EMPLOYMENT TRIBUNALS

Claimant: **Miss S Sacheva**

Respondents: **(1) All Techmart UK Ltd**
(2) Mr A Uddin

Heard at: **East London Hearing Centre (in public by video)**

On: **12 July 2022**

Before: **Employment Judge Moor**

Representation
Claimant: Mr Abel, solicitor
Respondent: Mr Watson, counsel

RESERVED JUDGMENT

The application to extend time to present the response is refused.

The default judgment and remedy judgment shall stand.

REASONS

1. This was a preliminary hearing to decide whether time should be extended to allow the Respondents to present their response.

Facts

2. Having heard the evidence of the Second Respondent and Mrs Aktar, and having read the documents referred to me at this hearing and the prior remedy hearing, I make the following findings of fact.

3. The Claimant was engaged by the Second Respondent to work in his business, the First Respondent, on 12 October 2020. She left that work in March 2021.

4. The First Respondent was Mr Uddin's business. It was a subcontractor for an Indian IT business. The First Respondent sold warranties to clients who paid by cheque.

5. The Claimant was engaged to work for the business as an administrator and because Mr Uddin needed help to produce a report that was designed to raise funds. While Mr Uddin has been inconsistent about the nature of the engagement in his draft Response and witness statement, I find he engaged her on a probationary period of 3 months, as he said in his statement under oath.

6. During this period Mr Uddin worked from an office on a pc or a laptop and from time to time at home. In his work he had to deal with banking but he engaged an accountant to do the company accounts.

7. While I have not seen all the documentation in the claim the contemporary texts produced by the Claimant at the Remedy Hearing show evidence of the two main comments made by Mr Uddin that she says were unwanted:

   Mr Uddin: We will go for dinner tomorrow.

   Claimant: was it your bday tomorrow

   Mr Uddin: Yes Love

   Claimant: Mm, we can have coffee in the morning

   *Mr Uddin: It's on me because you are beautiful Miss u Y not dinner I have never presented a lady with flowers hence awkwardness I have sent flowers to people but not in person You are the first lady I vanna hummpa lot Love When are we going to f****

   Claimant: this is really inappropriate Can you please make sure that my payment is in tomorrow

   Mr Uddin: you get paid on Thursday Sorry about language

   Claimant: After you just sent me I am not comfortable to come to work

   Mr Uddin: are you why

   Cliamant: Are you serious, I can't believe you said that!

   Mr Uddin: No Not serious Forgive me

   Claimant: Do not ever dare to talk to me like that, and from now on do not text me out of my working ours if is not work related!

   Mr Uddin: Okay Sorry [repeated 4 times] *I am extremely sorry*

   Claimant: Let me be very clear, what you have said to me was horrible, and I want to keep my job, but if something like this happened again, I have to take a further action!

Mr Uddin: Yes I want you to work for me too Your very talented

In later texts Mr Uddin says*: My friend has a place in Essex He said I can go and visit over night.*

Hello Sasha One evening

Claimant: Good for you

Mr Uddin: Us

Claimant: Are you sick What's wrong with you

Mr Uddin: No I am not sick ….SASHA what do you mean Hello

Claimant: Do u think this is appropriate?

Mr Uddin: OK let's keep it clean from now on ok No personal stuff

Claimant: No, you crossed all possible lines [she sends a screen shot of earlier comment] *Is this acceptable*

Mr Uddin: I said sorry

Claimant: I can do nothing with I am sorry At this point this is pass all limits, and only one thing I can think is to report it This is sexual harassment and it makes me feel very uncomfortable.

Mr Uddin: it's up to you what you want to do

The texts then continue with the Claimant complaining and telling Mr Uddin to stop harassing her.

8. Shortly after this last exchange the Claimant left her job.

9. In the draft response and/or his statement for this hearing Mr Uddin contends that on her first day of work the Claimant suggested they have sex. He alleges he replied, '*How dare you say that to me'*. A few days later on 15 October he alleges she stated on a visit to the Council '*What's it going to take for you to sleep with me?*' He alleges he found this distressing and told her it amounted to sexual harassment. He alleges the Claimant talked 'dirty' in the office and that sort of sexually inappropriate behaviour continued throughout her engagement. He alleges the claim is a money-making enterprise by the Claimant. He contends the '*I vanna humpalot'* comment was a reference to a character in the film *Austin Powers and the Spy Who Shagged Me* and effectively part of a joke because the Claimant liked Donald Trump whose wife (he says) was called Ivana. He regrets sending the second message but was in response to the Claimant's previous suggestions of sex. He says he was married and did not mean the remarks seriously and did not want to have sex with the Claimant. He argues none of the comments or behaviour could have been harassing in that context because the Claimant had instigated the discussion about sex and made repeated sexually inappropriate comments. He contends on her last day she tried to kiss him.

