



EMPLOYMENT TRIBUNALS

Claimant: Mr. J. Cheung
Respondent: North West Anglia NHS Foundation Trust

OPEN PRELIMINARY HEARING

Heard at: Bury St Edmunds Employment Tribunal (via CVP)

On: 10 May 2022

Before: Employment Judge Mason

Appearances

For the claimant: In person
For the respondent: Mr. S. Craig, solicitor

JUDGMENT

1. **The Respondent's application for an extension of time for submission of its response (ET3) succeeds.**
2. **The Claimant's application for an anonymity Order (Rule 50) fails.**

Reasons

Background

1. The Claimant is a doctor and was employed by the Respondent from 30 July 2019 to 25 August 2020.
2. On 20 November 2020 he first notified ACAS and on 20 December 2020 an Acas Early Conciliation certificate was issued.
3. The Claimant presented this claim on 20 January 2021 and brings claims of breach of contract, failure to comply with the Working Time Regulations (WTR) and unlawful deduction from wages.
4. On 19 April 2020, the Claimant applied for an anonymity order pursuant to Rule 50 Employment Tribunal Rules 2013 (the Rules).

5. An Open Preliminary Hearing (OPH) was listed to take place on 5 January 2022 to consider this application and also whether to enter judgment pursuant to Rule 21, no response having been received from the Respondent.
6. On 30 December 2021, the Respondent's solicitors wrote to the Tribunal to advise they had just been instructed (that day) and asking for copies of documents.
7. On the same day, the Tribunal sent a Notice of Claim to the Respondent.
8. On 31 December 2021, the Respondent's solicitors wrote to the Tribunal to say that the Respondent was not aware of these proceedings until 23 December 2021 when they received the notice of the OPH to be held on 5 January 2022.
9. The OPH on 5 January 2022 was then postponed at the Claimant's request.
10. On 17 January 2022, the Respondent applied for an extension of time for submitting its response and enclosed with that application a proposed response (ET3) and a request for further and better particulars of claim.
11. On 19 March 2022, EJ Tynan (on the papers) made case management orders. The issues at the OPH were extended to include the Respondent's application for extension of time. The Claimant was ordered to provide a response to the request for Further & Better Particulars by 26 April 2022.
12. The Claimant wrote to the Tribunal on 26 April 2022 objecting to the Respondent's application for an extension of time.

Procedure at the OPH

13. The OPH was conducted remotely via CVP.
14. The Respondent provided a bundle of documents (70 pages) which the Claimant confirmed he had received and had access to. I did not have access to the Tribunal file other than documents I could access remotely.
15. I heard and determined the Claimant's application for anonymity order first and then heard the Respondent's application for an extension of time. As the latter was successful, I then closed the hearing for the purposes of listing the final hearing and case management. My case management orders are set out in a separate document.

Claimant's application for anonymity: Rule 50

16. The Claimant wrote to the Tribunal on 19 April 2021 as follows:
"The Claimant wishes to apply for an order preventing the public disclosure of any aspect of the tribunal proceedings under Rule 50 of the Employment Tribunal Rules of Procedure"
17. I explained to the Claimant that a restriction on public disclosure is only imposed in exceptional circumstances. It can only be imposed if the Tribunal considers it

necessary in the interests of justice; to protect Convention rights; and/or prevent disclosure of confidential information. The Tribunal must then give full weight to the principle of open justice by properly evaluating competing rights.

18. I asked the Claimant to explain to me why he wanted a restriction on disclosure. He told me his Article 8 (right to private life) rights would be breached as it would affect his reputation and future employment prospects if proceedings were reported. I asked him why he thought his reputation and employment prospects would be detrimentally affected; he said things could be misinterpreted.
19. Mr. Craig, on behalf of the Respondent, objected. He said this type of order should only be made in exceptional circumstances which do not apply in this case and it would undermine the principles of open justice to make a rule 50 order.
20. Having listened to both parties, I gave my decision orally that it was not appropriate to make a rule 50 order in this case. I am not satisfied that it is in the interests of justice; the Claimant has not persuaded me that his Convention rights would be breached; and it is not necessary in order to protect disclosure of confidential information. There are therefore no competing rights to evaluate and weigh against the important principle of open justice.

