EMPLOYMENT TRIBUNALS

Claimant		Respondent
(1) Mr J Murray	**v**	**(1) Child & Child**
(2) Mr P Puxon		**(2) Khalid Sharif**
		(3) Mohammed Hakim

Heard at: **Central London (Remotely by Cloud Video Platform)**

On: **7 July 2021**

Before: **Employment Judge Brown**

Appearances:

For the Claimant:	**Ms C de Souza, Counsel**
For the Third Respondent:	**Ms A Mayhew, Counsel**
First and Second Respondents:	**Did not attend and were not represented**

JUDGMENT AT AN OPEN PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. Time is extended for the Third Respondent, Mr M Hakim, to present his Response to 16 March 2020. The Third Respondent's Response shall therefore be accepted by the Tribunal.

2. The Second Respondent, Mr K Sharif's, application to be dismissed from the proceedings is rejected. Mr Sharif remains a Respondent.

3. Judgment in Default is not entered against the Second Respondent under r21 ET Rules of Procedure 2013.

REASONS

This Hearing

1. This Hearing was listed to determine:
   1.1. The Second Respondent ("R2")'s application (dated 20 March 2020) to be removed as a respondent to the proceedings;

1.2. The Third Respondent ("R3")'s application (dated 16 March 2020) for an extension of time in which present his response;
1.3. The Claimants' applications (dated 4th and 10th March 2020) for judgment in default against R2 and R3.

2. I heard evidence from Mr Hakim, the Third Respondent ("R3"). The First and Second Respondents did not attend and were not represented. There has been no correspondence from R2 since the date of his application on 20 March 2020.

3. There was a Bundle of documents. Page numbers in this judgment refer to that Bundle. The Claimants and Third Respondent made submissions.

Relevant Facts

4. The Claimants joined the First Respondent ("R1") on 1 October 2016 having entered into contracts of employment and an Asset Purchase Agreement with the R1. They each resigned on 1 February 2019 alleging constructive dismissal.

5. By claims presented on 19 June 2019 and 18 June 2019 respectively, the Claimants brought complaints of unfair dismissal, breach of contract and protected disclosure detriment against the Respondents.

6. On 7 April 2020 the Claimants' solicitor wrote to the Tribunal acknowledging that the only claim they bring against the Second and Third Respondents is of protected disclosure detriment.

7. At the material times, R2 and R3 were practising solicitors. R3 continues to be a practising solicitor in England and Wales.

8. On 28 June 2019, R1 went into administration, p132, and the statutory moratorium took effect on that day.

9. A Notice of Claim in respect of C1's claim was sent to R2 and R3 on 24 September 2019, with a deadline for presentation of any response of 22 October 2019. On 11 October 2019, the Tribunal consolidated the two claims, and issued an Amended Notice of Claim in relation to both claims. The Amended Notice imposed a deadline of 8 November 2019 for presentation of a response.

10. Neither R2 or R3 submitted any response within the required timeframe. On 18 November 2019, 10 days after Responses were due, the Tribunal imposed a stay of proceedings. That stay was lifted on 3 March 2020. On 4 March 2020, C1 applied for default judgment to be entered against R2 and R3. On 10 March 2020, C2 applied for judgment in default against all respondents.

11. On 16 March 2020, R3 submitted an application for an extension of time to present a response, attaching draft Response Forms and Grounds of Resistance in each claim.

12. Having heard evidence from the Third Respondent, I found as follows, regarding the steps he took when he received notice of the proceeding.

13. On about 26 September 2019 R3 received a Notice of a Claim in respect of C1's claim, along with Notice of Preliminary Hearing Case Management listed for 20 November 2019.

14. Shortly afterwards, R3 wrote to Begbies Traynor, the Administrators appointed on behalf of R1 ("the Administrators"), providing them with the documentation and asking that they notify the Tribunal that R1 had entered into administration on 28 June 2019 and that they had been appointed as Administrators

15. The Administrators wrote to James Anderson, C1's Solicitors, pages 132-133, on 11 October 2019, copied to R3, saying that R1 had entered administration on 28 June 2019 and that the Tribunal claim had been issued in breach of the statutory moratorium. The administrators said that they did not consent to C1 commencing proceedings against R1.

