EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4100126/2020 (A)

Held on 10 September 2020
(conducted remotely by telephone conference call)

Employment Judge: Ian McPherson

Mr Robert Spence	**Claimant** **In Person**
Olivia Catering Limited	**Respondents** **Represented by:** **Mr Mark Horner**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(1) Having heard oral submissions from the claimant in person, and the respondents' representative, at this Preliminary Hearing, and noted the late ET3 response submitted on 9 September 2010, in the name of Olivia Catering Limited, defending the claim, the Tribunal, acting in terms of its powers under **Rule 34 of the Employment Tribunals Rules of Procedure 2013**, substitutes that limited company as the proper respondent, it being agreed by both parties that it traded as the Village Steakhouse East Kilbride, and it was the employer of the claimant at the time of his former employment by the respondents, and that it paid wages to the claimant in that name.

(2) Further, having heard from the claimant in person, and the respondents' representative, and after private deliberation in chambers, after this Preliminary Hearing, considering their respective submissions, the Tribunal **grants** the respondents' opposed application under **Rule 21 of the Employment Tribunals Rules of Procedure 2013** to be allowed an extension of time to lodge a late ET3 response defending the claim, it being in the interests of justice to do so.

(3) Having granted the respondents' opposed application, and an extension of time until 9 September 2020, the Tribunal **allows** the ET3 response submitted by Karen Horner, on behalf of Mark Horner, by email to the Tribunal, copied to the claimant, on 9 September 2020 to be accepted, and the case to proceed as defended by the respondents on both liability and remedy.

(4) Accordingly. the Tribunal **instructs** the clerk to the Tribunal to serve a copy of the now accepted ET3 response for the substituted respondents on the claimant, and on ACAS, when issuing a copy of this Judgment to both parties.

(5) The Tribunal further **orders** that the claim and response shall be listed for a **3 hours Final Hearing,** before any Employment Judge sitting alone, at the Glasgow Employment Tribunal, **on a date to be hereinafter assigned by the Tribunal,** to be conducted remotely using Cloud Video Platform ("CVP"), and that for full disposal of the case, including remedy, if appropriate, and case management orders for the conduct of that Final Hearing by CVP shall be issued to both parties under separate cover from the Tribunal

REASONS

Introduction

1. This case called before me on the morning of Thursday, 10 September 2020, at 11.30am, for a one-hour telephone conference call Case Management Preliminary Hearing, previously intimated to both parties by letter from the Tribunal on 13 August 2020 with Notice of Preliminary Hearing. The copy sent to the respondents, for information only as there was no ET3 response received, was sent to them by post, at their business premises at 2

Montgomery Street, East Kilbride, G74 4JS, and by email to info@villagesteakhouse.co.uk.

2. As intimated to both parties, by letter from the Tribunal dated 12 August 2020, Employment Judge Mark Whitcombe had decided, in light of correspondence from the claimant, that the case should be listed for a telephone conference call Case Management Preliminary Hearing, to discuss outstanding issues and potentially fix a date for a Final Hearing. The case had been previously listed, on 24 February 2020, for a one-hour Final Hearing before an Employment Judge sitting alone, on 16 April 2020, but, in light of the Covid-19 pandemic, that was varied by the Tribunal from an in person public Hearing to a remote private Hearing by telephone conference call, which I heard on 16 April 2020, with only the claimant attending.

3. At that earlier Hearing, on 16 April 2020, the respondents, who had not lodged any ET3 response, nor applied for any extension of time to do so, were not present nor represented, despite intimation having been made to them by Notice of Final Hearing issued on 24 February 2020 by post, and Notice of telephone conference call Case Management Preliminary Hearing emailed to both parties on 7 April 2020.

4. Having heard from the claimant, at that Hearing, I made an order for him to provide additional information, within 7 days, i.e. by 23 April 2020, with 7 days for the respondents to reply thereafter, to allow me to consider issuing a Default Judgment against the respondents, under **Rule 21**, rather than relist for a Final Hearing on a later date. My written Note and Orders, dated 16 April 2020, was issued to both parties, by email from the Tribunal, on 21 April 2020.