Respondent's application for extension of time

21. In accordance with Rule 20 the Tribunal has an absolute discretion to extend time but must also take into consideration the overriding objective to deal with cases fairly and justly (Rule 2).
22. In **Kwik Save Stores Ltd v Swain & ors** [1997] ICR 49, the EAT held that "... *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*". The case established that an Employment Judge should always consider the following three factors. First, the explanation supporting an application for an extension of time. The more serious the delay, the more important it is that the Employment Judge is satisfied that the explanation is honest and satisfactory. Secondly, the merits of the defence. Justice will often favour an extension being granted where the defence is shown to have some merit. Thirdly, the balance of prejudice. If the employer's request for an extension of time was refused, would it suffer greater prejudice than the employee would if the request was granted?
23. On 31 December 2021 (page 38) the Respondent's solicitors wrote to the Tribunal as follows:
"We were instructed by the Respondent in these proceedings yesterday. We understand that the Respondent was not aware of these proceedings until it received the Tribunal's correspondence dated 23 December 2021 giving notice that the Preliminary Hearing listed for 5 January 2022 will take place via CVP."
24. On 17 January 2022, the Respondent's solicitors wrote again to the Tribunal as follows:
"We were instructed by the Respondent in these proceedings on 30 December 2021. We understand that the Respondent was not aware of these proceedings until it received the Tribunal's correspondence dated 23 December 2021 giving notice that the Preliminary

Hearing listed for 5 January 2022 (which was subsequently postponed) would take place via CVP.

On 30 December 2021, we contacted the Employment Tribunal and were provided with copies of:

- the ET1 Claim Form and 'Claim Statement';*
- the Notice of Claim;*
- the ACAS Early Conciliation Certificate;*
- a letter from the Employment Tribunal dated 30 May 2021;*
- the Notice of Preliminary Hearing; and*
- emails from the Claimant to the Employment Tribunal dated 17 and 29 December 2021.*

Since being provided with copies of these documents, we have taken urgent instructions from the Respondent as to its response to the claims, and we have acted promptly in preparing the enclosed Response. We note that the Respondent only became aware of the claims shortly before the Christmas and New Year period, and that the Respondent's resources are currently stretched due to the Covid-19 pandemic and other winter pressures.

Application for an extension of time to serve the Response

We understand that the deadline for the submission of the Respondent's Response in these proceedings has passed and that no Response has been presented.

In light of the background set out above, the Respondent avers that it was unable to present the Response within the original time limit because it did not receive the Notice of Claim and was therefore unaware that it was required to submit a Response at all.

We hereby make an application for an extension of time to present the Response in these proceedings. A Response has been prepared and is enclosed with this letter. We respectfully make the following submissions on behalf of the Respondent in support of this application:

- 1. The Respondent has explained above why its Response was not presented within the original time limit. To the best of its knowledge, the Respondent did not receive any notice of the claims until it received the Tribunal's correspondence dated 23 December 2021.*
- 2. Upon discovering that it had failed to submit a Response within the original time limit, the Respondent acted promptly to rectify the situation. The Respondent has prepared a Response and a Request for Further Information, which are enclosed with this letter.*
- 3. The balance of prejudice favours the granting of the Respondent's application. The Respondent does not believe that the Claimant will suffer any undue prejudice if the Respondent is allowed to defend the claims being made. The Claimant had in any event made an application for the Preliminary Hearing which had been listed for 5 January 2022 to be postponed, and as such no delay has been occasioned to the overall timetable by reason of the missed deadline. In contrast, the prejudice to the Respondent in not allowing it to present its Response would be very severe in the circumstances.*
- 4. If the Respondent is not allowed to present its Response, it is possible that it may be ordered to pay the Claimant significant compensation. As a publicly funded body, the Respondent wishes to have the opportunity to defend the Claimant's claims.*
- 5. It is in accordance with the overriding objective to grant this application, as it will ensure that the parties are on an equal footing, and that matters are dealt with proportionately and flexibly."*