16. On 15 October 2019, R3 wrote to the Tribunal, enclosing the copy letter from the Administrators to James Anderson dated 11 October 2019, pages 134-136. He said that C1 had failed to inform the Tribunal that R1 had entered into administration on 28 June 2019, or that C1 was already listed as an unsecured creditor against R1. R3 said that the claim had been issued in breach of the statutory moratorium. He asked that an Employment Judge consider whether the claim should be rejected and that the Tribunal vacate the preliminary hearing.

17. R3 was cross examined about this letter. It was put to him that the letter was dated 28 October 2019 and the date had been changed, in manuscript only, to 15 October 2019.

18. R3 told me, and I accepted, that R3 had asked his secretary, Jenny Barnes, to type the letter. He said that a feature of Microsoft Word is that it automatically changes the date of document, so that, when Ms Barnes later sent another copy of the letter to the Tribunal, the original date automatically changed. R3 had obtained a PDF of the original letter, p280, from Child & Child, signed in manuscript by Jenny Bond. R3 also produced the meta data for the Word version of the original letter, showing that it was created on 15 October 2019, p282.

19. I accepted R3's evidence on this, and found that he had written to the Tribunal on 15 October 2019, asking that the preliminary hearing be vacated and the claim rejected.

20. R3 told me, and I also accepted, that he believed that the claim would be rejected against all Respondents, not just the First Respondent, and that the preliminary hearing would be vacated. I accepted his evidence on this. R3 practices in property law. It would not be obvious to a non-employment expert that proceedings might continue against individuals, even if the same proceedings could not continue against a corporate Respondent.

21. R3 then received a Notice of a Claim in respect of the Second Claimant, with an Amended Notice of Claim, joining the two claims and an Amended Preliminary Hearing listed for 20 November 2019, for both claims.

22. He wrote to the Administrators on 18 October 2019 attaching the documentation and again asking them to write to the Tribunal, advising it of the administration, and to C2's Solicitors.

23. On 25 October 2019, he received a copy of the Administrators' letter to the Tribunal of that date, p138-140, and a copy of their letter to C2's Solicitors, also of the same date, saying that the claim had been issued in breach of the moratorium and that the administrators did not consent to the proceedings being issued.

24. On 28 October 2019, R3 wrote again to the Tribunal, p284, in relation to both claims and attaching the letters from the Administrators to C2's solicitors and the Tribunal of 25 October 2019 (pages 137-140 of Preliminary Hearing Bundle). He said that C2's claim had been issued in breach of the statutory moratorium and again asked that the claim be rejected and that the Tribunal vacate the preliminary hearing listed.

25. R3 told me that he thought that his letters of 15 October 2019 and 28 October 2019 would be accepted as his formal response.

26. R3 said that his ignorance and lack of knowledge of the Tribunal process meant that he was unaware that "response" meant provision of a formal ET3 form. He was cross examined about this. It was put to him that he had used words in his 15 and 28 October 2019 letters, including "reconsideration" and "on its own initiative" which indicated a knowledge of ET processes.

27. R3 told me that he did not known me that "reconsideration" was a specific term used by the ET. R3 said that "reconsideration" is everyday English language and he used "of own initiative" regularly in his own professional practice. Of , "on its own initiative", R3 told me that he was aware that Tribunal proceedings are not carried out with the same formality as in the County and High Court and he understood that the ET had powers to act on its own initiative. He said that he had never been involved with any ET proceedings, either as employer or employee.

28. I accepted R3's evidence on this, he gave a convincing explanation regarding he used the terms that he did, despite not having knowledge of Tribunal processes.

29. R3 was also cross examined regarding why he had sent his correspondence to the Tribunal by DX, rather than email. The R3 pointed out that the Tribunal provides its postal address and DX address on its correspondence. He said that the Administrators also wrote to the Tribunal by DX.

30. Having not received a response from the Tribunal, R3 asked his colleague, Sophie Haugen, to telephone the Tribunal in early November 2019, to try to establish the position regarding the claims and whether the Preliminary Hearing had been vacated.

