EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4112382/2021

Preliminary Hearing held remotely on 24 March 2022

Employment Judge: R Sorrell

Mr P Leggat	**Claimant** **Represented by:** **Ms R Kochar - Solicitor**
GXO Logistics UK Limited	**Respondent** **Represented by:** **Ms L Whittington - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the respondent's application for an extension of time in which to lodge a response to the claim under Rule 20 (1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is allowed.

REASONS

Introduction

1 The claimant lodged claims for unfair dismissal and wrongful dismissal on 10 November 2021. (Pages 2-20 of the claimant's bundle)

2 A response to the claim was not lodged within the 28 day statutory time period and a final hearing on liability and remedy was initially scheduled for today.

3 A response to the claim was lodged by the respondent on 4 February 2022, together with an application for an extension of time to present its response in accordance with Rule 20 (1) of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. (Pages 32-43 of the claimant's bundle and Items 6 & 7 of the respondent's bundle)

4 On 4 February 2022 the claimant intimated their objection to the respondent's application. On 8 February 2022 the claimant set out the basis for that objection in more detail. (Page 44 of the claimant's bundle)

5 In view of the claimant's objections, on 11 February 2022 EJ McPherson converted the final hearing listed for today to a preliminary hearing in order to determine the respondent's opposed application for an extension of time under Rule 20 to lodge an ET3. (Pages 45-46 of the claimant's bundle)

6 The Hearing took place remotely. It was a virtual hearing held by way of the Cloud Video Platform.

7 Parties lodged separate bundles of productions and the claimant also lodged written submissions.

8 The application was heard by way of oral submissions.

9 Ms Kochar for the claimant confirmed that it was accepted the correct designation for the respondent is GXO Logistics UK Ltd.

Respondent's Submissions

10 Ms Whittington submitted on behalf of the respondent that by way of background, a claim was filed on 10 November 2021 by Mr Leggat, who was employed by the respondent as a warehouse operative, for unfair dismissal and wrongful dismissal. There had been an altercation in June 2021 between the claimant and a colleague. An investigation into that altercation took place on 8 and 9 June 2021. The claimant was thereafter invited to a disciplinary meeting on 17 June 2021 which took place on 21 June 2021. At this meeting, the claimant was dismissed for gross misconduct. The claimant appealed that decision and the appeal hearing took place on 9 July 2021 where his appeal was rejected. On 17 January 2022, a hearing on liability and remedy was listed for today, but the Tribunal correspondence does not say liability is determined in favour of the claimant. There is no formal order entering judgment for the claimant.

11 On 4 February 2022 the respondent filed an application pursuant to Rule 20 seeking an extension of time to file a response. The respondent did not receive the claim in November 2021 and only became aware of it on 3 February 2022. It has no record of receiving a claim. The reference made by the claimant to the respondent's correspondence to the Tribunal dated 3 February 2022, which says the Human Resources Manager is looking for a copy of the above claim as she has not received it, is entirely consistent with the respondent's case that the claim was not received in November 2021 and only on 3 February 2022. (Page 31 of the claimant's bundle)

12 It is difficult for the respondent to provide any further evidence in this regard. The respondent has acted extremely promptly once it became aware of the claim. The ET3 was filed on 4 February 2022. The claimant has made reference to the ACAS correspondence at page 25 of the claimant's bundle. It is not clear from the correspondence if the discussions referred to relate to the claim. It states that ACAS has got in touch with the respondent and had some discussions but was not willing to conciliate. It does not state that the respondent was aware of the claim. There is nothing to contradict the respondent's position. There was no further discussion between November 2021 and parties about a settlement or claim. That is because the respondent did not receive the ET1.

13 In respect to this application, if the Tribunal consider that judgment has already been entered, the respondent seeks for it to be set aside. Effect must be given to the Overriding Objective. It is clear that there is a valid response to the claim and that the respondent denies unfair dismissal. There are no specific criteria in Rule 20 as to when to exercise discretion. However, the Tribunal is assisted by the guidance in **Kwik Save Stores Ltd v Swain and ors 1997 ICR 49**, in that there are two key factors in exercising the discretion. These are the balance of prejudice to both parties and the merits of the defence.

14 The balance of prejudice weighs in favour of the respondent. The prejudice to the respondent in refusing this application would be significant. It would prevent the respondent from engaging in this claim or defending it. It would

preclude them from making submissions or producing evidence regarding liability. The respondent did not receive the claim in November 2021. It could therefore not respond within the 28 day deadline and that prejudice weighs heavily against them. If the respondent were prevented from defending this claim, this would prejudge the case without the claimant having to prove his case.