Claim and Response

5. The claimant, acting on his own behalf, presented his ET1 claim form in this case to the Tribunal, on 10 January 2020, following ACAS early conciliation between 19 December 2019 and 2 January 2020. Formerly a head chef with the respondents, he stated that he had been employed by them from 25 August to 23 November 2019. He complained that he was owed holiday pay,

and arrears of pay, for lying time, overtime, and unpaid wages. His claim was accepted by the Tribunal administration, and served on the respondents, then designed as the Village Steakhouse East Kilbride, by Notice of Claim issued by the Tribunal on 14 January 2020, by post to the respondents at their business address.

6. No ET3 response was lodged by the respondents within the allocated 28 days, which expired on 11 February 2020, or at all, and there was similarly no application for any extension of time to do so. Accordingly, on referral to Employment Judge Mel Sangster, on 14 February 2020, she decided that a Default Judgment could not be issued, but instead instructed that the undefended case be listed for a Final Hearing for full disposal, including remedy, if appropriate.

7. On 24 February 2020, the undefended case was listed for a one-hour Final Hearing before an Employment Judge sitting alone, to be held on 16 April 2020.. As detailed above, in light of the Covid-19 pandemic, that Final Hearing was converted to a telephone conference call Case Management Preliminary Hearing, which I heard.

Additional Information from the Claimant

8. In light of the order for additional information which I made on 16 April 2020, the claimant emailed the Tribunal later that same day, sent at 21:54 pm, to the Tribunal only (but not copied to the respondents, despite previous direction to do so, as per **Rule 92**), and he set forth his basis of calculation for seeking **£2,826.80** from the respondents, and he produced some supporting documents.

9. On referral to me, and as per letter from the Tribunal dated 5 May 2020, sent to both parties by email, the claimant was reminded of the importance of copying correspondence to the respondents, but the Tribunal copied his further and better particulars of 16 April 2020 to the respondents for any comment / objection within 7 days, and the claimant was asked to clarify certain matters arising from the information he had provided to the Tribunal,

and provide clearer copy supporting documents, as the quality of some of the Jpegs sent with his email of 16 April 2020 were not of good quality.

10. While nothing further was heard from the respondents, the claimant did not respond either, and on 3 July 2020, Employment Judge David Hoey directed that a letter be sent to the claimant advising him that failure to comply with Tribunal orders, and failure to actively pursue his claim, might result in his claim being struck out.

11. Following an enquiry from the claimant, as to what information was required by the Tribunal, a clerk responded to him, on 13 July 2020, referring to the Tribunal's letter of 5 May 2020, requesting clear and legible copy documents, and for him to send in any supporting documents confirming why he was claiming the sum of £2,826.80, as per his email of 16 April 2020.

12. The claimant replied, by email on 17 July 2020, to the Tribunal only, stating that he did not understand what he was to do next, as he was really lost with the whole process. On instructions from Employment Judge Mary Kearns, on 28 July 2020, the Tribunal again wrote to the claimant, clarifying he should read the Tribunal's letter of 5 May 2020, and provide the information requested.

13. The claimant replied to the Tribunal only, by further email on 6 August 2020, enclosing copy bank statements showing payments from Olivia Catering Ltd on 19 September, 17 October and 14 November 2019. On instructions from Employment Judge Mark Whitcombe, and as per letter emailed to both parties on 12 August 2020, his email was copied to the respondents, for information, and he was advised that the case would be listed for this Preliminary Hearing.

Late ET3 Response from Respondents

14. On 23 August 2020, the Tribunal received an email from a Karen Horner, on behalf of Mark Horner, referring to the Tribunal's letter dated 13 August 2020 in relation to a Hearing due to take place on 10 September 2020 for this case. The email was referred to Employment Judge David Hoey and, as per his instructions, a reply was sent to Karen Horner, with copy to the claimant, on

27 August 2020, seeking clarification in what capacity she was writing to the Tribunal, and noting that, as no ET3 response had been lodged, the respondents would only be able to participate in the Hearing to the extent permitted by the Judge.

