



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Josipovic

Respondent: Haberdasher's Aske's Temple Grove Free School

HELD AT: London South ET by Cloud Video Platform **ON:** 23 June 2022

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: Ms Canetti, counsel
Respondent: Mr Burgess, consultant

JUDGMENT

The respondent's application for an extension of time to submit responses to the claimant's three claims succeeds.

The Tribunal directs that all three claims should be consolidated and heard together.

The claimant's application that the Tribunal enter default judgment in the claimant's favour in all three claims fails and is hereby dismissed.

REASONS

1. The claimant brings the following claims, which were filed with the assistance of Mr Kesar, a solicitor and Ms Canetti of counsel:
 - a. In claim 2300754/2021 (hereafter, "claim 1"), lodged at the Tribunal on 22 February 2021, the boxes in the ET1 form for age discrimination, disability discrimination, race discrimination and notice pay were ticked. The narrative box in section 8.1 contained the following information: that the claimant was alleging "*Bullying and harassment related to race, age and disability, Victimisation, Direct associative disability discrimination, Automatically unfair dismissal/protected disclosure detriment, Unlawful*

deduction from wages, Whistleblowing detriment and dismissal, Breach of contract, Health and safety detriment.” Box 8.2 contained the following information:

“The disability relied upon in this claim is my husband’s advanced stage cancer.” The claimant also filed a separate document “Particulars of Claim” with claim 1, which were drafted by counsel Ms Canetti, and which set out the particulars and the narrative in some detail, and run to 96 paragraphs.

- b. In claim 2300869/2021 (hereafter, “claim 2”), filed at the Tribunal on 2 March 2021, the claimant ticked the boxes in the ET1 form for “unfair dismissal” and “other payments”. The narrative in box 8.2 stated “*associative disability*”. There was a separate particulars of claim which was also drafted by counsel and ran to 53 paragraphs. Much of the factual and legal particulars of claim 1 are repeated in the particulars for claim 2, save that (contrary to the boxes ticked in the ET1) the new pleadings in the particulars for claim 2 relate to indirect discrimination on the grounds of age and indirect associative disability discrimination.
- c. In claim 2300900/2021 (hereafter “claim 3”), filed at the Tribunal on 5 March 2021, the boxes in 8.1 of the ET1 form list the claims as “unfair dismissal, age discrimination, disability discrimination, notice pay, holiday pay and other payments” plus the narrative in section 8.1 states “*associative disability [sic] and breach of contract*”. Claim 3 was lodged with identical particulars to those filed with claim 2. Box 15 “Additional Information” of the ET1 form for claim 3 states the following:

“This claim arises from the same circumstances and facts stated in the claims 232015884300 (1st claim) and 232016026800 (2nd claim). Due to a number of clerical errors in the 2nd claim the claimant is respectfully requesting that her claims be consolidated.

We hope that the Tribunal will accept our apology for the clerical errors in the 2nd claim.”

2. During this hearing, Ms Canetti told the Tribunal that Mr Kesar is acting pro bono for the claimant. This is contradicted by the written skeleton argument submitted by Ms Canetti which refers to the claimant funding her own claims. However, I take from these two statements that the claimant is receiving a certain amount of free advice but making with some contribution to additional costs.
3. The respondent is represented by Peninsula Business Services. A number of different consultants from Peninsula have been involved in these proceedings.

4. The Tribunal was provided with statements from Mr Kesar and Ms Amory, the respondent's current business manager for Hatcham Temple Grove Free School, where the claimant worked. Ms Amory was sworn in and answered questions from Ms Canetti and the Tribunal. Mr Kesar's evidence was not disputed by the respondent and so he was not cross-examined.
5. The matter was listed for a hearing with a duration of one hour, which was entirely inadequate to deal with the factual issues and the complexity of the pleadings. The parties agreed to continue past the estimated hearing time and the Tribunal agreed to deliberate after the end of the proceedings and provide a reserved judgment with reasons.