10. In answering questions today Mr Uddin gave a number of differing explanations as to why he did not dismiss the Claimant after her alleged sexual remarks so early in the engagement that he says he found harassing at the time. First, that she had no contract so how could he terminate her employment. When it was pointed out to him that he himself had stated he had hired her on a 3 month probationary period, he stated needed her help and wanted to give her a chance. He did also in his evidence acknowledge that he could have told her to go away but said she would not have done so.

11. As part of this hearing, I do not decide the truth of the allegations or the draft response. I do consider however the passages of texts I have been provided with are full passages rather than edited. I accept, however, they may not be all the texts that passed between the parties. I do also consider that Mr Uddin's evidence that the Claimant made sexual advances towards him that he found harassing while she was on probation seems implausible both because he could have just stopped the probation there and then and stopped such harassment; and also importantly because the contemporary documents - the lengthy to and fro texts - I have quoted above do not suggest that the Claimant had been herself making any sexual advance or using inappropriate sexual language or talking dirty: to the contrary, she immediately objected to his advances, and avoided any comment on his remarks that she was beautiful etc. Nor did he say words to the effect – I don't understand your objections now, it was you who started this. The comments he made that he had sent flowers and that she was beautiful suggest clearly he was making advances and those comments are completely inconsistent with his defence that he felt harassed by her alleged earlier advances.

12. As part of her claim, the Claimant also raised matters not capable of being recorded: that Mr Uddin stared at her so as to make her uncomfortable and was seen hanging outside her apartment. These matters are disputed by Mr Uddin.

13. ACAS early conciliation started on 1 April 2021 and ended on 13 May 2021. Mr Uddin remembers speaking to the ACAS conciliator and understanding that the Claimant might bring a claim. He contends the ACAS conciliator advised him that the Claimant would go for a default judgment but then it could be reviewed. In my judgment, Mr Uddin is mistaken about this. No ACAS conciliator would anticipate whether a default judgement would be made. This is because the early conciliation period happens at a stage when it is not necessarily clear that a claim will be made at all. At around the time of speaking to ACAS, Mr Uddin spoke to Bindman's solicitors who advised him to come back if anything further happened.

14. The claimant was presented a claim on 11 June 2021 claiming that she had been unlawfully harassed by Mr Uddin because of conduct relating to sex and conduct of a sexual nature. She claimed this was direct sex discrimination and also claimed notice pay for having to resign because of the conduct.

15. Mr Uddin remembers that he received a copy of the Notice of the Claim in the post at his home address. It was sent on 12 July 2021. However, at this time, from about the end of June until 21 July 2021 he was experiencing a psychotic episode. He was during this period not able to deal with the claim.

16. He has paranoid schizophrenia. His condition had been well-managed by medication until this point. He had only two admissions in 1983 and 2012. On 30 June 2021 Mrs Aktar, Mr Uddin's wife, called the crisis line as he had become more delusional. They attended the crisis house for assessment. It was recommended he was sectioned but Mrs Aktar wanted to manage him at home. He was therefore put under the care of the Home Treatment Team. On 2 July 2021 he saw Dr Bhattacharya, consultant psychiatrist, and was very unwell being delusional and including likely having auditory hallucinations. His medication was changed to add Haloperidol. The Home Treatment Team supervised medication with his wife during this period. The discharge sheet records that '*There was gradual improvement of his mental state and this was corroborated by his wife. … Discharge was planned and agreed with him and he was stable at discharge and denied any risks*.'

17. Dr Raham provided his solicitors with a letter dated 15 May 2022. She stated '*Mr Uddin appeared stable in his mental health following his discharge from HTT until his trip to Bangladesh. Due to the chronic nature of his condition, there is unlikely to have [been] full remission*.' She could not comment on his ability to conduct his affairs.

18. Mr Uddin states that the new medication made him feel drowsy during the day. He denied he slept during the day when I asked him expressly. Mrs Aktar's evidence is that he slept all day since the medication change (apart from a point 2/3 months after the episode when she stopped the medication). What do I decide about this difference in their evidence? It seems to me the truth is most likely to lie somewhere in the middle: Mr Uddin does not sleep all day every day, but does sleep more often during the day and his medication does make him feel drowsy. Mrs Aktar, as his carer, is doubtless concerned for his welfare and she observes him sleeping, but this is not the same as every day or all the time. I find this to be an exaggeration. I do take into account Mr Uddin's experience since becoming mentally stable in July 2021 and his description of drowsy is credible.