15. She was further advised that if the respondents wished to defend the claim, then an ET3 response should be submitted with an explanation as to why it was late and reasons why the respondents should be allowed to defend the case now, and a Judge could decide whether to allow the ET3 although late. She was advised this should be done before 10 September 2020.

16. In reply to the Tribunal's email, a further email was received from Karen Horner but, as transpired in information provided to me at this Hearing, it, like the previous email of 23 August 2020, while sent from Karen Horner's email address, was actually sent not by her, but by a person named only as Claire, described as a family friend. At this Hearing, I was advised that Claire McLaughlin is an employee of the respondents, who was opening mail and looking after correspondence while Mark and Karen Horner were in Jersey on holiday from 14 August to 3 September 2020.

17. The email of 27 August 2020 stated that the Horners had never received an ET3 form to complete, therefore this is the reason the Tribunal had not received it, and they asked that it be sent out again so that Mark Horner could submit details to defend the claim. Following referral to me, on 4 September 2020, and on my instructions, a copy of Karen Horner's emails were sent to the claimant, and a blank ET3 response sent to the respondents, along with other copy documents, specifically the ET1 claim form, the claimant's email of 16 April 2020 seeking £2,826.80, and my written Preliminary Hearing Note & Orders issued on 21 April 2020.

18. The respondents were informed that any application to lodge a late ET3 response should be submitted as soon as possible, before this Hearing, be copied to the claimant, and that the Judge would want to hear from both parties about any **Rule 20** application by the respondents for an extension of time to lodge a late ET3 response.

19. By email to the Glasgow ET office, sent by Karen Horner, on 9 September 2020, at 13:31, she attached a completed ET3 response for the respondents, submitted in the name of **Olivia Catering Limited** (with Mark Horner as named contact), defending the claim. Agreeing with the details given by the claimant about early conciliation with ACAS, the claimant's stated dates of employment were disputed, as were the normal hours of work stated by him to be 65 hours per week, but stated by them to be 35, and it was further stated that he had been paid all sums due, and no sums were outstanding to him from the respondents, for what they stated were his employment between 2 September 2019 and 10 November 2019.

20. Parties were advised by email from the Tribunal, later on 9 September 2020, when acknowledging Karen Horner's email, that the respondents' application for an extension of time to lodge the ET3 response would be discussed at this listed Hearing.

Preliminary Hearing before the Tribunal

21. When the case called before me, at 11.30am, on Thursday, 10 September 2020, the claimant was in attendance on the phone, representing himself, while Mr Mark Horner attended, on the phone representing the respondents, accompanied by his wife, Karen Horner, who explained that she was the company bookkeeper. Mark Horner stated he was representing his son, Darren Horner, who is the company director, that he had his son's authority to represent the company, and that he (Mark Horner) was not a director, but just helped out, from day to day.

22. I explained to both parties, at the start of the Hearing, the purpose of this Hearing, which was not to hear evidence from witnesses from both parties and then decide the outcome of the case, but to determine further procedure in this case, the precise nature of which would be dependent upon whether or not , in the exercise of my judicial discretion, I allowed the respondents an extension of time to lodge a late ET3 response defending the claim.

23. This Hearing was an audio Hearing ("A") held entirely by telephone conference call, and parties did not object to that format. On account of the

ongoing Covid 19 pandemic, and joint Presidential Guidance issued by the President of the Employment Tribunals in Scotland, and England & Wales, and on account of there currently being no In Person Hearings conducted, both parties were notified accordingly that this Hearing would be held by telephone conference call given the implications of the pandemic.

24. There was some static, crackly background noise on the BT Meet Me call, cause unknown, and Mr Horner indicated that Mrs Horner had some hearing difficulty, being hard of hearing, and so finding it difficult to hear the discussion, but, with co-operation and understanding from all involved, this Hearing proceeded allowing both parties to effectively participate, answer my requests for clarification, make their own submissions, and respond to the other party's submissions.

