



EMPLOYMENT TRIBUNALS

Claimant: Ms H Khan

Respondent: NCINO Global Ltd

OPEN PRELIMINARY HEARING

Heard at: London South (by video) **On:** 3 September 2020

Before: Employment Judge O'Rourke

Appearances

For the Claimant: Ms Greenley - counsel

For the Respondent: Mr McCorkell - solicitor

JUDGMENT

1. Subject to Rule 20 of the Employment Tribunal's Rules of Procedure 2013, the Respondent's application to extend time to present their response, is granted and, in turn, the Claimant's application for a Rule 21 Judgment is refused.
2. As set out in the Case Management Orders of even date, such extension is granted to 29 October 2020.

REASONS

1. I read written submissions from both parties and neither representative wished to add to those submissions.
2. It was agreed between the parties that the Respondent had presented its initial Response (now to be amended, if so advised) on 25 March 2020, when the due date was 19 March. The Respondent made an application, at the same time, for an extension of time to present its Response, to which the Claimant objected, in turn applying for a Rule 21 Judgment against the Respondent.

The Law

3. Both parties relied on the case of **Kwik Save Stores Limited v Swain & others [1997] ICR 4 UKEAT**, which sets out the principle that: "*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.*" Such factors are suggested as:
- (a) the explanation for the delay;
 - (b) the length of the delay;
 - (c) the merits of the defence; and
 - (d) the balance of possible prejudice to each party.

Consideration

4. I consider those factors as follows:
- a. **Reasons for Delay.** The Respondent stated that while the Claim had been sent to the correct address (their registered office address), it had not been forwarded on to them, until 24 March, by another company, a 'corporate services provider' called Vistra, who administered the Respondent's registered office. The Respondent had discovered, the previous day, from a discussion with the Claimant's representatives that a claim had been presented and they queried that situation with Vistra. That Company have provided a letter (not in the bundle, but read out at the hearing), in which they accept responsibility for the error. The Claimant considers this an unacceptable explanation, particularly for a large organisation like the Respondent and commented on the brevity of the letter. I considered, however that I had no reason to doubt the explanation provided and applying **Kwik Save**, (55) considered there was no evidence of "*procedural abuse, questionable tactics, even, in some cases, intentional default*", but that instead the delay was "*the result of a genuine misunderstanding or an accidental or understandable oversight*", indicating therefore that this was not a factor which should weigh against the Respondent.
 - b. **Length of Delay.** The delay in this case was minimal (six days), with the Respondent's application and Response being presented the day after they were provided with the Claim. I contrast that delay with the six-month delay contributed to by the Claimant's resistance to that application and the yet further delay in progressing this claim, following an abortive case management hearing today. I give this factor, therefore, little or no weight.
 - c. **Merits of the Response.** While the Claimant considers that the current Response is a mere denial of her claims, I note that firstly, her claims are insufficiently pleaded (as set out in the case management order), rendering it difficult for the Respondent to fully respond. Secondly, the burden of proof for all of the Claimant's claims (and at least the initial

burden of proof in her direct discrimination claim) rests with her and therefore all that is required of the Respondent, at least technically, is to deny such claims. Thirdly, in any event, however, the Respondent does set out its alternative potentially non-discriminatory reason for dismissal in some detail and raises potentially relevant arguments as to limitation. I find therefore that at least on the face of the Response, with the burden of proof being on the Claimant, it is impossible for me to find that the Response does not have at least '*some merit*' (**Kwik Save**). This factor therefore falls in the Respondent's favour.

- d. Balance of Prejudice. There can be no question that the balance of prejudice falls firmly in the Respondent's favour. If its application were not to be granted, it would face a default judgment for a potentially very large sum, with no-doubt attendant reputational damage, without the opportunity to defend itself. In contrast, the Claimant is able to proceed with her claim, have it heard and if it has merit, be compensated accordingly.
5. Conclusion. For these reasons, therefore, the Respondent's application is granted and the Claimant's is refused.

Employment Judge O'Rourke

3 September 2020