19. On the basis of the medical evidence and these findings, I find therefore that Mr Uddin was capable of seeking advice and instructing others to act for him shortly after the end of the episode of crisis. While he was drowsy and slept at times, that did not mean he was unable to function to some extent. If not, medical professionals are likely to have been further involved. Further, he was able to act quickly once the Rule 21 Judgment arrived and there is no suggestion that in December Mr Uddin had made a substantially greater recovery than in the months before.

20. Mrs Aktar suggests Mr Uddin is forgetful now. But my finding is that Mr Uddin did not forget about the claim during the period after his crisis to 31 December 2021. I make this finding because he told me clearly that he took the claim into account as part of the reason he decided to stop working after his crisis. The other reason was his health. I find his evidence about what ACAS had

advised him to be self-serving: I find it likely during this period that Mr Uddin simply decided not to deal with the claim rather than forgetting about it. Mr Uddin knew how to contact solicitors. He also had an accountant. In my judgment he chose not to refer the matter to them, until he was forced to do so by the Rule 21 Judgment.

21. The Rule 21 Judgment was sent to the parties on 21 December 2021. Mr Uddin likely received it on 22-23 December 2021. He contacted Bindmans who suggested he look locally for a solicitor because the person he had originally spoken to had moved. He then found Brit solicitors and instructed them on 31 December 2021 before he left for Bangladesh.

22. Mr Uddin and his wife went to Bangladesh from 31 December 2021 until about 28 January 2022. They had to isolate for 14 days or so before the flight but that did not stop Mr Uddin from making telephone and email enquiries of solicitors: that much is obvious from his contact with Brit solicitors on 31 December 2021.

23. It took Brit solicitors until 11 January 2022 to make the application to extend time. There is no reason for this extra delay after the working year started on 4 January 2022. They relied in the main on the need for the Claimant to have extensive time to recover from his crisis in July 2021.

Legal Principles

24. Rule 20 allows for applications for extensions of time for presenting a response. They must be presented in writing, setting out the reason why the extension is sought. Where time has expired, the application must be accompanied by a draft of the response.

25. Rule 20(4) provides that if the decision is to allow an extension, any judgment issued under Rule 21 shall be set aside.

26. The parties agree that I must apply the Overriding Objective to act fairly in considering this application and must consider the factors set out in the leading case Kwik Save Stores Ltd v Swain and others [1997] ICR 49: the reason for the delay; the merits; the balance of hardship. The case reminds me that I must decide what weight to give each factor.

27. As to the reasons for delay, in Kwik Save Mummery J (as he then was) reaffirmed the importance of meeting time limits, laid down as a matter of law. This is particularly so in employment tribunals, which were established to provide a quick, cheap and effective means of resolving employment disputes. Failure to comply with the rules causes inconvenience, results in delay and increased costs. It can also indicate an unacceptable attitude to the system. Thus an explanation for the delay is an important factor. *'The Tribunal is entitled to take into account the nature of the explanation and to form a view about it. … In general, the more serious the delay, the more important it is for an applicant to provide a satisfactory explanation which is full as well as honest.'*

28. As to the balance of hardship, Mummery J explained: *'An important part of exercising this discretion is to ask these questions: what prejudice will the application for an extension of time suffer if the extension is refused? What prejudice will the other party suffer if the extension is granted? If the likely prejudice to the applicant outweighs the likely prejudice to the other party, then that is a factor in favour of 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.'*

29. Finally the merits is a factor. Mummery J explained: '*If a defence is shown to have some merit in it, justice will often favour the granting of an extension fo time, since otherwise there will never be a full hearing of the claim on the merits… the 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 of time 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…'* The court must form a '*provisional view about the possible outcome of the case'*.

30. The Alpine Bulk case referred to in Kwik Save concerned a defendant that had deliberately decided not to defend the claim. There the court had to ask whether they had 'a real prospect of success in defending the case'.

Application of Facts and Law to Issue

Explanation for the delay

31. I have not found the explanation for the delay to be full for the following reasons.

32. I fully accept and understand that Mr Uddin has paranoid schizophrenia, a chronic (meaning long-term) condition. It was well-managed until July 2021. I also understand and accept that during July 2021 he could not have dealt with the claim because he was experiencing a psychotic episode and was under the care of the crisis team at home, otherwise he would have been sectioned.

33. Nevertheless the medical evidence is that Mr Uddin was stable after discharge. While I have accepted the new medication made him drowsy during the day and on occasion that he slept during the day, he did not do so all day every day. There is no evidence that his functioning suddenly improved in December when he was able to instruct solicitors.

34. I have found that that Mr Uddin did not forget about the claim after July: it was a factor in his mind when he decided not to continue running his business after his crisis.