Findings of Fact

6. There was some dispute between the parties, and in particular the witness for the respondent Ms Amory, as to when Peninsula first were instructed to act for the respondent in relation to this litigation. Emails in the bundle of documents submitted by the claimant show the respondent's former business manager, Ms Williams, informing Mr Kesar on 8 March 2021 that Peninsula had been instructed.
7. Ms Amory, who did not work for the respondent's school in question (Hatcham Temple Grove Free School) at the time, was unable to provide direct evidence of what happened at this time. She did not start work at Hatcham Temple Grove as business manager until July 2021. Ms Williams still works for the respondent in a different capacity, but is not the business manager for Hatcham Temple Grove. I note that as Ms Williams is still employed by the respondent, it was within the respondent's control to have Ms Williams give evidence to this hearing, but they have chosen not to do so. It would have been of assistance to the Tribunal to hear from Ms Williams and it is regrettable that she did not attend.
8. It is the respondent's case that claim 1 was served on them by the Tribunal but that Ms Williams "put it in a drawer" and did not notify those coming after her of the existence of the claim. It is the respondent's case that claims 2 and 3 were not served on them by the Tribunal and they have no record of any such claims arriving at the school offices.
9. I do not accept that claims 2 and 3 were not served on them by the Tribunal; there are two letters from the Tribunal to the respondent's address for service both dated 18 March 2021, which serve claims 2 and 3 on the respondent respectively. Claim 1 was sent to the same address and the respondent accepts that they received this (albeit that it was subsequently "put in a drawer" and not discovered for some time). On the balance of probabilities I find that claims 2 and 3 were both properly served on the respondent's address for service by the

Tribunal, although I accept that there is now no record of them at the respondent's offices.

10. On 23 March 2021, Peninsula contacted the Tribunal to inform them that they had "*just been appointed to represent*" the respondent "in the above case", which was claim 1. Mr Kesar wrote to Peninsula by return to inform them of the three claims and their issue dates.
11. Mr Kesar's email signature contains his name, office address and his CJSM email address. This is not the same as the email address at the top of his emails, that he uses to correspond with non-CJSM email addresses. However, his non-CJSM email address does not appear in full in his emails, only his name "Mladen Kesar" is shown.
12. On 8 April 2021, Mr Mukhtar of Peninsula filed an application for an extension of time with the Tribunal for claim 1 only. The application was accompanied by a "holding response" which was a bare denial of all claims in claim 1. Mr Mukhtar copied in the respondent, but used the CJSM address of Mr Kesar, who did not receive it (as it was not sent from a CJSM address).
13. On 22 April, Mr Kesar was informed by the Tribunal that the respondent had applied for an extension of time for claim 1 and had provided an outline response. On 5 May, Mr Mukhtar provided further particulars of response to the Tribunal for claim 1, but copied Mr Kesar in again by his CJSM address and the email again therefore did not reach Mr Kesar.
14. In an email exchange between Mr Kesar and Mr Mukhtar on 14 May 2021, Mr Mukhtar said the respondent was unaware of claims 2 and 3. On 20 May 2021 Mr Kesar wrote to the Tribunal objecting to the application for an extension of time and noted that claims 2 and 3 had not been addressed by the respondent.
15. No further significant action was taken in this matter until 27 October 2021 when the file was referred to a judge. EJ Ferguson wrote to the parties to notify them that a response had been received by the Tribunal in relation to the first claim, but not claims 2 and 3. The following day (28 October 2021), Mr Calvet of Peninsula wrote the Tribunal requesting an extension of time to file a response to claims 2 and 3. He informed the Tribunal that claims 2 and 3 had not been received by the respondent and asked the Tribunal to re-send the papers. No response to this email was ever given by the Tribunal and the papers were not re-sent to the respondent. Mr Kesar send a lengthy and detailed objection to this application on 4 November 2021 but did not supply the respondent with a copy of claims 2 and 3 either. A hearing was listed on 16 March 2022 to consider the applications and the objections, which took place on 23 June 2022.
16. It was the respondent's Ms Amory's evidence, which I accept, was that the school was closed completely from 2 April 2021 until 19 April 2021 for the

Easter holidays and that the majority of the office staff at the school were still working from home until July 2021, as the school office space was limited and did not allow for social distancing. I also accept that, although the claims were sent to the school's address for service by the Tribunal, the respondent has no record of having received them.