25. Mr and Mrs Horner were able to confer during the discussion, and it was appropriate to deal with the extension of time application remotely, at this Hearing, rather than adjourn it, and relist it to a later date, as that would merely have caused further delay, and further time and cost to all involved, which did not seem to me to be in accordance with the interests of justice, or the Tribunal's overriding objective under **Rule 2** to deal with the case fairly and justly. Further, and in any event, neither party proposed a postponement of the Hearing, and nor did I consider that appropriate, given the procedural history of the case to date, and that parties were both aware of the extension of time application, and that I proposed to deal with it at this listed Hearing.

26. From my pre-read of the Tribunal's case file, I started the Hearing by raising a number of questions of clarification for each party, and, to assist me, I stated that I would ask each of them questions to help me ingather information relevant to the applicable legal tests which an Employment Tribunal should take into account in deciding whether or not to allow an extension of time under **Rule 20** to lodge a late ET3 response.

27. As neither of the parties were legally represented, and neither advised me that they had any 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 was obliged to apply the relevant law, as

interpreted by the higher Tribunals and Courts, and that I would do so, in light of judicial guidance from Mrs Justice Simler, then President of the Employment Appeal Tribunal, in a 2017 case known as **Grant v Asda**, the terms of which I briefly paraphrased, saying I would need to take into account all relevant factors, including the explanation for the timing of the late application to defend, the relative prejudice to each party in allowing or refusing an extension of time, and the merits of the proposed defence to the claim, and I would wish to hear what both parties had to say on all of these matters.

28. As regards the proper identity of the employer, the claimant stated that he thought it was Village Steakhouse, East Kilbride, as he had stated in his ET1 claim form, and ACAS notification, and that he didn't know it was Olivia Catering Ltd, albeit he accepted had received payments of some wages from them. He then accepted that the company was his former employer. After discussion, and me referring to my powers under **Rule 34**, both parties agreed that I should make an order substituting the company name as the proper respondents.

Submissions by Parties

29. In addressing the Tribunal, and having clarified his instructions to appear on the company's behalf as its representative, Mr Horner stated that, until the middle of August 2020, when they received Notice of this Hearing from the Tribunal, the respondents were not aware of this Tribunal claim against them, although he did vaguely recall, sometime ago, that he got a phone call from somebody representing the claimant.

30. Asked by me to clarify who and when that was, he could not recall the specific details, but he then stated that it was ACAS, and he recalled ACAS telling him that the company had no case to answer. The claimant stated he was not represented, and I clarified for Mr Horner that ACAS are a separate statutory body, distinct from the Tribunal, who have a conciliation role in Tribunal claims, but they do not act for either party.

31. Mr Horner continued by stating that the company had no earlier, prior knowledge of this case, and that they had never received any earlier letters, or emails, from the Tribunal. When I stated correspondence had been posted by the Tribunal to 2 Montgomery Street, East Kilbride, he agreed that was the business premises, but then he stated 2 businesses shared the same address, and that the email address being used by the Tribunal had not been used by the company for many years. He stated that they only got the Tribunal's letter of 13 August 2020 by post, and not by email, and that the letter must have arrived while they were in Jersey, and the person looking after the post had alerted them to it, resulting in Karen Horner's email to the Tribunal on 23 August 2020, signed by a Claire. He further advised that the restaurant had been in lockdown since March 2020.

32. When I asked the claimant to clarify his position, about the respondents' application for an extension of time, he stated that he opposed it as late, and added that ACAS had told him that they had phoned Mark Horner several times, and as far as he was aware, Mr Horner was General Manager, and he (the claimant) had never heard of Darren Horner being the owner or director of the company, and he felt that every correspondence sent to the respondents had been ignored until now.

33. I then enquired of Mr Horner what prejudice he saw the respondents suffering if I decided not to grant his application for an extension of time. In reply, he advised that he felt there would be prejudice if the company was not allowed to defend the case brought against it, as they would not be able to answer the claimant's case, and give the Tribunal what he referred as "***the true story***". He further stated that the claimant had been paid all he is due, and that he is not owed anything further.

34. When I observed that the claimant was seeking payment of £2,826.80, Mr Horner described the claimant as "***totally deluded***", and that he was not owed that sum, indeed he was not owed any sum by the company, and if the Tribunal were to grant judgment for that sum against the respondents, then that would be prejudicial to the company. Mr Horner then stated that, living in times of Covid, he would dispute why the claimant does not want a proper

Hearing of his case, and make sure that everybody is right done by, with both sides to present evidence, and let a Judge decide.

