EMPLOYMENT TRIBUNALS

Claimants	**Respondent**
v	
Mr Andrew Reed Mr Roland Reed	Thorney Golf Centre Limited

Heard at Watford and CVP **On**: 9 September 2021

Before: Employment Judge Manley
Members: Mr Bhatti
Ms Hancock

Appearances
For the Claimants: Mr P Tomison, Counsel
For the Respondent: Mr N Morgan, Director

JUDGMENT

1. The application to accept the response out of time is refused.

2. There will be a final hearing before the same tribunal to determine all outstanding matters in this case on **Thursday 9 December 2021** by CVP. A separate order sets out details of that hearing.

REASONS

Introduction & Issues

1. This matter has had an unsatisfactory history, with delays for various reasons. The claims were presented on 18 April 2019 with the date of termination of employment being stated as 21 January 2019. Copies of the claims and the blank response form were sent to the respondent on 12 June 2019. The accompanying letter informed the respondent that the date for presentation of the response was 10 July 2019.

2. The respondent did not present its response until 8 August 2019. On 1 September 2019 a standard rejection of response letter was sent to the respondent.

3. By e-mail of 3 September 2019, Mr Morgan, on behalf of the respondent made several points, including a request that the email be treated as an application to file the response late. A later e-mail asks that the claims be struck out on time limitation issues. In summary, the respondent's case is that the claimants' employment ended in June 2017. The claimants' case is that they were not aware that the respondent considered their employment had ceased in 2017 until an email was sent to their solicitor on 21 January 2019.

4. The matter was listed for a telephone case management preliminary hearing (CPH) on 20 January 2020 but that had to be postponed because it was unlikely that the case would be heard. The CPH was relisted for 9 April 2020 and the respondent did not attend that hearing. The employment judge ordered that the claimants should file schedules of loss and that the employment judge would then consider matters further.

5. A letter of 23 May 2020 from the respondent led that employment judge to treat it as an application to reconsider orders made at that CPH and it was relisted for 27 November 2020, when Mr Morgan attended for the respondent, along with counsel for the claimants. It was a hybrid and CVP hearing. A Case Management Summary sets out the employment judge's account of what occurred in that hearing with reference made to previous claims by the claimants in May 2018 and a costs application in those earlier claims. The preliminary hearing in November 2020 did not proceed to make any decisions or any further orders and the employment judge recused himself after allegations of bias were made.

6. The matter was later relisted in February 2021 to be considered further. That hearing was then postponed until 10 March 2021 when I was the allocated employment judge.

7. It became clear during that hearing that the response had been rejected in September 2019 and I recorded that the claimant's representative drew my attention to the respondent's e-mail of 3 September 2019, mentioned above at paragraph 3. I therefore listed the matter for further consideration in June 2021. Mr Morgan, on behalf of the respondent, asked for a full tribunal and I agreed that it was possible that the factual dispute about the end dates of employment might be considered and agreed to his request.

8. The issues for this hearing were as follows:

    1) Whether the decision made on 1 September 2019 to reject the response presented on 8 August 2019 should be reconsidered and the response accepted out of time;

    2) If the response is not accepted, what claims should succeed and what compensation is due under Rule 21 Employment Tribunal Rules 2013;

3) If the response is accepted, whether to reconsider any part of the case management order made by Employment Judge Ord on 9 April 2020;

4) If the response is accepted, whether to strike out the claims following the respondent's application which alleges the claims have been presented out of time.

5) Any other matters which arise and which can be dealt with, to ensure the claims proceed if not struck out or determined under Rule 21.

9. The respondent applied for a postponement of the June 2021 date as that was the date of their Covid vaccine. It was re-listed on the agreed date of 9 September 2021. The first issue for the tribunal was the question of whether the decision to reject the response presented on 8 August 2019 should be reconsidered and the response accepted out of time.

10. Various orders had been complied with and the tribunal had the advantage of written skeleton arguments from the claimants' solicitor and from the respondent. Other documentation, including witness statements from Mr Morgan and Ms Abbott on behalf of the respondent, were also available to the tribunal. Mr Morgan referred to other documents and some were sent through to the tribunal clerk as the hearing progressed. Many were already in the bundle and the tribunal is satisfied that it saw all relevant documents.

11. As will become clear, the tribunal was unable to deal with the other matters indicated for consideration today because of the tribunal's decision that it needed to hear evidence on the time limitation point. The issue that was determined at this hearing, therefore, was the question of whether to accept the response out of time and to make any further case management orders.

