EMPLOYMENT TRIBUNALS

Claimant: Mr S Newman

Respondent: Integrated Technology Limited

HELD AT: Liverpool (by CVP) **ON:** 27 January 2021

BEFORE: Employment Judge Shotter (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Nigel Pilling, managing director

JUDGMENT

The Judgment of the Tribunal is that time will be extended to 10 October 2020 for the filing of the ET3 Response, and the ET3 filed on that date should stand as the respondent's defence in this matter.

REASONS

1. This has been a remote hearing by video which has been consented to by the parties. The form of remote hearing was Code V: Kinley CVP fully remote. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are in a bundle of unpaginated pages, the contents of which I have recorded where relevant below.
2. This is a preliminary hearing to consider whether the respondent should be granted an extension of time from 10 June 2020 to 10 October 2020 when the draft response was received by the Tribunal.
3. I heard evidence from Nigel Pilling, managing director of the respondent who had consented to take the affirmation, which was not entirely satisfactory and this may be down to his poor recollection as he cannot even remember how may engineers were furloughed before or after four engineers were made redundant, including the claimant, on various dates.

4. The Tribunal found the following facts and conclusion based on the evidence before it, oral submissions received from both parties and existing case law.

Facts

5. The claimant issued proceedings for direct age discrimination, unfair dismissal and unlawful deduction of wages which were received on the 6 May 2020 following early ACAS conciliation that took place between 14 April to 4 May 2020 and the respondent, providing ACAS managed to make contact, was put on notice that litigation was a possibility. The claimant states the respondent did not respond to ACAS in this period, Nigel Pilling's evidence on this was vague.
6. The claimant did not have sufficient continuity of employment to bring a claim of unfair dismissal and the Tribunal wrote to the respondent on 13 May 2020 informing it was not required to enter a response to the unfair dismissal claim but was required to enter a response to all other claims. The ET3 was enclosed.
7. The respondent wrote to the Tribunal in a letter dated 15 May 2020 stating £200 had been deducted as the claimant had lost company property, the Tribunal responded on the 18 June that a response was still required and if the ET3 was not received by 10 June 2016 the respondent will not be able to take part in the proceedings. Nigel Pilling was confused over the proceedings and believed incorrectly that the age discrimination claim had also been struck out because it was linked the unfair dismissal and redundancy.

8. The response was not submitted.

9. The unfair dismissal claim was struck out and judgment sent to the parties on 17 July 2020 and on the same date the respondent was sent a "No Response Received" under rule 21 of the Employment Tribunal Rules of Procedure 2013 and informed it was entitled to receive notice of any hearing but may only participate to the extent permitted by the judge.

10. The respondent was sent a notice of preliminary hearing to which it responded on 17 July 2020 via an email from Nigel Pilling, the managing director, that he was confused as he thought the case had been struck out. Nigel Pilling wrote a letter dated 30 July 2020 repeating the case was struck out and asking "I am unsure as to what you still require of me if anything, please could you confirm what you require of me if anything in order to bring this case to a close."

11. On 5 August 2020 the respondent was informed again only the unfair dismissal part of the claim was struck out and the other claims will proceed.

12. Nigel Pilling made contact with ACAS on the 25 August 2020 "please find attached also what other claims still continue. I have nothing on these so can't respond/defend who do I need to speak with to get the details/forms sent again?"

ACAS informed him an ET3 needed to be filed and if the case remained undefended the respondent may not be able to participate in hearings. In a separate email ACAS suggested the respondent contacted the Employment Tribunal or seek legal advice.

13. Nigel Pilling immediately wrote to the Tribunal on 25 August 2020 attaching the earlier letter of 30 July 2020 requesting clarity/instruction and copies of "the relevant documents in order for us to consult with our solicitors."

14. The Tribunal wrote to the respondent on 19 September 2020 setting out the position and "if the respondent wishes to make an application for an extension of time to enter a response to the remaining claims, it must provide a draft response form with its grounds of response at the same time as making such an application…this should be done as soon as possible." It is apparent from the letter that the documents requested by the respondent were not attached.

15. In an email sent 19 September 2020 Nigel Pilling asked the Tribunal to send "a draft response form for us to complete…we asked for this on numerous occasions but has not received anything, we can't respond as you request without this form."

16. On the 2 October 2020 by email the respondent was sent a blank ET3 form.

17. The draft response was received by the Tribunal on 10 October 2020, out of time.

18. The respondent completed a response form describing its name as NP Integrated Technology Ltd. The address for service was the same as that set out in the ET1. The Grounds of Response referred to all works being suspended by their client following the outbreak of the COVID19 pandemic with the result that the claimant's role ceased to exist. It is alleged he carried out audio visual repair work on Amber Taverns sites and did not carry out the same job as other engineers who unlike the claimant, were capable of carrying out maintenance and repairs to intruder and fire alarm systems, which the claimant had refused training for earlier in his employment. There were also issues with the claimant's performance and clients requested that he was not sent to carry out refurbishment work. The claimant today indicated the respondent's grounds were disputed, he had received training and carried out repairs on intruder and fire alarms. The £200 deduction was made to replace a power tool lost by the claimant as a result of his own negligence. Reference was made to a number of witnesses who would support the respondent's defence and to the claimant breaching restrictive covenants post termination. At today's hearing Nigel Pilling confirmed no written contract had been issued to the claimant, and that he had written to him before deducting the cost of the replacement tool, and the claimant had not responded. Nigel Pilling indicated he would now be taking legal advice.

