EMPLOYMENT TRIBUNALS

Claimant: Mrs Goodarzidavan

Respondent: Duncan Lewis

Heard at: Watford via CVP

On: 11 May 2022

Before: Judge Bartlett

Representation
Claimant: Mr Clarke
Respondent: Mr D Head

JUDGMENT

1. The respondent's application for an extension of time in which to submit its ET3 has been granted.

2. The respondent's ET3 dated 1 February 2022 is accepted as submitted within the period of extended time.

3. The respondent is permitted to take part in these proceedings.

REASONS

Background

4. This preliminary hearing was called to decide **whether or not to grant the respondent's application for an extension of time to present a response.**

5. The chronology of key events is as follows:

   5.1. the claimant lodged her ET1 with the Watford Employment Tribunal on 14

April 2021;

5.2. the Employment Tribunal serves the ET1 on the respondent's Harrow office on 22 June 2021;

5.3. the Employment Tribunal sends a further ET1 to the respondent's office in the City of London on 22 September 2021;

5.4. the respondent asserts they discovered the ET1 on 31 January 2022;

5.5. the respondent telephoned the Employment Tribunal on 31 January 2022;

5.6. the respondent made an application to extend time to file an ET3 accompanied by a draft ET3 on 1 February 2022.

6. The respondent's application to extend time to file and serve an ET3 was received by the Employment Tribunal on 1 February 2022. It is a three page document which includes the following:

6.1. from 13 April 2021 the respondent moved out of their Harrow offices to new offices at Sackville House, London, EC3M 6BL. The day the ET1 was received by the Employment Tribunal was the day after the respondent's registered office changed from Harrow to the city address;

6.2. Mr Jason Bruce and Mr David Head carried out searches for the ET1. Mr Jason Bruce had located the Employment Tribunal letter dated 22 June 2021 and Mr David Head located a copy in his inbox dated 22 September 2021. He stated that he had not seen this email until 1 February 2022. He had carried out a search November 2021 for Employment Tribunal documents after becoming aware of a missed ET1 in a different matter but did not locate this one. He accepted that the respondent had received the document in his inbox and that he did not read it;

6.3. reference was made to rule 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Employment Tribunal Rules);

6.4. it was asserted that a public judgement against them for constructive dismissal and/or disability discrimination would severely damage their reputation and that because no orders had been made there was little or no prejudice to the claimant.

7. The claimant did not respond to the respondent's application.

8. On 25 March 2022 the Employment Tribunal issued notice of this Preliminary Hearing to decide the respondent's application and also issued directions largely concerning the claimant providing information about her alleged disability. No orders, directions or hearings were issued by the Employment Tribunal before that date.

9. In very brief summary, the claimant's claims arise out of her employment as a solicitor with the respondent and raises issues of constructive dismissal and disability discrimination.

10. The respondent's response agrees a number of factual matters and disputes others. The respondent disputes all the claims made against it.

The hearing

11. The hearing took place via CVP. At the start there was a difficulty with Mr Clarke's sound but this was resolved and the hearing proceeded without any difficulties with connection or communication.

12. Mr David Head appeared as a witness where he adopted his witness statement and was asked a number of questions by Mr Clark and me. His evidence has been set out at the relevant parts of this decision and reasons.

The law

13. Rule 2 of the Employment Tribunal Rules set out the following:

"Overriding objective

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a)ensuring that the parties are on an equal footing;

(b)dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c)avoiding unnecessary formality and seeking flexibility in the proceedings;

(d)avoiding delay, so far as compatible with proper consideration of the issues; and

(e)saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

14. Rule 20 of the Employment Tribunal rule sets out the following

"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."

15. Both parties agreed on the case law which is set out in Kwik Save Stores Ltd v Swain and Others [1997] ICR 49 EAT, Grant v Asda [2017[ICR D17 and Thornton v Jones UKEAT/0068/11/SM.