31. Ms Haugen called the Tribunal on numerous occasions but was unable to speak to anyone. On 13 November 2019, she was finally able to speak to a Ms Tiwari at the Tribunal office, who advised her that both R3's letters of 15 and 28 October 2019 had been received and forwarded to a Judge. At Ms Tiwari's suggestion, Ms

Haugen sent an email on 14 November 2019, pp141-143, chasing a response from the Tribunal to R3's 15 and 28 October letters.

32. Ms Haugen telephoned the Tribunal again on numerous occasions. Finally, on 19 November 2019, she spoke to a Ms Alija, from the case progression team, who advised her that an email had been sent to C2's solicitors confirming the hearing for 20 November 2019 had been cancelled. Ms Alija forwarded to Ms Haugen and R3 emails sent by the Tribunal to the Claimants' Solicitors, confirming the proceedings had been stayed due to R1's administration and that the hearing listed for 20 November 2019 had been cancelled, pages 144-154.

33. There was no reference in the Tribunal's correspondence to the fact that R3 had not filed an ET3 response before the 8 November 2019 deadline.

34. On 14 January 2020 C2's Solicitors emailed the Tribunal, copied to R3, saying that that R1 had been placed into Creditors Voluntary Liquidation on 31 October 2019, so that the statutory moratorium no longer applied. They asked that the Tribunal lift the stay so that the proceedings could continue.

35. On 4 March 2020 C1's Solicitors wrote to the Tribunal, copied to R3, applying for judgment under *r21 ET Rules of Procedure 2013,* and stating that no responses had been received from R2 or R3 by 8 November 2019.

36. R3 told me, and I accepted, that he was unaware that the stay had been lifted, as the letter from C1's Solicitors did not make any express reference to that fact.

37. R3 subsequently became aware that the Tribunal had lifted the stay by a letter of 3 March 2020. That letter, however, had only been sent to C1's Solicitors, copied to the Liquidators, C2's Solicitors and ACAS. It had not been sent to either R2 or R3.

38. Nevertheless, having received the Cs' application for default judgment, on 4 March R3 contacted Richard Owen-Thomas, Counsel, to obtain advice. He had a conference call with Counsel on 9 March 2020, which was his earliest availability. Counsel was then formally instructed to prepare an application for an extension of time to file an ET3 and to draft the ET3 and grounds of resistance.

39. Counsel sent the drafts to R3 for review on Friday 13 March 2020. Counsel submitted, by e-mail to the Tribunal on 16 March 2020, R3's application for an extension of time to file an ET3, the ET3 forms and supporting Grounds of Resistance in respect of the First Claimant and the Second Claimant, pp156 - 186.

40. In his proposed Grounds of Resistance, R3 denies that the Cs made protected disclosures. He contends that the failure to pay the Cs, of which the Cs complain, was not because of any protected disclosures but because the R1 was unable to pay. R3 denies that he subjected the Cs to any detriments, including denying that he levelled false and malicious allegations against C1, spoke about C1 in disparaging terms, or subjected his communications to improper scrutiny.

Relevant Law

41. The automatic stay applicable to proceedings against companies in administration applies only to the relevant company, and not to individually named Respondents, *Cook v. Mortgage Debenture Ltd* [2016] EWCA Civ 103; *Ince Gordon Dadds LLP v. Tunstall* UKEAT/0141/19 at §52-54.

42. ET Rules of Procedure 2013 Rule 20 provides:

"**Applications for extension of time for presenting response**

20. (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.

43. There is no time limit for making such an application.

44. The principles to be applied when considering an application for extension of time under Rule 20 were explained by Mummery J in *Kwik Save Stores Ltd v Swain [1997] ICR 49,* EAT.

45. In *Kwik Save* Mummery J said that all relevant documents and other factual material must be put before the tribunal to explain both the non-compliance and the basis on which it is sought to defend the case on its merits, and the employment judge in exercising his discretion must take account of all relevant factors, including the explanation or lack of explanation for the delay and the merits of the defence, and must reach a conclusion which is objectively justified on the grounds of reason and justice, 55 B - D.

46. *M*ummery J commented that an important part of exercising discretion will be to take account of the prejudice to each party, p55C- D. Another factor to take into account is the merits of the case. "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 [employment] tribunal will only hear one side of the case. It will decide it without hearing the other side. The result may be that [a Claimant] wins a case and obtains remedies to which he would not have been 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 the reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner. This will involve some consideration of the merits of his case."