19. A telephone case management hearing took place on the 2 November 2020. Nigel Pilling took part and made an oral application for an extension of time. A written application had not been made. The claimant objected and the application was set down for hearing today. The case management summary records the claimant's case that he was subject to direct age discrimination when other younger engineers were retained and placed on furlough when he was made redundant. Nigel Pilling denied less favourably treatment had occurred because of the claimant's age, maintain he was made redundant prior to employees being placed on furlough and as a result of a loss of work from a specific client and the duties fulfilled by the claimant.

20. In an email sent 2 November 2020 the respondent requested an extension of time "on the grounds that since March 23 2020 NP Integrated Technology has been fully shut down during the lockdown period with all employees placed on Furlough and were unable to respond efficiently to any communication or attend daily duties, I was the only employee working this period."

Law

21. In **Grant v Asda 2017 ICR D17, EAT,** the respondent did not receive a copy of the claim form and the employment tribunal directed that the ET1 be re-sent to the company's registered office, giving the respondent a further 28 days in which to present a response. On appeal, the EAT held that it was not open to the tribunal to restart the clock on the 28-day time limit by re-sending the claim form. The Tribunal Rules 2013 expressly provide for time to run from the date on which the claim is sent to the respondent, regardless of whether it is received. The tribunal should have re-sent the ET1 on the basis that the time limit for responding had expired and the respondent could then have submitted a late response coupled with an application to extend time under rule 20 The EAT was satisfied that such an application would have been granted as the respondent had a complete explanation for the delay and a strong defence based on jurisdiction.

22. If a response is presented outside the 28-day time limit rule 20 the Tribunal Rules 2013 allow an application to be made even where the time limit has expired.

23. Under rule 20 a tribunal has absolute discretion to extend the time limit for presenting a response. The overriding objective to deal with cases 'fairly and justly' provided in rule 2 is relevant the exercise of this discretion.

24. The EAT's decision in **Kwik Save Stores Ltd v Swain and ors 1997 ICR 49, EAT,** sets out the test for determining what was 'just and equitable' under previous Tribunal rules, and whether, having regard to the overriding objective, an application for an extension of time to submit a response under rule 20 should

be granted. The EAT stated 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'. When exercising a discretion in respect of the time limit, a judge should always consider the following:

24.1 the employer's explanation as to why an extension of time is required.

24.2 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

24.3 the balance of prejudice to both parties – who would suffer the greater prejudice if the extension was granted, and

24.4 the merits of the defence. In Mr Newman's case there is a claim for unlawful age discrimination with uncapped damages and unlawful deduction of wages for the sum of £200, the latter involving serious allegations, and it may be unjust for the respondent to be held liable for a wrong which it had not committed

Conclusion: applying the facts to the law

25. The Tribunal is required to adopt the approach set out **Kwick Save** (above) by looking at all the factors. Turning first to Nigel Pilling's employer's explanation as to why an extension of time is required, which included that as he was furloughed no work could be carried out by either him or is employees, with the result he was unable to put in a defence. Nigel Pilling was the dismissing officer. I accepted he was confused over what steps he could and could not take in the business during furlough when he and other staff were furloughed following the COVID19 pandemic March onwards. It is common knowledge that people were confused and businesses disrupted to a great extent, and Nigel Pilling was not alone in this. It is unfortunate that his confusion and inactivity spilled into filling the ET3. It is apparent from the factual matrix above Nigel Pilling was in disarray and unable to grasp or deal with the litigation for a number of reasons, not least that he did not understand it and nor did he seek legal advice in order to gain a better understanding.

26. There has been a long delay and 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, and I formed the view that Nigel Pilling on balance gave a satisfactory explanation for some but not all of the delay, and had sympathy with Mr Newman's frustrations at dealing with the him in this litigation.

27. Turning to the balance of prejudice to both parties and the question who would suffer the greater prejudice if the extension was granted, I found the claimant would suffer prejudice because he claims would not go forward undefended, but on balance the respondent would suffer the most prejudice. There is clearly a triable issue in relation to the unlawful age discrimination claim which has uncapped damages and the merits of the defence are such that the respondent

should be given the opportunity to defend a claim involving serious allegations. It would be unjust for the respondent to be held liable for a wrong which it had not committed, and for this reason I have extended the time to 10 October 2021 and the draft ET3 filed on that date should stand as the respondent's defence in this matter.

28. This case has been case managed to trial, a record of which has been provided in a separate Record of Preliminary Hearing.

Employment Judge Shotter 28.1.21

JUDGMENT & REASONS SENT TO THE PARTIES ON

26 February 2021

FOR THE TRIBUNAL OFFICE