15 In contrast, there is minimal prejudice to the claimant who can still present his claim and be heard on it. There has been little or no delay. It is not a valid reason to submit there is prejudice due to an increase in costs for the claimant as he would prefer for it to be dealt with summarily. The situation is not the same if the claimant brought the claim out of time and it was knocked out. This application requires to be considered on whether there is a specific prejudice to a party and the merits of the defence. The high threshold for jurisdictional points does not apply to Rule 20 and the discretion is much broader.

16 The respondent has good prospects of defending the claim. The ET3 states there was a fair reason for the claimant's dismissal. He was dismissed by reason of gross misconduct as a result of a very serious incident at work which is conceded by both parties. The CCTV evidence shows the claimant physically pushing his colleague at work and during the disciplinary hearing the claimant did not deny that. Prima facie, there has been a fair procedure followed. Meetings were held to investigate the alleged gross misconduct and the claimant presented different reasons for that aggression throughout the disciplinary process. The claimant was represented at the disciplinary hearing and an appeal process was followed. The respondent will rely on the witness evidence of the respondent manager and the appeal manager. A short delay is not going to impact on the presentation of that evidence.

17 In reply to the claimant's submissions, the respondent further submitted that there is no prejudice to the claimant if the response was submitted on time or if the respondent was not able to submit a response at all. The claimant can still pursue a claim on the merits. The delay in submitting the response between December 2021 and February 2022 is short. It is factually incorrect

that the respondent can engage in a remedy hearing as that is entirely at the discretion of the Tribunal under Rule 21. The claimant has submitted that there is no prejudice because the claim is slightly modest, but the claimant has not been unfairly dismissed and the prejudice in refusing this application would be that the respondent cannot put in their defence.

18 In terms of the documents at pages 25 and 31 of the claimant's bundle, it is not said that the ET1 was received, but that it was possibly sent to central HR offices and on further investigation it was not received there. There is also no evidence of a discussion with ACAS before 23 November 2021. All the correspondence says is that there has been a discussion and there is no reference to a claim.

19 The Tribunal is invited to grant the application.

Claimant's Submissions

20 Ms Kochar for the claimant submitted that both parties engaged in ACAS conciliation for a significant period of time. The early conciliation process started on 16 September 2021 and ended on 11 October 2021, during which the respondent was alerted that it was likely the claimant would submit an ET1. At the end of that process ACAS made contact with both parties six weeks later on 23 November 2021. The correspondence from ACAS at page 25 of the claimant's bundle confirms that ACAS made contact with the respondent. There is no other reason for this correspondence other than that the claim had been lodged. The respondent was therefore aware of the claims brought by the claimant.

21 The Tribunal correspondence of 11 November 2021 states that a copy of the claim has been sent to the respondent and to ACAS and that the respondent has 28 days to respond. (Pages 21-3 of the claimant's bundle) The respondent says it did not receive a copy of the claim but the reasons given are not credible. The respondent's email from the Human Resources Manager dated 3 February 2022 to the Tribunal does not say that the claim was not received, rather that she believes the claim was possibly sent to their central HR offices. (Page 31 of the claimant's bundle) A Human Resources team are

responsible for and deal with claims on a daily basis and are aware of the time limits in responding to such claims. The address used by the Tribunal is the same address that was used by ACAS, the central HR office is the respondent, it was therefore HR's responsibility to deal with the claim. ACAS had a conversation with the respondent on 23 November 2021. It was for the respondent to go and seek a copy of the claim from their central HR office. It was reasonably practicable for the respondent to submit the ET3 within the normal time limit.

22 The prejudice faced by the claimant outweighs the prejudice to the respondent. The claimant has already waited for a period of six months. If this application is granted, the final hearing is likely to be extended by a few days which is more time and will cause further delay. The claimant is not seeking significant compensation. The respondent will be able to participate in a remedy hearing and there is nothing to present them from doing that.

23 In respect to Rule 20, a copy of the ET3 will be presented if the respondent is making an application within the normal time limit, but this is being made outside the normal time limit. Rule 20 is not applicable as the time limit has expired. It is not clear why prospects are being looked at. Rule 16 provides that a response should be presented within 28 days of the claim being received. Rule 18 states that a response will be rejected if received outside the time limit.

24 If the application is allowed there will be additional delay and expense. Expense is a sufficient reason and an overriding factor to be taken into account.