The Law

17. Rule 20 of the Employment Tribunal Rules of Procedure 2013 deals with applications for extension of time for presenting a 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.

18. *Kwik Save Stores Ltd v Swain and ors 1997 ICR 49, EAT*, stated 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'. In particular, the EAT held that, when exercising a discretion in respect of the time limit, a judge should always consider the following:

- the employer's explanation as to why an extension of time is required.
- the balance of prejudice.
- the merits of the defence.

Application of the law to the facts found

19. Claims 1, 2 and 3 were all properly served on the respondent at the correct address for service. Claims 2 and 3 were properly served under cover of letters dated 18 March 2021. The respondent's representative was informed by Mr Kesar on 23 March 2021 that three claims had been filed, not just one.

20. There is no record of the respondent having received claims 2 and 3. Mr Kesar's email of 23 March 2021, notifying them of three claims, was ignored by the respondent's representative.

21. The way in which the claimant's claims were presented to the Tribunal was confused and confusing. It took this Tribunal quite some time to determine which claims were being advanced under cover of which ET1, and determining the differences between the pleadings in claim 1 and claims 2 and 3 required

the use of document comparison software, as on first reading it was altogether unclear whether some paragraphs were simply being repeated or whether they had been edited, and how. I accept that the claimant's legal representatives are providing advice pro bono, at least in part. I also accept that discrimination and whistleblowing are complex jurisdictions and that the claimant's claims themselves are complex. However, representatives and parties have a duty to co-operate with each other and the Tribunal and to avoid unnecessary formality in the proceedings, as per Rule 2 of the Tribunal Rules of Procedure 2013.

22. They also have a duty to deal with cases in ways which are proportionate to the complexity of the issues. Claim 2 sought to clarify the existing associative discrimination and age discrimination claims by relabelling facts already pleaded as indirect discrimination (in addition to the discrimination claims already pleaded in claim 1). This is confirmed by the narrative in claim 3 which states (as set out above):

"This claim arises from the same circumstances and facts stated in the claims 232015884300 (1st claim) and 232016026800 (2nd claim). Due to a number of clerical errors in the 2nd claim the claimant is respectfully requesting that her claims be consolidated.

23. It was not helpful to either the Tribunal or the respondent that claim 2 (and therefore claim 3) repeated many of the facts in claim 1 with slightly amended wording and some additional facts. It would have been preferable for the pleadings in claims 2 and 3 to be clearer as to what was being added and what was being repeated. It also did not help matters at all that claim 2 changed the list of jurisdictions in box 8.1, meaning that the particulars of claim 2 contradicted the list of jurisdictions in box 8.1. The service of claim 3 three days later did not entirely clarify matters, in my view.
24. It was clear that Ms Williams had been advised, correctly, by Peninsula that contact in relation to the first claim would come from ACAS. ACAS Early Conciliation is well established as the qualifying process that parties must go through before an ET1 claim form may be submitted in claims such as those advanced by the claimant. Ms Williams was correct, when she acknowledged Mr Kesar's email in early March by saying that the next contact would come via ACAS.
25. However, the claimant used the same ACAS EC number to issue claims 2 and 3. Had Ms Williams believed that she could ignore these claims until she was contacted afresh via ACAS, she was mistaken. In any event, the respondent was aware that such claims existed on 23 March 2021 and made no enquiries of the Tribunal, so far as I am aware. However, had Ms Williams received claims 2 and 3 in early March (although there is no record of her having done so) it would have been quite unclear what these claims were, or how they were different to claim 1.