35. While therefore there is explanation for the initial delay, there is not a satisfactory explanation for the full delay. It is significant – 5 months - and Mr Uddin had not forgotten about the claim.

36. However the lack of a fully satisfactory explanation is not the only factor and I must also consider the merits and the balance of hardship.

Merits

37. I am encouraged not to undertake a mini-trial. On the other hand, the merits are a factor and I should consider whether I can reach a provisional view of the prospects of success of the response.

38. I am afraid that I do not consider the defence has real prospects of success. This is a case where the contemporaneous texts I have seen will make it difficult for the Respondents' defence to succeed. The texts themselves are evidence of the most significant allegations (Mr Uddin stating he wanted to f*** the claimant and him asking her to spend the night with him in Essex). They are also evidence of how she, at the time, responded – by telling him to stop and with disgust. These texts are full interactions and not selective. I accept there may have been other interactions by text but this is not a case in which only partial textual evidence of the key interactions has been disclosed. In relation to those interactions, it is clear from the evidence that it is Mr Uddin who sexually propositioned the Claimant, not the other way around. It is also clear that there is no sense in which there is a shared sexual dialogue or jokey sexual talk: the Claimant immediately objected to his language and called it harassment.

39. While of course I cannot anticipate the oral evidence fully, in my view, forensically it will be very difficult for Mr Uddin to persuade a Tribunal that, given the Claimant's reactions, before these texts there had been shared sexual talk or that the other behaviour she accuses him of did not occur.

40. Furthermore it is surprising that, if the Claimant had sexually propositioned Mr Uddin in the way he suggests on the first few days of her appointment and that if he felt harassed by her conduct as he alleges, he did not simply terminate her probationary period immediately. His explanations for not doing so orally varied and were not credible: he engaged her, he could disengage her. In the light of this it is unlikely he will persuade a Tribunal that it was the Claimant who made advances.

41. Mr Watson did not raise the issue of 'status' in his submissions, with good reason. Mr Uddin has been inconsistent on whether he says the Claimant was employed or an independent contractor. In his evidence under oath he says he hired her on a probationary period: that looks very like employment. There is no doubt that she was engaged to do personal work. On this issue of status, therefore, I also consider any argument that she was not an employee does not have real prospects of success, particularly under the Equality Act where 'employee' is akin to 'worker': someone engaged on a contract to do work personally.

Balance of Prejudice

42. What will the Claimant lose if the Respondents' application is successful? I tend to agree with Mr Watson that she is left in the position most litigants are in: that she must pursue her claim to a fully defended hearing.

43. Will the Claimant suffer any prejudice? I agree with Mr Watson that there is no specific prejudice here. There is no submission that the passage of time has affected memory or the existence of documents.

44. But the Claimant's solicitors have been put to extra cost if the application is successful. It does not seem to me I can take these into account: costs do not normally follow the event in the Tribunal, though there is some prospect of the Claimant making an application for the costs of dealing with this application (as opposed to the future cost of the trail) under Rule 76.

45. Plainly, however, the Claimant suffers the general prejudice of the delay in her claim being resolved. Litigation is stressful for all concerned and delay exacerbates it.

46. What about the Respondents? They obviously suffer the prejudice of not being able to pursue fully their defence, but I have already decided that this is a limited hardship given that the defence does not have real prospects of success.

Assessment of factors overall

47. How then to weigh the factors?

48. First the Respondents have not provided a sufficient explanation for the full delay; while initially the Second Respondent could not deal with the claim because of his crisis, later, his mental health having stabilised he had not forgotten about the claim; he delayed responding until receiving the default judgment, but was then able to act quickly to obtain advice. While he was drowsy from medication this did not stop him from doing so and he was not asleep all day every day in the relevant period. The delay is lengthy just over 5 months (from 9 August 2021, the date the response had to be presented, to 11 January 2022 when his solicitors wrote to the Tribunal).

49. Second, the Claimant suffers little prejudice in the application being allowed, though I have taken into account the delay in resolution of her claim.

50. Third, the Respondents suffer the prejudice in not being able to present their defence but this is not so weighty here, because they do not have a real prospect of successfully defending the claims.

51. I am conscious that generally justice expects that a claim and a defence should be fully litigated, despite procedural default. I have therefore looked at the relevant factors carefully. Overall I consider the weight of those against the application is greater than the weight of those in favour. The lengthy delay for which there is not a sufficient explanation and the limited prospects of success in the defence in my judgment mean the application should not be allowed. I do not consider either factor (delay and merits) decisive on its own

but taken together they outweigh the fact that the Claimant would suffer only limited hardship in the application being allowed.

Employment Judge Moor
Dated: 12 July 2022