35. Having heard Mr Horner's submissions on prejudice, I invited the claimant to reply. He stated that he just wants this over and done with, as he is still due over £2,800 from the respondents, and he has been waiting more than 10 months already, so if the respondents were let in, to defend the case at this stage, then time delay is prejudice to him, and he again repeated that he would like it over and done with as soon as possible, as there will be more stress to him if we have to wait longer.

36. Further, added the claimant, he believed the email address for the restaurant has been used for a long time, and the respondents had had ample opportunity to respond to correspondence from the Tribunal, but they had done ***"just too little, too late***." He objected to their application for an extension of time as being late, when he knew that, through ACAS and the Glasgow ET, correspondence had been sent to the respondents. In his view, they had just ignored correspondence, and hoped this case would go away.

37. Responding to the claimant's comments, Mr Horner stated that the business had not been able to operate through Covid, and he queried why the claimant cannot wait more time, as if allowed in to defend, he stated the respondents would agree an early date for a Final Hearing. I commented that there are currently no In Person Hearings, and it was difficult to know when that might be available, but the Tribunal was successfully using remote Hearings by way of a video conferencing platform known as CVP (Cloud Video Platform), and that was allowing Hearings in an earlier timeframe than waiting for an In Person Hearing.

38. In light of this discussion, which I stated was related to further procedure, and not the matter in hand, that being the opposed extension of time application, the claimant stated he had the ability to participate in a CVP Hearing, if a further Hearing was needed, and Mr Horner stated that the respondents could likewise participate in such a Hearing, if there was to be a Final Hearing, which is what he sought. Both parties stated that they sought a Final Hearing sooner rather than later, and that by CVP was agreed as a way forward.

39. As regards correspondence to the respondents going forward, Mr Horner stated the Tribunal should continue to use the 2 Montgomery Street address, as on the ET3 response, and Karen Horner's email address, not info@villagesteakhouse.co.uk. I have instructed the Tribunal clerk to update the respondents' designation and contact details on the casefile.

40. Both parties having concluded their submissions to the Tribunal, and having confirmed they had nothing further to raise with me as regards the case, I reserved Judgment, and advised them that I would reflect on their submissions, and draft a written Judgment and Reasons for issue as soon as possible, after private deliberation in chambers after the close of this Hearing. The Hearing closed at 12:13 pm, having lasted just short of three-quarters of an hour.

Relevant Law

41. In coming to my reserved judgment in this case, as regards the opposed **Rule 20** application, I have addressed 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**. For ease of reference, I reproduce here the full text of paragraphs 16, 17 and 18 from **Grant v Asda**:

*16. Rule 20 of the **ET Rules** 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 explaining why the application is opposed.***

> ***(3) An Employment Judge may determine the application without a hearing.***
> ***(4) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside."***

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**.*

Discussion and Disposal

42. Having carefully considered matters, in chambers, during private deliberation, after this Hearing, I have now come to my decision, to grant the **Rule 20** application, and allow the extension of time to lodge a late ET3 response defending the claim, and so for the case to proceed as defended, it being in the interests of justice to do so.

43. I am also satisfied, having regard to the Tribunal's overriding objective, under **Rule 2**, to deal with the case fairly and justly, that this disposal is appropriate and proportionate. The Tribunal has to have regard to the interests of justice, and that includes the interests of both parties, and the wider public interest in the proper administration of justice. The respondents have taken steps to enter the legal process, and state a defence, in particular, that the claimant is not entitled to any further payments from them.

44. I recognise, of course, that the claimant disputes that, and asserts that the respondents do owe him outstanding monies, and I recognise too that as far as the claimant is concerned, he sees it that the respondents could have, and should have, defended these proceedings far earlier than this stage. He objects specifically to the manner and timing of the submission of their late ET3 response only the day before this listed Hearing. The respondents have explained the reasons for them not participating earlier, and I accept those reasons, although I equally accept I can see why the claimant is cynical about the explanation provided.

