EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107944/2021

Preliminary Hearing held remotely on 23 June 2021

10 **Employment Judge A Kemp**

Mr M Fitzgibbon	**Claimant** **Represented by:** **Mr N MacDougall** **Advocate** **Instructed by:** **Ms D Robertson** **Solicitor**
Norbord Europe Ltd	**First respondent** **Represented by:** **Ms A Stobard** **Advocate** **Instructed by:** **Ms Z Khan** **Solicitor**
Mr A McMeekin	**Second respondent** **Represented by:** **Ms A Stobard** **Advocate** **Instructed by:** **Ms Z Khan** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The application by the respondents to allow late receipt of their Response Form under Rule 20 is granted, and the claim is sisted pending determination of a Sheriff Court action by the claimant against the first respondent.

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REASONS

Introduction

1. This was a Preliminary Hearing held remotely by Cloud Video Platform for the purpose of addressing an application for receipt of the respondents' Response Form, although it was not presented timeously.

2. The parties were each represented by counsel, to whom I am grateful for the clarity of their submissions.

Evidence

3. The parties had agreed a Joint Bundle of Documents. Evidence was also given by Ms Hazel Smith the European HR Director of the first respondent, who spoke to a witness statement which had been the subject of an earlier permission by an Employment Judge. She was cross-examined by the claimant's counsel.

Facts

4. I found the following facts as having been established and relevant for the hearing before me:

5. The claimant is Mr Maurice Fitzgibbon.

6. He was employed by the first respondent until 5 November 2020.

7. On 23 December 2020 he commenced early conciliation in relation to the first respondent.

8. On 27 January 2021 he commenced early conciliation in relation to the second respondent.

9. On 27 January 2021 ACAS issued early conciliation certificates in respect of both respondents.

10. On 5 February 2021 the claimant's solicitors wrote to the first respondent a letter, expressed to be for the attention of the second respondent, setting out his claim for wrongful dismissal, setting out the quantification of that

claim, and intimating that court proceedings would be commenced if the claim was not met.

11. On 26 February 2021 the claimant commenced a claim against both respondents by presenting the same to the Tribunal. His claim was for unfair dismissal, direct discrimination under section 13 of the Equality Act 2010 and for notice pay, a claim for breach of contract, against the first respondent, and for direct discrimination against the second respondent.

12. On or about 4 March 2021 Notices of Claim for each of the first and second respondents were sent by letter from the Tribunal to the office of the first respondent at Station Road, Cowie, Stirlingshire, FK7 7BQ. That included a requirement to present a Response Form if the claim was defended by 1 April 2021. The Notices also included the Claim Form.

13. Frances Reekie is employed by the first respondent as the Executive PA to the Managing Director, a role she has held for about 20 years. She was responsible for dealing with any physical post which was delivered to the said office. The first respondent had been aware of the possibility of a claim by the claimant against them since about the time of the end of early conciliation. The first respondent had received the Certificates issued by ACAS. Ms Hazel Smith, the European HR Director of the first respondent, spoke to Ms Reekie at about the end of January 2021 and said that she should watch out for claims or similar items of mail that were expected, without providing the names of the employees or former employees concerned. She repeated that comment periodically thereafter.

14. A claim from the claimant was not the only such item of mail expected. Ms Reekie attended at the office every second day from January 2021 onwards to check for mail, and if it was to make a claim at a court or Tribunal her practice was to send that immediately to Ms Smith.

15. The first respondent did not receive the Notice of Claim addressed to it.

16. The second respondent did not receive the Notice of Claim addressed to him.

17. Neither of the Notices of Claim were returned to the Tribunal by the Post Office.

18. On 2 April 2021, which was Good Friday, the second respondent received an email at approximately 16:12 from the claimant's solicitors attaching a copy of the claimant's application to the tribunal for a case management order dated 2 April 2021 and a copy of an initial writ lodged at the Sheriffdom of Tayside, Central and Fife at Stirling (the "Initial Writ"). The email referred to proceedings against the first respondent only and did not include the Claim Form to the Tribunal. The Initial Writ sought damages for breach of contract against the first respondent.

19. 2 April 2021 was a bank holiday in Scotland and England.

20. On 5 April 2021 at approximately 17:08 the second respondent forwarded the said email to Ms Smith. On the same day at approximately 18:44 she forwarded that email to the first respondent's solicitors DAC Beachcroft LLP and commented that the first respondent had not received an ET1. At that stage neither she nor the second respondent were aware of a claim against the second respondent.

21. 5 April 2021 was a bank holiday in England, therefore the office in which our solicitor was based in was closed on that day. In any event the email to them was sent after normal working hours. When their office was open on 6 April 2021 the first respondent's solicitors sent an email to the Tribunal requesting a copy of the claim form (ET1), the ET2, the Notice of Hearing and making an application for an extension of time to present a response.