The application to consider the rejection

12. As indicated, the application for the response to be accepted out of time was contained in a two-page e-mail sent on 3 September 2019. It begins with a criticism of the tribunal for accepting the claim forms. It continues with a strongly worded commentary on the tribunal system. The language is abusive and highly disrespectful. For instance – "*this enables you to stick your parasitical snouts into the public trough of money and suck off your excessive wages, excessive pensions, long paid holidays and myriad other benefits, as well as standing at your ubiquitous sherry parties telling all and sundry that you are an Employment Judge (ie you failed in every other area of law). You are a parasitical and corrupt blight*". Another paragraph repeats much of this negative opinion.

13. The e-mail then goes on to say that the claimants are out of time because, it is said, their employment ended in 2017. A further criticism made is that of accepting the claim form – *"why, contrary to procedure, did you issue*

the cynical, false and time-wasting claims in the first place? And why then reject our Response purporting to rely upon procedure, when you did not apply scrutiny or procedure when issuing the claims in the first place".

14. There then appears to be an explanation of the delay as follows:

"to be further specific, we could not respond to claim forms any faster because:

1. *"When we received them it was our peak season, and our peak workload of the year. Contrary to you dilatory-public-sector-go-home-at-2-on-Fridays-23days-a-year-off-sick-8-days-paid-holiday-huge-pension-parasitical-fuckers; we actually have to work for a living. In practical terms, this means 14+ hour days and 7 days a week. Consequently, we could not attend to them any sooner."*

15. The e-mail then goes onto criticise the claimants' lawyer using similar language, stating that the respondent had been waiting for a reply to an e-mail they had sent to that lawyer on 26 June 2019.

16. The e-mail of 3 September includes an application to strike-out the claims because they are "*time-barred*" and "*because costs of previous failed claims have not been paid*". It is also an application to file the response "*a couple of weeks late (only)".*

17. The e-mail sent to the claimants' solicitor on 26 June 2019, which was copied to the tribunal, has similar vitriolic criticisms and expletives. The part which might be relevant to the application to present the response out of time reads as follows (paragraph 3):

> *"What you have written is a highly prejudiced, far left-field, fantasy, fairy story. We are not spending our time and effort addressing your invented bullshit".*

18. On the face of the file there does not seem to have been any further communication until the response was presented on 8 August 2019. The response states that the claimants should be debarred from further ET claims "*as the costs from their previous attempted failed ET claim have not been paid to the Respondent*". This is a reference to a costs application made by the respondent in a previous claim where the claimants withdrew the claim. I record here that, at the costs hearing in that matter in November 2019, costs were <u>not</u> awarded against the claimants.

19. The response presented on 8 August 2019 contains the respondent's case on the end of the claimants' employment, said to be caused by them "*walking out*" of the workplace in May 2017. The claimants' case is that they were on sick leave but did not receive SSP which is what the 2018 tribunal claim was about.

20. As can be seen from the summary above, there were considerable delays in this matter coming to a hearing. The respondent did not attend the CPH

in April 2020 and the hearing in November 2020 could not proceed. It appears to the tribunal that the application to reconsider the rejection and accept the response out of time might well have been overlooked by the parties and the Employment Tribunal. However, it clearly came to light on 10 March 2021 when the claimants' counsel referred me to it. Given that the position was quite clear that there had been a response which had been rejected and an application made to accept it out of time, I decided that issue would need to be determined before anything else in these claims.

21. When this hearing began, I asked Mr Morgan to address the tribunal on the reasons why the response should be accepted out of time. Mr Morgan decided that he wanted to address us first on the fact that the claim forms had been accepted, on his case, in breach of the rules. He did say that there were witness statements from himself and from Ms Abbot of 26 May 2021 which were not in the bundle but we agreed to read those documents.

22. A number of e-mails were also sent to the clerk by Mr Morgan which contained letters which we had previously seen. He also sent information reminding the tribunal about time limits in tribunal claims. Mr Morgan repeated his opinion that there were double standards; that there were high levels of hypocrisy and queried the date of the presentation of the claims, stating that he did not accept that they had been presented on 18 April 2019.

23. When prompted again to address the issue of the response being presented out of time, Mr Morgan went on to say that the respondent was very busy at the time that the response was due. He said that it was a private business; it was a leisure park and it was the summer period and they were overwhelmed with business, working 7 days a week. He also said that, at some point, he was away for 2½ weeks on a business trip to the United States. He submitted that there was no prejudice to the claimants in any late submission.