25. Mr. Craig made the following submissions at the OPH in support of this application:

- 25.1 In accordance with the guidance given in **Kwik Save** the Tribunal should take into consideration the Respondent's explanation for the delay, the merits of the proposed defence and the balance of prejudice.
- 25.2 Explanation for delay: The Respondent was not aware of proceedings until it received correspondence from the Tribunal dated 23 December 2021 regarding the OPH on 5 January 2022. The Respondent cannot explain why it did not receive earlier communications. The Respondent is a large acute hospital and the relevant period of time fell within the Covid 19 pandemic. As soon as the Respondent was aware it acted swiftly taking into account the Christmas/New Year break. This shows that had it been aware at the outset, it would have acted with similar speed and efficiency.
- 25.3 Merits of the claim/defence: The Respondent has provided a full response strongly defending the claims and raising a jurisdiction point. The weakness of the Claimant's claim is relevant; he has failed to plead any facts, only made simple assertions. The Respondent's request for further particulars of the claim demonstrates the extent of the omissions. The Claimant has not responded to this request despite EJ Tynan's order that he do so by 26 April 2022 and if he cannot provide this information, then his claim is doomed to fail.
- 25.4 Balance of prejudice: If the Tribunal does not extend time, it is clear the Respondent would suffer the greater prejudice. If time is extended, the Claimant will not suffer any real prejudice bearing in mind he has still not provided particulars of his claim.
26. On 26 April 2022, the Claimant wrote to the Tribunal objecting to any extension of time:
"The Claimant objects to the Respondent's application to extend time for the Respondent to file its Response and Grounds of Resistance, noting that the Claimant's claim was submitted in January 2021, nearly a year prior to the Respondent's Response in January 2022, and the Respondent has been served numerous correspondence and documents by the Tribunal Office within that period. The Claimant notes that the requested information has already been provided to the Respondent on 21 January 2022. The Claimant is not currently legally represented or assisted, and requests for more time to consider the Respondent's correspondence."
27. The Claimant made the following submissions at the OPH:
- 27.1 Explanation for delay: The response is nearly a year after the claim was presented and this is an unreasonable and unacceptable delay given that the Respondent has had numerous documents sent to them by the Tribunal. The Respondent failed to engage with Acas prior to these proceedings. The address used is the same as the address stated on formal correspondence he has received from the Respondent. There is no reason why correspondence sent to that address was only received for the first time in December 2021.
- 27.2 Merits of the claim/defence: He provided further information on 21 January 2022, to include a breakdown of dates and amounts. However, He accepts he has not yet provided a full response to the request for further and better particulars and needs further time.
28. Having listened to both parties I briefly adjourned to make my decision in light of the Rules and the guidance in **Kwik Save**. Having done so, I allowed the Respondent's application to extend time for submission of the response and advised the parties of this verbally and gave reasons:
- 28.1 Explanation for delay: The response is considerably out of time and I am mindful that the more serious the delay the more important it is that the employer provide a satisfactory and honest explanation. In light of the fact the Respondent is an acute hospital and the relevant time fell within the Covid 19 pandemic, I accept that the Respondent did not (regrettably) receive notification of the claim (or other correspondence) until December 2021. As Mr. Craig points out, as soon as the Respondent was aware of these proceedings it acted quickly by instructing

solicitors who swiftly submitted this application together with a response and the request for further particulars. I am satisfied that this was not a case where the Respondent was deliberately failing to take action and ignoring correspondence.

28.2 Merits of the claim/defence: The claim as pleaded is inadequate in terms of pleaded facts and whilst the Claimant may have provided some of the information he has not complied with EJ Tynan's order and he acknowledges that he needs to provide further information. Until the Claimant has provided all the information required, it is not possible to assess the merits of his claim or even determine what he is claiming and why. I must therefore give the Respondent the benefit of the doubt and conclude that, as things stand, the defence has some merit.

28.3 I agree with Mr. Craig that the balance of prejudice is against the Respondent if I refuse this application. Whilst the delay is regrettable, it was the Claimant who applied for the OPH on 5 January to be postponed. I cannot identify any real prejudice to the Claimant although I fully understand his frustration.

EJ Mason
11 May 2022

Judgment sent to the parties on:

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For the Tribunal Office:

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