22. On 9 April 2021 the first respondent's solicitors received the documents requested from the Tribunal by email. The papers from the tribunal included a copy of the Claim Form from which the solicitors noted the claim against the second respondent.

23. On 12 April 2021 the respondents' solicitors therefore wrote to the Tribunal to confirm that they were acting on behalf of both respondents and requested that the application dated 6 April 2021 be extended to cover the second respondent.

24. On 14 April 2021 a proposed Response was submitted to the tribunal on behalf of both respondents.

25. On 15 April 2021 the claimant's solicitors wrote to the Tribunal with their observations on the application and opposed it.

5 26. A search of the first respondent's office was conducted after the fact of the Claim by the claimant became known to the first respondent and the Notices of Claim were not found.

Respondent's submission

27. The following is a basic summary of the submission made by the
10 respondent. The application was to extend time for receipt of the Response Form under Rule 20. Findings in fact were proposed. It was submitted that the evidence of Ms Smith should be accepted as credible and reliable. Reference was made to the factors identified in the case of Kwik Save (commented on further below). The explanation for the late
15 receipt of the Response Forms was that they had not been received. As soon as that became apparent steps were quickly taken to ascertain the claim made, and once known the applications for extension made and then a proposed Response Form sent. The steps had been taken as soon as reasonably practicable. There was no prejudice to the claimant by that
20 delay, but not permitting the respondents to defend the claim would cause them very large prejudice in not being able to defend the claims made. The Response Form sets out defences on the merits of the claim, on jurisdiction, and as to remedy. The position of the second respondent is that he would suffer even greater prejudice. It is unclear from the Claim
25 Form why he is a named respondent, and the issue of jurisdiction against him arises. She sought the granting of the application.

Claimant's submission

28. The following is again a basic summary of the submission made by the claimant. Mr MacDougall accepted the factors identified in the said
30 authority, and that much of the ground had been covered by the respondents' counsel. On the issue of explanation he invited the Tribunal to reject the evidence of the respondents. The claimant was in a difficult

evidential position. He could not prove positively that the documents were not lost. He argued that the circumstantial evidence indicated that the explanation was not credible. Two Claim Forms had been sent, one for each respondent, and it was not likely that both would be lost. The second matter was the respondents' anticipation that a claim would be made. He did not argue that there was a positive obligation to check whether a claim had been made to the Tribunal with the Tribunal itself, or the claimant or his solicitors, but there were avenues of investigation open to the respondents. He argued that the claimant would suffer prejudice as he would have the additional cost of defending a claim if it was defended, rather than the lesser costs if it was undefended. He very properly accepted that the respondents had set out a defence that could form the basis of a defence on liability. He argued that the key factor was the credibility of the explanation given by the respondents, and invited me to refuse the application.

The law

29. The question of whether or not to allow the Response Form when late is a matter for the exercise of discretion by the Tribunal. The Tribunal's power to do so is set out in Rule 20 which states as follows:

> "**20 Applications for extension of time for presenting response**
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> (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.
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> (2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.
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> (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."

5 30. Rule 20 requires to be exercised having regard to the overriding objective in Rule 2. It states as follows:

"**2 Overriding objective**

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case
10 fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the
15 proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in
20 interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

31. The parties were agreed that the three factors identified in the case of
25 ***Kwik Save Stores Ltd v Swain [1997] ICR 49*** required to be considered, being the explanation for the delay, the merits of the proposed defence, and the balance of prejudice, although that is not an exhaustive list and all relevant factors are considered.

Discussion

30 32. Mr MacDougall very properly conceded that there was a prospective defence pled on the merits of the claim. I therefore need say little about that, but do consider that it is also relevant in this connection that there

are issues raised as to jurisdiction that the Tribunal would require to determine in any event and that that arises particularly in the case of the second respondent. No acts are pled so far as he is concerned as a basis to argue that he was liable for an act of direct discrimination. In any event, given that the claimant was off work for a material period and the dismissal decision and appeal decision were not taken by the second respondent any matter in which he is said to have had an involvement may well date from a substantial period before a timeous claim, having regard to the terms of section 123 of the Equality Act 2010. This factor strongly favours the granting of the application.

