claim but that is the function of the Tribunal. This is effected by post and, as Mr Wilson accepts, the claim form was properly served by the Tribunal at the Respondent's then registered office at Regus. Mr Wilson sets out that there were "some internal issues with Regus" and the Respondent was not receiving its post sent to that address. He says that in September 2019, "a staff member", presumably a staff member of the Respondent, advised Regus not to accept any post for the Respondent as it was not getting to the Respondent. This seems nonsensical to me. I note from the Tribunal file that the claim form was posted to the Respondent at its registered office on 6 August 2019, which is before this direction to Regus not to accept the Respondent's post. This does not seem to be supported by the documents produced in the bundle at page 33 in which Regus says " …. until your compliance is not (sic) resolved we will not be in the position to accept letters from you". There is no evidence in the Tribunal file that the claim form was returned as undeliverable.

12. The Respondent then changed its registered office, according to Mr Wilson, on 30 January 2020. He says, " …. as LGCT moved to 43 Berkeley Street on 30th January 2020 and therefore that is when the office address was changed". What Mr Wilson completely fails to address is what arrangements were made in respect of the Respondent's post between June 2019 and 30 January 2020 given that he implies that the Regus address was still live. There is no explanation as to how mail other than the claim form sent by the Tribunal reached the Respondent.

For example, where did HMRC and others communicate with the Respondent, if at all, during the 6 months in question in this case?

13. I next consider the balance of prejudice. The Claimant has a judgment for £7,300.52 given on 26 September 2019. That sum attracts interest. The prejudice

to him is significant. In particular, the Respondent has presented a weak argument as to why he should not be paid his full salary for April 2019. It seems to suggest he should only be paid half of his salary for the month as he only worked 4 hours per working day. Even if that argument is accepted, no good reason for failing to pay it is advanced. Since there is an acknowledgment of an amount being due to the Claimant, it is pertinent to ask why, some 11 months later, nothing has been paid? The fact that there is an acknowledgment that an amount is due only serves to increase the prejudice to the Claimant in granting the extension.

14. For the Respondent, as is usually the case in such proceedings, the prejudice is that of having to pay an amount it says is not wholly due to the Claimant in circumstances where it claims to have a good defence and/or there are disputed facts which should be determined by a Tribunal. This is discussed further below.

15. On balance, therefore, I consider the greater prejudice lies with the Claimant.

16. I must also consider the merits of the defence. In this regard, I found the Respondent's account to be inconsistent as to the facts it relies on. I note that the response form states that the Claimant was employed until 23 May 2019, as claimed by the Claimant. When I raised this with Mr Gorasia, he said this was an error. When I then raised the fact that Mr Wilson's statement stated the Claimant was dismissed on 30 April 2019 but said Mr Green spoke to him to confirm dismissal on 1 May 2019, Mr Gorasia's instructing solicitor interrupted to say there were two conversations with the Claimant on 30 April and 1 May. Nowhere is it mentioned in the pleadings or Mr Wilson's statement that there were two conversations. This casts doubt on the Respondent's pleaded case. I doubt the Respondent's version of events. Putting aside the fact that Mr Wilson's statement is hearsay (Mr Green is no longer an employee and there was no clear picture as to whether he would attend to give evidence), the inconsistency in the account of the Claimant's dismissal is further illustrated by Mr Wilson stating at paragraph 4 of his statement that the Claimant was notified by email on 1 May (page 30) along with others, that he was dismissed. Firstly, if he was dismissed on 30 April, why did he need to be notified at all that the office was closing and, secondly, the email of 1 May merely states the company will not trade " …. until such time as we can confirm …. so we can commence trading again …. in due course". This is not a letter of dismissal.

17. Mr Wilson also refers to the email dated 23 May 2019 to the Claimant and another (page 31) which notes he has been in communication with ACAS and states, "Further to recent communication with ACAS …. we would like to inform you both that we will not be requiring your services with LGCT International LTD, due to a failure in passing probation". I note no reference here to the fact that the Claimant was allegedly dismissed on 30 April 2019. Thus the only actual evidence of the Claimant's dismissal is the email of 23 May which states the Respondent **will not** require his services (i.e. going forward) and not that it **has not** required his services since 30 April 2019.

18. I further note the Respondent's argument that the Claimant was dismissed because he did not pass his probation (as it is put). The Claimant's contract of

employment at pages 25-29 makes no mention of a probationary period. Mr Gorasia submitted that this does not mean there was not an agreement either verbally or in other written form but the written offer of appointment is silent on the point and it is not pleaded elsewhere that there was any such probationary period anticipated or discussed by the parties.

19. It is not until the Respondent submitted its grounds of resistance attached to the response form that it is claimed the Claimant had committed acts of gross misconduct. At paragraph 7 of those grounds of resistance, the Claimant is accused of committing acts of gross misconduct in not performing his contractual duties or fulfilling his contractual hours and recruiting staff (including his wife) to work for the Respondent without seeking prior approval. This seems to be nothing more than an "add-on" in an attempt to discredit the Claimant as the email of 23 May 2019 states quite categorically that he was dismissed for failing his probation. The Respondent's argument that the alleged working of less than his contractual hours in order to defeat the claim for holiday pay (by halving it) and wages for April, is novel but doomed when the Claimant, a salaried employee, does not appear to have been notified of these matters.

20. Finally, I do not accept Mr Gorasia's argument that compensating the Claimant for the lack of itemised pay statements would amount to double recovery. There is an element of penalising the Respondent in such circumstances under s.12(4) Employment Rights Act 1996 and this is clearly set out in the judgment.

Conclusion

21. In considering the matters set out in Kwik Save Stores, I find the Respondent's explanation to be unsatisfactory for the reasons discussed above. Mr Wilson's account of the change of addresses and his somewhat weak attempt to blame the Claimant for failing to serve the claim on a trading address rather than the Respondent's registered office has no merit.

22. Further, I find it is would be of greater prejudice to the Claimant in granting the extension of time.

23. The Respondent's defence has little merit. It is not enhanced, quite the contrary, by a belated attempt to reduce the Respondent's liability to compensate the Claimant by accusing him of gross misconduct some 10 months after the only evidence before me of his dismissal on 23 May 2019.

24. In addition to these matters, I have taken account of the overriding objective. In my view, in the circumstances of this case that objective will not be served by extending the time limit for service of the response.

25. For the above reasons, and balancing all of the factors discussed above, I dismiss the application and the judgment of 26 September 2019 stands.

Employment Judge Butler

Date 7 July 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

14 July 2020.....
FOR THE TRIBUNAL OFFICE