26. The considerations for the Tribunal in deciding the issue of applications for extensions of time for the response are set out primarily in *Kwik Save Stores v Swain* where all relevant factors must be taken into account and balanced against each other to reach a conclusion objectively justified on the grounds of reason and justice.
27. In order to assess this, the extent of the delay that is the respondent's responsibility must be considered. In this case, not all of the delay in the proceedings is caused by the respondent or its representatives. From March until April when Mr Mukhtar applied for an extension of time for claim 1 is clearly caused by the respondent. In relation to claim 1, Mr Mukhtar used the incorrect email address and so Mr Kesar did not receive notification of the application to extend time. Using the incorrect email address in this instance is not the determining factor that the claimant's submissions assert it is. Unless Mr Mukhtar knew what "CJSM" meant and what the purpose of the CJSM secure system was for, it was not unreasonable of him to think that this was Mr Kesar's email address. Indeed, it was the only address in his email signature. Mr Mukhtar in all likelihood received a "bounce back" from the CJSM email address, and should have followed this up, but I note that there is no telephone number in Mr Kesar's email signature either.
28. Mr Kesar also struggled to obtain a clear response from the Tribunal, which was not the respondent's fault. The respondent's representatives have failed to secure a re-sending of claims 2 and 3 from the Tribunal administration despite having asked for this. There was also a significant delay from May 2021 until October 2021 where the parties were waiting for a judicial response to their various applications. The respondent's representative responded very quickly to EJ Ferguson's letter (within a day). The parties have subsequently had to wait until this hearing for any judicial determination – and this was partly due to the claimant requesting that this be decided at a hearing (in their letter of 4 November 2021) as opposed to on the papers.
29. The delay caused by the employer is therefore significantly shorter than the delay to the proceedings overall. Furthermore, although the claimant complains that the respondent's initial ET1 response "*did not disclose any arguable defence*" this is not strictly true. A respondent is not obliged to disclose the full particulars of their response in their ET3, in much the same way that a claimant is not required to disclose every particular of their claim in an ET1, and a Tribunal or a claimant is entitled to require that further particulars be supplied in due course, which the respondent has done.
30. The respondent's explanation of the reasons for the delay must be considered. Neither the individual at the respondent nor the individual at Peninsula who dealt with this initially were before the Tribunal to give an explanation, which is notable because Ms Williams still works for the respondent. Ms Amory did her

best but was simply not employed by Hatcham Temple Grove at the time to which these issues relate. However, the fact that the claims were served on the respondent in February and March 2021 and not responded to until April/May and October 2021 is not the determining factor in relation to applications for extensions of time for submitting responses, as *Kwik Save v Swain* sets out.

31. The balance of prejudice must also be considered. The claimant acknowledges that claim 1 contained the vast majority, if not all of the factual pleadings for all three claims and all the jurisdictions she wishes the Tribunal to consider. In terms of factual allegations, claims 2 and 3 add very little, if anything, to the narrative. This is acknowledged by the apology set out by the claimant in section 15 of claim 3.
32. The respondent provided a blanket rebuttal of all claims brought by the claimant in its response to claim 1. In fact, this rebuttal also covered the claims subsequently added in claims 2/3. The respondent has now provided detailed particulars to all three claims and all allegations made by the claimant in June 2022, having finally had sight (as part of the preparations for this hearing) of all three claims and the pleaded particulars for all three. The defence clearly has the possibility of being found to have some merit at the final hearing. The balance of prejudice falls in favour of allowing the defence to be pleaded, as the claimant has brought a number of claims (in whistleblowing and discrimination) where damages are uncapped. The respondent is also a school and would, I accept, suffer reputational damage if the claims were allowed to succeed undefended and the respondent may well be held liable for wrongs it had not committed.
33. In terms of the prejudice suffered by the claimant, it has been put to the Tribunal that a number of emails and letters have been sent by Mr Kesar to the Tribunal and the respondent in an attempt to progress the matter. I accept that Mr Kesar is doing his best to pursue the claimant's claims alongside his regular practice. I accept that the response from the Tribunal was not as prompt or constructive as the parties could expect and that this is regrettable. However, Mr Kesar has been at times somewhat zealous in his conduct of the claimant's claims and some of his correspondence was not necessary. Arguably submitting three ET1 claim forms in these circumstances was also not necessary and has led to a considerable degree of confusion. I make no real criticism of Mr Kesar in saying this, but it is necessary to explain the facts of this case as I find them.
34. There has undoubtedly been delay in these proceedings, caused in part by the respondent and in part by the Tribunal. This is prejudicial to the claimant. There have been letters and emails written by the claimant's representatives which would not otherwise have needed to be written, had the receipt of the ET1 claim forms and the response from the respondent been better managed. Indeed, this is a matter that the claimant has indicated may be pursued by way of a costs application, which has been made in broad terms as part of these proceedings.

