



THE EMPLOYMENT TRIBUNAL

SITTING AT: BY CVP
BEFORE: EMPLOYMENT JUDGE BALOGUN
BETWEEN:

Mr J Bogira

Claimant

And

Abbott Mead Vickers BBDO Limited

Respondent

ON: 1 March 2022

Appearances:

For the Claimant: Ms A Greenley, Counsel

For the Respondents: Miss Owusu-Agyei, Counsel

JUDGMENT AND REASONS ON PRELIMINARY ISSUE

The respondent is granted an extension of time for filing its response to the claim.

REASONS

1. This hearing was to consider the application of the respondent dated 24 February 2022 for an extension of time for filing the ET3 response. The response to the claim should have been filed by 10 November 2020 so was 15½ months late. The respondent contends that it was unaware of the proceedings until recently because of circumstances related to the pandemic. The claimant objects to the application.

2. Rule 20 of the Employment Tribunal Rules states:

(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.

3. In dealing with this matter, I have considered the evidence of Marion Mitchell, Head of Administration Services for the respondent. I have also considered the written and oral submissions from both counsel.

4. The case: Kwik Save Stores Ltd v Swain and Ors EAT, ICR 49, gives useful guidance on how these applications should be approached. The EAT stated that The tribunal should ordinarily take into account:

(a) The explanation for the delay which has necessitated the application for an Extension

(b) The balance of prejudice between the parties

(c) The merits of the defence

5. In accordance with that approach, I have reached the following conclusions:

Explanation for delay

6. The explanation is provided by the evidence of Marion Mitchell, which was substantially not in dispute and which I found credible. The respondent received the notice of claim and other correspondence sent by the Tribunal. However, it

was unaware of the claim because post was not being attended to during the pandemic.

7. The respondent was based in premises occupied by over 40 other businesses. Responsibility for receipt and distribution of deliveries from Royal Mail and other couriers for all the businesses on site was sub-contracted to a company called Swiss Post. The normal process for dealing with the respondent's in-coming post was that Swiss would receive it into the building and deliver it to the floors occupied by the respondent on a daily basis. Ms Mitchell, with the assistance of a colleague, would then distribute it to the appropriate addressee or department, as indicated on the correspondence.
8. Following national lockdown, most of the staff began to work from home (including Ms Mitchell) while others were furloughed. During this time there was nobody on site to deal with in-coming post so it was simply placed in a boxes and stored unopened in a secure place.
9. Although Ms Mitchell visited the building 5 or so times, she did not have time to go through unopened post and did not have access to most of it. During this time, the respondent had been consolidating its premises from occupying 2½ floors to 1. Ms Mitchell described the state of the building as being chaotic, with individual belongings and paperwork placed in hundreds of storage boxes. She was under pressure to retrieve the property of staff who had left and this took priority over sorting out the post.
10. To leave post unopened for so long, without any thought given as to whether there might be important correspondence needing urgent would appear an extraordinary way for a business to manage its affairs, especially one of the size of the respondent. However, these were extraordinary times. The pandemic and the consequent lockdown meant that normal efficiencies associated with doing business were, for the large part, put on hold. Many businesses, organisations and, indeed, government departments had to adjust to new ways of working very quickly. These were reactive, ad-hoc and often unstructured, leading to inefficiencies and delays. The Tribunal has not been immune to this. I therefore have to consider the respondent's explanation in that context. This is not a case of intentional default or procedural abuse. The delay was a consequence of the difficulties caused by the pandemic, which in the respondent's case meant that there were no staff available to sort out the post. I find that the respondent has given a satisfactory explanation for the delay.

Merits

11. The respondent has provided a draft ET3 response, in which it disputes all of the claimant's allegations. It was submitted by the claimant's counsel that the response does not deal with the substance of the claim and so the Tribunal cannot say whether the defence has merit. It is right that the response does not deal with each and every allegation, but it does not need to.

12. The respondent's primary case is that nearly all of the claims are out of time. That is an issue that goes to jurisdiction, which, if correct would mean that the claimant's case could not proceed. That contention is one which, in my view, makes the respondent's case arguable. Further, the respondent has cited redundancy as the reason for the claimant's dismissal (which is a potentially fair reason) and has described the process followed. This provides an arguable defence to the claim that the dismissal amounted to discrimination.

Prejudice

13. Turning to the issue of prejudice, if the application is not granted, the respondent will only be able to participate in the case, to the extent allowed by the Tribunal which may mean that it will not be able to put its case fully, or at all. It was submitted on behalf of the claimant that allowing the application would result in further delay in this case being dealt with and that would be detrimental to the claimant's health. A letter was produced from the claimant's treating Physician, Dr Piper, in support.
14. Having considered the balance of prejudice, my view is that the respondent will be more prejudiced by my refusing the application than the claimant would be by my granting it. Any prejudice to the claimant can be mitigated by the Tribunal applying reasonable adjustments, as it does in many cases when dealing with claimant's with mental impairments.

Conclusion

15. Having considered all of the Kwik Save factors in the round, I have decided to grant the respondent's application and extend time to the 24 February 2022. The draft ET3 response is therefore accepted as its defence to the proceedings.

Employment Judge Balogun
Date: 3 March 2022