25 In reply to the respondent's submissions, the delay in submitting a response was not short and was a delay of eight weeks. Whilst the document at page 25 of the claimant's productions does not indicate what the discussions were centred around, it does make reference to the nature of those discussions and at this point the respondent was on notice that the claimant was making claims for breach of contract and unfair dismissal. It was therefore reasonably

practicable for the respondent to submit a response on time and it has not provided any reasons as to why it did not do so.

26 The Tribunal is invited to dismiss the application.

Relevant Law

27 Rule 20 (1) of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that:

"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."

28 The EAT held in the case of **Kwik Save Stores Ltd v Swain and ors 1997 ICR 49, EAT** that when exercising a discretion in respect of the time limit, a judge should always consider the employer's explanation as to why an extension of time is required, whether the employer would, if its request for an extension of time were to be refused, suffer greater prejudice than the complainant would suffer if the extension of time were to be granted and the merits of the defence.

Conclusion

29 In reaching my conclusion I have been guided by the authority of **Kwik Save Stores Ltd v Swain and ors 1997 ICR 49, EAT** and the approach to be adopted in such applications. I have also given effect to the Overriding Objective under Rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to deal with cases justly and fairly.

30 I first considered the respondent's explanation for the delay in submitting the ET3 response to the claim.

31 In doing so, I have noted that whilst the respondent's position is that it was not in receipt of the claim or indeed aware of it until 3 February 2022, it is clear in the correspondence from ACAS to the claimant dated 23 November 2021 that discussions had taken place with the respondent prior to 3 February 2022. The nature of these discussions were out-lined in the correspondence from ACAS in that the respondent did not believe that a breach of contract had occurred, that a fair process was followed and any decisions made were aligned with company policy. ACAS accordingly advised the claimant that the respondent was not willing to conciliate at that time or make any offer of settlement to the claimant. (Page 25 of the claimant's bundle)

32 I have further noted that the ET1 claim was presented to the Tribunal on 10 November 2021 which was prior to this correspondence, as well as the claimant's submission that the ACAS early conciliation process between the parties took place from 16 September 2021 until 11 October 2021, which was not disputed by the respondent.

33 I have also had regard to the email from the respondent HR Manager, Mairi McNeil-Caulfield to the Tribunal dated 3 February 2022 which states that she is looking for a copy of the claim which she believes was possibly sent to their Central HR offices. (Page 31 of the claimant's bundle)

34 On the basis of parties' submissions and the documents before me, I considered there were notable anomalies within the respondent's explanation for the delay in submitting an ET3 response to the claim. Following the unsuccessful conclusion of the ACAS early conciliation process, ACAS was in contact with the respondent after the claim had been lodged and it is difficult to reconcile the reason for that contact, other than because the claim had been lodged. The email from the respondent HR Manager to the Tribunal does also not state that the claim had not been received, but that it was possibly sent to their central HR offices.

35 However, whilst I did not find the respondent's explanation to be entirely satisfactory or transparent, I accepted that there was no reference to a claim in the ACAS correspondence, that the respondent HR manager was not

definitive in her email that the claim had in fact been received by the central HR offices and that a response to the claim was submitted the day after the respondent HR manager's email.

36 I then proceeded to consider the balance of prejudice to parties depending upon whether the application was refused or allowed.

37 Having carefully considered parties' submissions and the factors relied upon

in the round, I am satisfied that the balance of prejudice weighs in favour of the respondent. This is because if the application was refused the respondent would suffer greater prejudice than the claimant in that it would be prevented from participating in proceedings and defending the claim. Whereas if the application was allowed, the claimant would still be able to present his case at a final hearing and be heard on the merits of it.

38 In reaching this view, I did not consider that the amount of compensation sought by the claimant was a relevant factor. Nor did I accept the respondent's submission that a delay of eight weeks in submitting a response to a claim is short. However, I did consider that any delay or additional costs incurred by the claimant in listing this case for a final hearing before both parties would not be significant or indeed materially different than if this application was refused.

39 I lastly considered the merits of the ET3 response. I am of the view that it is a valid defence. This is because the response resists the claims in their entirety and relies upon the decision to dismiss the claimant for gross misconduct as a reason that falls within the band of reasonable responses open to an employer and that a fair procedure was followed in reaching that decision.

40 In undertaking a balancing exercise of all these factors and carefully weighing these in the round, I have concluded that the respondent's application for an extension of time to submit an ET3 response to the claim is allowed.

41 There is no judgment issued under Rule 21 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to be set aside.

Further Procedure

42 A telephone case management preliminary hearing shall be fixed as soon as practicable to discuss further procedure.

Employment Judge: Rosie Sorrell
Date of Judgment: 28 March 2022
Entered in register: 05 April 2022
and copied to parties