45. From what he told me at this Hearing, Mr Horner appears to have been aware of the possibility of a claim, at the stage of ACAS early conciliation, albeit his recall of this was very hazy and vague, other than a clear recollection that ACAS told him there was no case to answer. Based on my judicial experience, and knowledge of the role and responsibility of ACAS conciliation officers, I have to say that I found that alleged remark by an unnamed ACAS officer frankly unbelievable.

46. Further, as ACAS and the ET are separate organisations, the Tribunal does not know what contact, if any, there was between ACAS and the respondents during early conciliation. All this Tribunal knows, from the detail on the ACAS early conciliation certificate, issued on 2 January 2020, is that the claimant notified ACAS on 19 December 2019. Given the festive holiday period over that range of dates, it seems to me the likelihood is that there was limited opportunity for contact.

47. Be that as it may, the Tribunal has looked at the whole period from 14 January 2020 to 9 September 2020, being the date when the ET1 was served on the respondents by Notice of Claim issued by the Tribunal, and when Mrs Horner emailed in the completed ET3 response. The Notice of Claim was issued by post, on 14 January 2020, and as I indicated to parties, in the email sent on my behalf, on 4 September 2020, none of the posted correspondence addressed the respondents, at what is accepted is the business address, has been returned to the Tribunal as undelivered, or gone way, and so it is presumed to have been properly served in terms of **Rule 90**, the contrary not having been proved by the respondents. That includes not just the Notice of Claim, but also the Notice of Final Hearing for 16 April 2020, posted out on 24 February 2020.

48. At this Hearing, while the matter of arrangements for collecting post at the business premises was canvassed, there was insistence by the Horners that no correspondence from the Tribunal was received by them until they received the Tribunal's letter of 13 August 2020 with Notice of this Preliminary Hearing. The fact that they did not appear at the previous Hearing on 16 April 2020 is consistent with them being unaware of it, but equally, I accept the claimant's scepticism about that, he seeing it as them ignoring correspondence, and hoping things would go away.

49. It is not clear from the casefile where the Tribunal got the respondents' email address as being info@villagesteakhouse.co.uk, but it was first used by the Tribunal clerk, on 7 April 2020, when sending the emailed notice of telephone conference call on 16 April 2020. My written Note and Orders issued on 21 April 2020 were emailed to parties on that date, as too were emailed the Tribunal's letter of 5 May 2020, and follow ups on 19 June 2020, and 28 July 2020.

50. There is nothing on the casefile to show these emails were not delivered to the respondents, but, as a matter of general practice, the Tribunal administration does not ask for read receipts. E-mails back from the claimant showed he had received the Tribunal's emails, but what I am unclear about

is whether the respondents ever received delivery of any of the emails sent to them by the Tribunal.

51. When the claimant communicated with the Tribunal, on 16 April 2020, 17 July 2020, and 6 August 2020, he did not copy his emails to the respondents' email address by cc, nor otherwise indicate that he had copied his correspondence to them, as required by **Rule 92**. As such, there is no evidence before the Tribunal that he had copied them direct to the respondents, at their postal address.

52. As far as the Tribunal was concerned, emails sent to the respondents were presumed to have been properly served in terms of **Rule 90**, there being no indicators to the contrary, until, at this Hearing, Mr Horner indicated that the company email address was not operating, and it had not been operating for some time, an assertion disputed by the claimant, but not a matter I could make any finding on one way or the other.

53. When the Tribunal wrote to parties, on 12 August 2020, the casefile shows that letter too was emailed to both parties. However, when the Notice of this Preliminary Hearing was issued by the Tribunal, on 13 August 2020, the casefile shows that while emailed to both parties, a hard copy was also marked as having been posted to the respondents. As far as I could glean from the information provided by Mr & Mrs Horner, at this Hearing, it was that hard copy letter that alerted them to this case. That is consistent with Karen Horner's email to the Tribunal on 23 August 2020, from Claire, referring to the Tribunal's letter of 13 August 2020, rather than any email.

54. From the terms of the ET3 response, the respondents have stated grounds of resistance which are that they have no liability to the claimant. While he disputes that, the matter will require to be tested by proceeding to a Final Hearing. The claimant advised me, that having read the ET3, he was still insisting in his claim.