33. In relation to balance of prejudice Mr MacDougall restricted the argument for the claimant to one of increased cost for the claimant over that which would arise if the claim was undefended. That is perfectly true, so far as it goes, but the prejudice to the respondents also requires consideration and that would or at least could be very substantial, as they would not be able to put forward defences to the claims made where they have set out what are at least statable defences that go to jurisdiction, the merits which include disputes on fact and the potential defence of objective justification for the direct discrimination claim, and remedy in relation to the unfair dismissal claim including a ***Polkey*** argument, and for contribution. It is possible, and it can be put no higher, that if the application is allowed and a hearing or hearings (for example with a Preliminary Hearing into jurisdiction as against the second respondent) take place the defences succeed in whole or part, and if so the outcome and any award to the claimant may be less than it would be if the claims were not defended. The findings as to the discrimination claims may also be different for a variety of reasons, including the case pled of objective justification, and a finding as to discrimination is a serious matter per se, separate to the issue of the financial award that follows. But the granting of the application does not mean that the defences or any of them will succeed. All parties will have the opportunity to put forward their position and arguments, if the application is granted, and it is possible that the claimant may succeed in whole or part and secure a remedy. The difference will be whether the outcome is determined with disputed evidence and submissions, or not. As a matter of general principle whilst time limits are important in litigation,

as was addressed in ***Kwik Save***, the EAT added that "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."

34. It is also noted that the claimant has taken both a claim in court for breach of contract, by the Initial Writ, but also seeks to pursue that same claim in the Tribunal as a kind of fall back position. Whether that is competent I express no view. The Tribunal Claim has in any event been sisted, that sist recalled for the purposes of this hearing, and it was agreed that it would again be sisted regardless of the outcome of the hearing before me. That action will be determined first, after which the sist can be recalled. That alternative forum and remedy is another factor to take into consideration.

35. There was no substantial delay from the date when the Response Form was due, and when it was tendered, being of a total of about two weeks. Taking all matters into account I consider that the factor of the balance of prejudice strongly favours the granting of the application.

36. That leaves the issue of the explanation for the delay in submitting the Response Form. I accepted the evidence of Ms Smith, who I considered to be a credible and reliable witness. It appears to me that the Notices of Claim were not received by the respondents at the time one would expect them to be after being sent by the Tribunal. Whilst that is something over which the claimant had no control, and that made his position difficult accordingly as his counsel argued, I did not consider that the circumstantial evidence raised in argument caused me to doubt the evidence of the respondent. The first issue was that two items of mail were not received. The respondents could not say exactly how that happened. It being lost in the post seems to be the most likely explanation, but it is possible that they did not reach the Post Office for example, by being mislaid at the Tribunal Office or lost en route to the Post Office. It is in a sense a guess that the correspondence from the Tribunal was lost in the post, in the sense of being received by the Post Office but not delivered to the addressees. All that the respondents could say is that the mail was not received by them. They had a system in place for its collection every

second day, they were looking out for claims or similar items, and I am satisfied that had they, or one of them, been received, they would have been sent to the solicitors who were latterly instructed. This was not I concluded a case of mistake or still less of some form of reckless disregard for responsibilities in dealing with mail sent to them.

37. The second matter was that the first respondent was aware of the lack of a settlement through ACAS, and that certificates had been sent. It was argued that there were avenues open to the respondents to find out if a claim had been commenced in the Tribunal. I did not consider that the first respondent needed to do any more than it did. There was the possibility of a claim, even a probability, but it was perfectly sensible to wait and see what happened. Not all those who say that they are to claim in fact do so. I also noted in this context that the letter sent to the first respondent with a form of demand, expressed as a letter before action, did not in terms refer to a Tribunal claim at all, but to a court action for breach of contract. It set out a quantification far above the limit that applies to such claims in the Tribunal. It did not refer to or quantify any claim of unfair dismissal, or one of discrimination (for which there is of course no limit financially). Nor did it refer to any claim against the second respondent.

38. In this context I considered that what happened after there being a claim became known to the first respondent and its solicitor was material. There was no delay in the response once the fact of a claim in the Tribunal was known to them. An application to extend time under Rule 20 was made as soon as that became practicable, and when the Claim Form was received a supplementary application made to apply to the second respondent. A fully detailed Response Form was sent without any material delay.

39. It appeared to me in light of all the circumstances that the explanation for delay was a good one. I appreciated that, as the claimant contended, there were time limits that applied and that it is all too easy for someone who misses them to say that a document was lost in the post but for the reasons given the evidence given by the respondents was, I considered, both credible and reliable. I considered it very likely that, had the Claim Forms been received when sent by the Tribunal, a timeous Response Form would have been submitted.

40. In any event, the factor of the explanation for the delay is only one of the factors to consider, and the weight to it may vary according to circumstance. As the then Mr Justice Mummery put it in ***Kwik Save***:

> "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"

41. Taking all matters into consideration in my judgment there was an adequate explanation for not presenting the Response Form for both respondents timeously, the respondents have the prospects of a defence to the claims made both on jurisdiction and separately on the merits and as to remedy and the respondents would suffer the greater prejudice if the application were to be refused than granted. I consider that it is in the interest of justice to allow the application.

Conclusion

42. I accordingly allow the application.

43. I have sisted the claim as was agreed by the parties' counsel

Employment Judge:	**A Kemp**
Date of Judgment:	**24 June 2021**
Date sent to parties:	**25 June 2021**