35. It was the claimant's submission that the use of the incorrect email address in April and May 2021 by the respondent's representative "invalidated" the application for an extension of time under Rule 20 of the 2013 Rules. I do not accept that this was the case. Unless the respondent had knowledge of what "CJSM" meant, Mr Kesar's email signature could lead an individual to believe that his CJSM address was his email address. Many professional representatives do not use CJSM and it is quite possible that Mr Mukhtar did not appreciate what this meant. I therefore accept that the respondent did attempt to present an application for an extension of time at that point. Mr Kesar did not respond to this within 7 days, but this was not his fault and the claimant has been allowed to present her objection late.
36. It is the claimant's submission that the respondent had "knowledge" of the existence of all three claims from March 2021. However, having "knowledge" of the claims does not allow a respondent to respond to them – a respondent must also be able to read the particulars pleaded in those claims. I accept that the respondent did not actually see the content of claims 2 and 3 until preparing for this hearing and was therefore not able to draft particulars of response until then. I accept that although the Tribunal validly served claims 2 and 3 at the respondent's address, they have clearly gone missing and were not seen by anyone who was able to respond to them at the time they were served.
37. Given that the response to the first claim was presented by the respondent in May 2021 but the responses to the second claims were not provided to the claimant and the Tribunal until June 2022, I have considered whether to allow the respondent to continue with a defence to claim 1 only and not claims 2 and 3. However, in the particular circumstances of this case this is not objectively justified on the grounds of reason and justice, because as has already been set out above, the facts and the pleaded case for the claimant in claim 1 overlaps significantly with claims 2 and 3. Furthermore, the response to claim 1, albeit in very broad terms, did address the claims raised in claims 2 and 3.
38. Furthermore, I accept that the reason given by the respondent for not serving the full defence to all three claims until June 2022 was because they were waiting for a clear response from the Tribunal, which was not given. The respondent wrote a detailed email to the Tribunal on 28 October 2021, informing the Tribunal that the respondent was aware that three claims had been lodged but that the respondent had not received them, and asking for the papers to be re-served. The claimant repeatedly told the respondent and the Tribunal that the papers had already been served on the respondent, however, no papers were sent by the Tribunal and the claim forms were only supplied by the claimant to the respondent in preparation for this hearing. The claimant told the Tribunal that the respondent had not taken active steps to request the ET1, but this is clearly not the case. Until the respondent had sight of claims 2 and 3, it was not able to submit a response to those claims.

39. The respondent's response of June 2022 to all three claims is therefore accepted by the Tribunal.
40. The matter will be set down for a case management preliminary hearing as soon as possible, to list the matter for a final hearing and provide case management orders.
41. Given that the hearing on 23 June 2022 concluded without the issue of costs being dealt with, should the claimant wish costs to be considered, this is to be raised with the Tribunal at the case management preliminary hearing.

Employment Judge Barker

Date: 20 July 2022

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.