55. The ET3 response, which strongly disputes this claim, refers to the claimant as "***an angry man, who is using the tribunal route as nothing more than***

a way to extort further funds". That is a very serious allegation being made by the respondents, which suggests to me that the respondents believe this claim to be unreasonable, if not vexatious, conduct by the claimant.

56. The truth of the matter will require to be judicially determined, if parties cannot resolve matters between themselves, with perhaps the assistance of ACAS. What is clear, from the ET1 and ET3, is that there is a core of disputed facts, and each party will require to put their case before the Tribunal by leading relevant and necessary witnesses, and producing any supporting documentation.

57. In these circumstances, I have ordered that the defended case be listed, in due course, on a date to be hereinafter assigned by the Tribunal, for a Final Hearing, for full disposal, including remedy if appropriate, and that it proceed by way of a CVP Hearing, so it can be listed at the earliest possible date available to the Tribunal.

58. At this Hearing, the claimant opposed the application made by Mr Horner but, in the interests of justice, I have preferred the submissions made by him on behalf of the respondents, and, in terms of the Tribunal's overriding objective, and the interests of justice, that requires that I do justice to both parties involved in this dispute, by allowing them both to be heard.

59. In balancing prejudice as between the claimant and the respondents, I have taken into account that if I had refused the late ET3 response, then the respondents would not have been able to defend the claim brought against them, and they would only be able to participate in any subsequent Hearing before the Tribunal to the extent permitted by a Judge, as per **Rule 21(3).**

60. Given the terms of the ET3 response, it far better accords with the interests of justice that both parties participate in a Final Hearing on an equal basis, and that is consistent with the overriding objective to deal with the case fairly and justly, as per **Rule 2**.

61. Both parties have now put their competing positions in writing, in the ET1 claim form, and ET3 response, and essentially put their respective cards

openly on the table. In these circumstances, I have decided that the prejudice to the respondents outweighs any prejudice to the claimant, and that it is appropriate to let in the late ET3 response, and the merits, or otherwise, of both parties' respective positions can be adjudicated upon by the Tribunal at a Final Hearing, after hearing evidence from both parties.

62. It seems to me that prejudice to the claimant will be far less, and all he has lost at this stage is the loss of a windfall of the possibility of obtaining an undefended Default Judgment in his favour, at an earlier stage. The delay in his case getting to a Final Hearing is part of the bigger picture, and it, like many, many other claims, has been impacted by the ongoing pandemic, and the reduction in in person Hearings.

63. It is clear to me that in extending time there is some prejudice for the claimant, but that prejudice is slight, and it is mitigated by the fact that he still has the opportunity to prove his claim in the same way he would have done if the response had been presented in time.

64. The claimant also suffers a delay of several months that has been occasioned by the late presentation of the response and that is a prejudice of a sort. However, I am satisfied that in this case that delay is not significant prejudice because there is nothing before me to suggest that it has led to any forensic prejudice, that is, making it significantly more difficult for him to present and prove his claim for example because documents are no longer available or because witnesses are no longer available.

65. On the other hand, if I do not grant an extension of time the prejudice to the respondents is far more profound. A judgment against it may damage its corporate reputation in the local business community, and possibly also pecuniary loss. The ET3 response provided to the Tribunal refers to the respondents being a small, family run restaurant, with modest takings operating on a fairly tight budget, and that they run a fair and proper business, using a chartered accountant to operate their payroll. On the face of it the defence is perfectly arguable, and, all in all, in my view, it is in the

interests of justice to grant the respondents' application and extend time for entering a response.

66. Both parties are entitled to a fair Hearing within a reasonable period of time, and, as discussed at this Hearing, use of a CVP Hearing provides an opportunity for the Tribunal to list this defended case for Final Hearing as soon as its listing diary might allow. I have estimated that a 3-hour Hearing will be appropriate and proportionate to the issues involved. Notice of Final Hearing by CVP will follow from the Tribunal in due course.

Employment Judge: I McPherson
Date of Judgment: 14 September 2020
Entered in register: 16 September 2020
and copied to parties