Decision - Time Extended for R3 to present his Response to 16 March 2020. R3's Response Accepted by the Tribunal

47. Applying the principles in *Kwik Save* to the facts of this case, I decided to extend time for R3 to present his Response to 16 March 2020, the date when he did present it.

48. I concluded that R3 had explained the delay and that the total delay (excluding the period of the stay) was relatively short, at a few weeks.

49. I accepted that R3 genuinely, albeit incorrectly, believed that the statutory moratorium meant that no claims arising from the same facts could properly be brought. I considered that R3 acted promptly in contacting both the Tribunal and the administrators to ensure that this issue was raised with the Tribunal.

50. R3 did not know that the stay on proceedings had been formally lifted on 3 March 2020 – the relevant correspondence was not sent to him.

51. When he became aware that default judgment had been applied for, he properly filed an application to serve his ET3 out of time. He did so promptly, along with full grounds of response for each claim.

52. Significantly, I considered that the grounds of response disclose a defence on the merits of both claims.

53. I considered the relative prejudice caused to the parties if I did, or did not, grant R3's application to extend time for his ET3.

54. If I dismissed R3's application, R3 would be greatly prejudiced. He would not be able to defend liability in significant whistleblowing claims. That would be so, despite him always having communicated an intention to resist the claims, as evidenced by his contact with the Tribunal in October 2019.

55. R3 would face substantial liability, as outlined in the Claimants' schedules of loss. This would represent huge financial prejudice to R3, particularly where R1 and R2 are not live Respondents and where R1 is insolvent.

56. I considered that it would clearly be in the interests of justice to consider the claims in the merits. There would be little prejudice to the Claimants in doing so – the normal expectation of parties is that there will be a proper consideration of both the claims and the defences and that a fully reasoned judgment will be given.

57. On the other hand, if the application is dismissed, the Claimants will receive a windfall judgment. They will not have to prove their claims to the normal standard of proof.

58. The circumstances, and the balance of prejudice, clearly favoured granting an extension of time for filing R3's ET3.

Second Respondent's Application to be Removed from the Proceedings is Dismissed

59. R2 applied on 20 March 2020 to be dismissed from the proceedings, p193.

60. In his application, R2 contends that he acted at all times on behalf of R1 and not in a personal capacity. To the extent that R2 is suggesting that the Tribunal has no jurisdiction to entertain a claim against him, thus engaging the Tribunal's powers under *Rule 27 Employment Tribunals Regulations 2013*, that proposition is misconceived, as the Tribunal has jurisdiction to hear claims against individual respondents for protected disclosure detriment (under *ss.47B(1A)(a) ERA 48(1A) ERA*).

61. If R2 is suggesting that the claims have no reasonable prospect of success under *Rule 37 ET Rules 2013*, I reject that contention. R2 claims that he was in Dubai from August 2018 and played no role in HR management of the corporate respondent since August 2018; that he was not privy to most communications preceding the Cs' departures, as R3 dealt mainly with such issues; and that any communications which were signed by him were drafted without his involvement. However, the contemporaneous evidence does not support those assertions pp206; 209; 210; 209; 211; 212; 216; 219; 220; 221; 222; 224; 227; 229; 236; 244; 278. That documentation suggests that R2 was meaningfully involved in communications and discussions relating to the Cs over the period in which it is said that detriments were inflicted on them, and that he was involved in HR matters. R3 does not accept that he alone would be liable for any acts in this claim.

62. A further matter raised by R2 in support of his application is that he no longer has access to the firm's records, so it is difficult for him "to make any further comment or represent myself". However, any current lack of access to documents would be remedied by disclosure orders (including 3rd party disclosure orders) in the case.

63. For all these reasons, I dismissed R2's application. There was no sound reason for his removal from these proceedings.

64. However, I did not enter judgment against R2. The allegations made against R2 are the same as those made against R3. It might cause difficulties in fact finding for a future Tribunal, considering liability or remedy, if judgment had already been entered for R2 on identical claims which were then being defended on the merits by R3.

Dated: 21 July 2021

Employment Judge Brown

JUDGMENT SENT TO THE PARTIES ON

22/07/2021.

FOR THE TRIBUNAL OFFICE