24. He went on to say that a number of things had happened since then in these tribunal proceedings. He reiterated that hearings were listed, that there was considerable correspondence and that the respondent had made numerous applications for the claims to be struck out on the time limit point. He went through the chronology in some detail which is not in dispute. He provided no explanation for the respondent's failure to attend the hearing on 9 April 2020.

25. Mr Morgan said that, at no point, had anyone mentioned the fact that the response had been rejected. He said the hearing on 27 November 2020 lasted about 1½ hours and there was no mention of that fact. Mr Morgan believes that an employment judge must have considered the application and allowed the response to proceed. He accepts that he got nothing to that effect in writing.

26. In the respondent's submissions, the fact that it was raised for the first time on 10 March 2021, shows it was opportunistic and shows "*breath-taking double standards*". He said that both the claimants' counsel and myself as the employment judge "*seized*" upon the fact of the rejection. He asked for the application to accept the response to be allowed.

27. On behalf of the claimants, Mr Tomison pointed out that there were no grounds to accept the response under Rule 19 because the decision to reject it was not wrong. The response was presented out of time and there was no application to extend time before time expired.

28. He asked us to take into account the fact that the respondent had managed to send a relatively long and vitriolic e-mail to the claimants' solicitor well within time (on 26 June 2019) and that meant he could have put in the response to the tribunal. He points to Mr Morgan's attitude to the proceedings, the use of abusive language, the failure to attend at least one hearing as an example of the contempt with which Mr Morgan treats the tribunal proceedings. Although Mr Morgan has been asked to desist from this language, he insists on using it, including relatively recently to the claimants' solicitors.

29. According to the submissions of the claimants' representative, there is real prejudice to the claimants who have waited over two years since presentation of their claims to get justice. A great deal of that is down to the respondent's behaviour during the course of the tribunal proceedings. Many of the delays have been caused by Mr Morgan, it was submitted.

The Law

30. The rules for presentation of the response are set out in between Rules 15 and 22 of the Tribunal Rules of Procedure 2013. Rule 16 provides that the response should be on the prescribed form and presented within 28 days of the date the copy of the claim form was sent by the tribunal. Rule 18 deals with forms presented late and reads:

> "(*1). A response shall be rejected by the tribunal if it is received outside the time limit in rule 16 (or any extension of that limit granted within the original limit) unless an application for an extension has already been made under Rule 20 or the response includes or is accompanied by such an application (in which case the response shall not be rejected pending the outcome of the application).*
>
> *(2).The response shall be returned to the respondent together with a notice of rejection explaining that the response has been presented late. The notice shall explain how the respondent can apply for an extension of time and how to apply for a reconsideration*."

31. Rule 19 deals with reconsideration of rejection and reads:

> *"(1) A respondent whose response has been rejected under Rule 17 or 18 may apply for reconsideration on the basis that the decision to*

reject was wrong, or, in the case of rejection under Rule 17, on the basis that the notified defect can be rectified".

That rule provides for the application to be writing within 14 days and allows an employment judge to consider it on the papers.

32. Where the response has been rejected or none has been presented, Rule 21 allows for the Judge to consider, on the available material, whether a determination can be made and allows a judgment to be issued or a hearing to be fixed before a Judge alone.

33. Rule 21 (3) reads:

"*The respondent should be entitled to a notice of any hearings and decisions of the tribunal but, unless and until the extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge".*

34. The leading case in this area is Kwik Save Stores Ltd v Swain [1997] ICR 49, which explains the exercising of the discretion about accepting a response out of time involves "*taking into account all relevant factors, weighing and balancing one against the other and reaching a conclusion which is objectively justified on the grounds of reason and justice*".

35. It is also possible that the application should be considered under Rules 70 -73. This is because, in this case, the decision to reject the response was not wrong and therefore may not fall under Rule 19. Rule 70 allows for reconsideration of other decisions and the test here is whether it is necessary in the interests of justice to reconsider the decision. The Kwik Save Stores case suggested three factors which might be relevant. These include why there was non-compliance, the merits of the response and prejudice to each party.