16. In Grant v Asda [2017[ICR D17 Mrs Justice Simler DBE set out:

"17. Again, unlike its predecessor, Rule 20 permits an application for an extension of time after the time limit has expired. Rule 20 is otherwise silent as to how the discretion to extend time for presenting an ET3 is to be exercised. Guidance on the approach to be adopted by tribunals in exercising their discretion was given in **Kwik Save Stores Ltd v Swain** [1997] ICR 49 EAT, a case concerning a respondent's application for an extension of time under the Employment Tribunal Rules 1993. Mummery J gave guidance at pages 54 to 55:

> **"*The discretionary factors***
>
> **The explanation for the delay which has necessitated the application for an extension is always an important factor in the exercise of the discretion. An applicant for an extension of time should explain why he has not complied with the time limits. The tribunal is entitled to take into account the nature of the explanation and to form a view about it. The tribunal may form the view that it is a case of procedural abuse, questionable tactics, even, in some cases, intentional default. In other cases it may form the view that the delay is the result of a genuine misunderstanding or an accidental or understandable oversight. In each case it is for the tribunal to decide what weight to give to this factor in the exercise of the discretion. In general, the more serious the delay, the more important it is for an applicant for an extension of time to provide a satisfactory explanation which is full, as well as honest.**

In some cases, the explanation, or lack of it, may be a decisive factor in the exercise of the discretion, but it is important to note that it is not the only factor to be considered. 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. An important part of exercising this discretion is to ask these questions: what prejudice will the applicant for an extension of time suffer if the extension is refused? What prejudice will the other party suffer is the extension is granted? If the likely prejudice to the applicant for an extension outweighs the likely prejudice to the other party, then that is a factor in favour in granting the extension of time, but it is not always decisive. There may be countervailing factors. It is this process of judgment that often renders the exercise of a discretion more difficult than the process of finding facts in dispute and applying them to a rule of law not tempered by discretion.

It is well established that another factor to be taken into account in deciding whether to grant an extension of time is what may be called the merits factor identified by Sir Thomas Bingham MR in *Costellow v Somerset County Council* [1993] 1 WLR 256, 263:

> **"a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate."**

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 industrial tribunal will only hear one side of the case. It will decide it without hearing the other side. The result may be that an applicant wins a case and obtains remedies to which he would not be 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 a reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner. That will involve some consideration of the merits of his case." (Original emphasis)**

18. The approach set out by Mummery J was subsequently adopted in relation to the 2004 Rules in **Pendragon plc (t/a CD Bramall Bradford) v Copus** [2005] ICR 1671 EAT. In our judgment, it applies with equal force to the **2013 Rules**. So, in exercising this discretion, tribunals must take account of all relevant factors, including the explanation or lack of explanation for the delay in presenting a response to the claim, the merits of the respondent's defence, the balance of prejudice each party would suffer should an extension be granted or refused, and must then reach a conclusion that is objectively justified on the grounds of reason and justice and, we add, that is consistent with the overriding objective set out in Rule 2 of the ET Rules."

17. At para 18 of Thornton Jones UKEAT/0068/11/SM it is stated:

"The correct approach in a case of this kind was prescribed by Burton J in Pendragon Plc v Copus [2005] ICR 1671, which makes it clear that a Tribunal should apply the principles set out in a slightly different context in Kwik Save Stores v Swain [1997] ICR 49. We will not set out the guidance in Kwik Save in extenso. It can be sufficiently summarised for present purposes as follows. The Tribunal is

entitled to exercise a broad general discretion in the interests of justice: this is not, therefore, a case where restrictive rules are applied, such as are applied in this Tribunal in extending time for the lodging of a Notice of Appeal. The Respondent's explanation for his failure to lodge a response in time will always be relevant. If the failure represents some kind of procedural abuse or intentional default, that will obviously weigh heavily against the grant of an extension. Conversely, to use Mummery J's words at page 55, if the delay:

"[…] is the result of a genuine misunderstanding or an accidental or understandable oversight, the Tribunal may be much more willing to allow the late lodging of a response."

Submissions

18. Mr Head relied on written and oral submissions which can briefly be summarised as follows:

    18.1. The respondent accepts that the reasons for the delay of 6.5 months in filing the response are due to both procedural errors and human errors. No excuses are made and the ET1s should have been picked up and dealt with by the respondent. However, these were not intentional errors or abuses rather than mistakes or incompetence;

    18.2. The respondent's has good prospects of defending the claim;

    18.3. The delays caused by the respondent have had limited impact given that there was no correspondence, orders or notices of hearing from the Tribunal until after the respondent submitted its application for an extension of time;

    18.4. The delays do not prevent a fair hearing taking place;

    18.5. Findings against the respondent in this claim are likely to have a damaging effect on it's reputation which is particularly the case because the claim includes claims of discrimination.

19. Mr Clarke made oral submissions which can briefly be summarised as follows:

    19.1. This case was caused by individual delay and system errors, The

respondent relies on moving office as a reason for some of the errors but this is inadequate as the respondent should have had proper procedures in place to deal with such matters;

19.2. The respondent's systems were woefully inadequate and whilst this is not a situation of intentional default or procedural abuse it is beyond understandable oversight;

19.3. The respondent missed the ET1 on multiple occasions and there is no real explanation for these errors;

19.4. The claimant does not ask for default judgement and as such the respondent may be able to participate in the hearing by making submissions on liability and remedy and may be the law.

19.5. The respondent has accepted some of the facts which form the basis of the claim which makes their defence incoherent;

19.6. The respondent's failures have caused delays because there would at least have been a case management on this case by now and potentially a final hearing;

19.7. The carelessness with which the respondent has treated the ET1 mirrors the carelessness with which the respondent treated the claimant. This has led to deterioration in her mental health and has had a greater impact on her than it would on other claimants;

19.8. If the extension of time is granted this would expose a procedural lacuna as there would be no procedural remedy for the respondent's failures. The claimant is represented by a union and therefore has incurred no indirect costs. The only potential order could be a preparation of time order but that would be made in favour of her representative and provide no direct benefit to the claimant.

Decision

20. The following is not disputed:

20.1. The respondent delayed in submitting its response from 22 July 2021 until 2 February 2022 which is a delay of 6.5 months;

20.2. The respondent has accepted both procedural errors and personal errors. These can be summarized brief as follows:

20.2.1. A failure in dealing with correspondence relating to the move of the respondent's head office from Harrow to Sackville House in the City of London;

20.2.2. Failures in the respondent's system so that scanned Tribunal correspondence/service was not sent to a board member and was only sent to one individual, Mr Head;

20.2.3. Failures by Mr Head to read the emails that contained the ET1 which were sent to him via the Indigo electronic post and case management system. This includes a failure to read an email from around 21 June 2021 and 22 September 2021 and a failure to locate either or both of these emails when Mr Head carried out a search of his inbox around November 2021 when it came to his attention that an ET1 in a different case had not been replied to by the respondent.

21. I must consider the factors set out in the case law and I make the following findings:

21.1. The respondent's explanation. The respondent's evidence discloses that its procedures were not set up to prevent errors like those in this case arising and that Mr Head himself made human errors by not reading the emails sent to him which were compounded by the procedure of the Employment Tribunal documents only being sent to Mr Head. I do not consider these errors are procedural abuse or intentional default. Mr Clarke agrees but submits that they are beyond accidental or understandable oversight. I accept that the respondent did not have in place adequate procedures to deal with incoming documents from the Employment Tribunal around the time of its move to the City of London. I also find that the respondent did not have procedures that ensured a board member of the respondent was sent documents served on the respondent by the Employment Tribunal. This latter failure put an onerous burden on Mr Head. Mr Head admitted that he had not read at least one and he presumed another email which contains the Tribunal documents. Mr Head's evidence was that daily he received a large number of emails to which he was

tenuously related. Given their very large number of emails that many professionals receive in the course of their working day, I consider that it is understandable that Mr Head did not read the email or emails in question. As is the case when things go wrong, it is often the result of a series of errors and that is what has happened in this case. Just because there are a number of errors, I do not consider that that makes this case beyond something that is fundamentally a genuine error;

21.2. The Merits of the Defence. Both the submissions of Mr Clarke and Mr Head went through the ET1 and ET3 in relation to arguments about the merits of the defence. Having read the ET1 and the ET3 it is fair to say that there are disagreements about the interpretation of events and actions that occurred. Fundamentally there is a real dispute between the parties about the circumstances of the claimant's employment and her leaving her employment with the respondent. This involves claims relating to constructive unfair dismissal and discrimination. The respondent's defence is arguable. This is not a case where it has no reasonable prospects of success and neither is it a case where the claimant's claim has no reasonable prospects of success such as being obviously time-barred or there being a jurisdictional point (the latter features in some of the authorities).