Conclusions

36. The tribunal gave this matter considerable thought.

37. First, the facts around the dates of presentation of the claims and response make the position quite clear. The claim forms were presented and date stamped by the tribunal on 18 April 2019. There was no reason for those claims not to be accepted. The date for ending of employment at section 5 was said to be 21 January 2019. The respondent is quite wrong to criticise the tribunal for accepting those claims. There is, it appears, a dispute about whether that was the date of the end of employment, but it is one yet to be resolved.

38. The tribunal regrets that there was a delay of around 6 weeks before the claims were sent to the respondent but can only assume this was because of the high workload at the tribunal office. In any event, that is no prejudice to the respondent which still had 28 days from the date it was

sent to it to respond. The respondent was told of that date, which was 10 July 2019.

39. The tribunal takes into account that the respondent felt able to write a long e-mail to the claimants' solicitor well within the time, which time could have been better spent filling in the response by the due date. When the response was sent on 8 August 2019, it raises the very same issues about whether the claims have been presented in time, if, as the respondent alleges, the claimants' employments ended in June 2017.

40. On the whole, the defence may be an arguable one, at least as far as the question of when employment ended is concerned. It is signed by Ms Abbot who signed it, at that stage, as a manager, although she told the tribunal today she was the finance director. It does contain some criticisms of the claimants alleging that they were "*work shy*" saying that the claims are "*false*". It includes an allegation about the claimants' lawyers. There is no application for an extension of time. The rejection letter was then quite properly sent to the respondent with the correct information.

41. The tribunal considered what Mr Morgan has said, both in the application of 3 September 2019 and in his oral submissions today.

42. We have tried to look beyond the vitriolic attacks on the claimants, their lawyers and the tribunal system and ascertain what there might be to suggest a reason for the response to have been presented late. The closest we can come is that it was the peak season and the respondent was busy. The tribunal does not accept that that is a good reason, particularly in light of the fact that the respondent found time to write the earlier email to the claimants' solicitors. That email made it clear that the respondent had decided not to respond (quote above at paragraph 17). In Mr Morgan's words, the respondent would not "*spend our time and effort*".

43. There really is no reason given for non-compliance, Mr Morgan, concentrated instead on asking for a strike-out of the claims which, on his case, have been improperly accepted. The tribunal considered the application as it was made at the time in September 2019. We have formed the view, that had we been considering it then, we would not have accepted the reason provided. The respondent did not apply for an extension of time and did not provide a satisfactory explanation for the late presentation of the response.

44. We considered the question of prejudice. The respondent has raised the issue of whether the claims were made in time and that is a jurisdictional issue which must be determined by the tribunal before the claims proceed. However, the tribunal can consider that issue with the benefit of evidence from the claimants and from Mr Morgan and Ms Abbott. When we consider the prejudice to the claimant, the tribunal have formed the view that it is significant, given the long delays there have been and the

respondent's insistence on pursuing matters other than the one in hand. Mr Morgan's belligerent attitude has made the proceedings very difficult.

45. The tribunal then considered whether the fact that this matter seems to have been overlooked by the parties and possibly by the tribunal, would affect our judgment on the issue. But this does not improve matters for the respondent. The respondent has not properly engaged with this process. It is true that a considerable number of e-mails have been sent both to the claimants' lawyers and to the tribunal, but they contain a high level of abuse and that makes it difficult to understand what is being requested. The two hearings in 2020 did not proceed properly. On the first occasion, nobody appeared for the respondent and on the second occasion, it was brought to an end because of the behaviour of Mr Morgan.

46. No good reasons have been given for late presentation of the response. There was no suggestion of ill-health or of a failure to understand the rules. Indeed, Mr Morgan was at pains to remind the tribunal on a number of occasions, of the rules that he believes assist his case. Given that the respondent can take part in hearings to the extent permitted by the Judge, and its evidence on the time limitation point will be taken into account, the tribunal have decided that the response will not be accepted out of time. It is not in the interests of justice to accept the late response.

47. I gave a very short judgment in the above terms but without the reasons and the parties were informed that reasons would follow, I then began to explain to Mr Morgan that the respondent's evidence on the time point would be taken into account and that the respondent would be able to comment on any possible compensation.

48. Mr Morgan's language became very abusive and it was necessary to exclude him from the CVP room. Ms Abbott, who was also in attendance, was informed that, as the response was not accepted, she would also need to leave. We then went on to deal with matters of case management which appear in a separate Order.

Employment Judge Manley

Date: …14 September 2021……..

Sent to the parties on: 21.09.2021.....

.....GDJ.....
For the Tribunal Office

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