21.3. The balance of prejudice.

21.3.1. The obvious prejudice to the claimant is that if the respondent's application is permitted she will have to establish her claim at a full tribunal hearing which in itself is likely to increase the time taken to judgement and the inherent pressures arising from the claimant pursuing Employment Tribunal proceedings.

21.3.2. Mr Clarke submitted that the claimant would suffer prejudice in that she would be left without a procedural remedy for the respondent's failures. This argument fails to take into account rule 2 of the Employment Tribunal Rules and that the rules of the Employment Tribunal including its costs rules, which do not require the loser to pay the winners costs, are not focused on penalising conduct. Whilst I understand the claimant's annoyance or distress if the respondent's

application is granted ,the case law is clear about the factors that I must consider and this is not one of them. Rule 20 and Rule 2 of the Employment Tribunal Rules are the rules which deal with this circumstance.

21.3.3. It is difficult to quantify the delay caused by the respondent's actions in this case. This is because there were no actions or correspondence from the Employment Tribunal until after the respondent's application on 1 February 2022. It is fair to say that the Employment Tribunal has experienced delays in dealing with matters before it in 2021 partly because of an increased caseload arising from Covid-19. I am not satisfied that the respondent's delay has caused a significant delay in this case progressing. I accept that it is quite possible that this preliminary hearing would have a been a case management hearing if this application was not a live issue and therefore any delays are most likely to be a matter of months. I consider that it is most unlikely that a final hearing would have taken place in this case without the respondent's delay. Therefore the respondent's delay has caused some prejudice to the claimant by the delay in progression of the case but this delay is limited;

21.3.4. the prejudice to the respondent is that the respondent faces the probable outcome that it would have findings made against it that it had discriminated and dismissed the claimant. This is of itself a serious prejudice. The respondent has made much about how being a good employer is important to it and that it values awards in this area that it has achieved. I partly agree with Mr Clarke that the respondent has claimed a greater value to these points then I am prepared to give them but the undoubted serious prejudice remains;

21.3.5. Mr Clarke submitted that the prejudice to the respondent would be limited because the respondent would be able to participate in the final hearing by making submissions on liability, remedy and maybe on the law. It may be the case that the respondent would be able to participate in the final hearing on that basis but this provides only very slight mitigation to the serious prejudice I have identified

above.

22. Taking all of the above factors into account, I conclude that the balance of prejudice favours the respondent.

23. In summary I find that:

23.1.1. the respondent had systematic and human errors which caused the delay in submitting the ET3 the delay of 6.5 months which is very substantial;

23.1.2. the respondent's errors were not procedural abuse or intentional default :they were accidental and I consider that they were understandable in all the circumstances;

23.1.3. as soon as the respondent became aware of its errors it submitted a fulsome ET3 with an application for extension of time. These documents were submitted the day after they became aware of the situation;

23.1.4. the respondent's conduct has caused a delay of some months in the progression of the case;

23.1.5. the respondent's defence has some merit in that it is an arguable defence. The claimant's claims are arguable;

23.1.6. the respondent would suffer substantial prejudice if the application is refused which outweighs the prejudice the claimant will suffer if the application is allowed;

23.2. For all these reasons I have decided to allow the respondent's application for an extension of time to submit the ET3 and the ET3 is therefore accepted.

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Employment Judge Bartlett

Date 16 May 2022

Case No: 3305834/2021

JUDGMENT SENT TO THE PARTIES ON

4/6/2022

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FOR THE TRIBUNAL OFFICE

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.