EMPLOYMENT TRIBUNALS

Claimant: **Ms I Hill**

Respondent: **Harehills Labour Club**

Heard by Cloud Video Platform (CVP) **On: 12 July 2022**

Before: **Employment Judge Shulman**

Representation

Claimant: **Mr A Parascandolo, Solicitor**
Respondent: **Mr J Jenkins, Counsel**

RESERVED JUDGMENT

The respondent's application for an extension of time in which to file a response is hereby refused and the adjourned remedy hearing will take place on 21 September 2022 at 10.00am.

REASONS

1. **Claim and process**

1.1. The claimant is making a claim to the Tribunal for unfair dismissal – constructive and wrongful dismissal. The claimant presented her claim on 18 March 2022. The respondent had until 19 April 2022 to file a response. Employment Judge Jones gave Judgment in the claimant's favour for unfair dismissal and wrongful dismissal on 26 May 2022, ordering a remedy hearing for 12 July 2022. On 24 June 2022 the respondent made an application for an extension of time to present its response, which application is opposed by the claimant. Employment Judge Lancaster reviewed the file and on 6 July 2022 ordered the respondent's application for an extension of time to be considered at the start of this hearing, which had as I have said been listed as a remedy hearing. Should the extension be granted, the Judgment would be set aside and further directions given. If on the other hand the respondent's application be refused, the remedy hearing will go

ahead, with the respondent to be allowed to participate at the remedy hearing as permitted by the Employment Judge hearing it.

2. **The law**

The Tribunal has absolute discretion to extend the time limit for presenting a response. Nevertheless it is thought that the overriding objective to deal with cases "fairly and justly" (see Rule 2 of the Employment Tribunal Rules (Rules)) is likely to carry significant weight in the exercise of the Tribunal's discretion. The previous test was "just and equitable" and it was under that test that the case of **Kwik Save Stores Limited v Swann and Others** [1997] ICR 49 EAT (Kwik Save) was decided. It is generally accepted that Kwik Save applies to the exercise of discretion under the present Rule 20(1) of the Rules. In the case of Kwik Save the Employment Appeal Tribunal 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." It was held in Kwik Save that a judge should always consider:

2.1. The employer's explanation as to why an extension of time was required.

2.2. The more serious the delay the more important for the employer to provide a satisfactory and honest explanation.

2.3. The balance of prejudice – would the employer, if its request for an extension were to be refused, suffer greater prejudice than the employee would suffer if the extension of time were to be granted?

2.4. If the employer's defence is shown to have some merit in it, justice will often favour the granting of an extension of time – otherwise an employer might be held liable for a wrong which it has not committed.

3. **Why was an extension of time required?**

The respondent maintains that it submitted a response on 13 April 2022, which, if true, would have been in time, so there would have been no need to apply for an extension of time to file the response. After this the respondent says it was making enquiries with its insurers and the respondent was under the impression that it was protected. The respondent told the Tribunal that the insurers contacted the respondent's solicitors on 26 April 2022. Then on 20 May 2022 the insurers sent instructions to the respondent's solicitors. As it turns out the so called response allegedly filed on 13 April 2022 was never received by the Tribunal. A number of copies of the response had allegedly been sent to various addresses, allegedly including the Tribunal, but the respondent was unable to say to what address or addresses the Tribunal's copy was sent. That being the case the respondent's failure to send a response spanned from 20 April 2022 until its application for an extension on 24 June 2022 and it seems that this application was prompted by the default Judgment on 26 May 2022. It is obvious that it is the respondent's wish to take part in the proceedings.

4. **Delay**

The claimant entered early conciliation on 21 December 2021. It is not clear whether or not the respondent knew of the likelihood of the proceedings then, but the respondent did receive a letter before action from the claimant's solicitors on or about 15 March 2022 and the claimant issued a claim form on 18 March 2022. It has never been in doubt that the respondent received the claim form, on or about 22 March 2022, with a warning that a response had to be issued by 19 April 2022. We are told that the respondent is not familiar with Employment Tribunal process, that it is a member's club run by unpaid volunteer committee members, that it is not their job and that they do the best they can with their limited time available. They certainly knew enough to attempt to file a response on 13 April 2022, but nothing meaningful happened until the respondent's solicitors were sent instructions on 20 May 2022 and then there was nothing thereafter until there was a report was made by the respondent's solicitors to the respondent's insurers on 13 June 2022. The respondent was unable to explain why there was a delay with the insurer, save that the insurers were busy. The respondent argues that a preliminary hearing could have used up similar time and that no substantive work had been done. The claimant suggests that the respondent knew about the claim in December 2021 at worst and by 15 March 2022 at best. The respondent had its copy of the claim form and grounds sent to it by the claimant's solicitors on 18 March 2022 and the respondent was sent them again, but this time by the Tribunal on 22 March 2022. A response was invited by 19 April 2022 and there were clear instructions as to how to respond to the claim. Furthermore on 23 April 2022 (albeit by without prejudice letter) the respondent received a schedule of loss (which apparently has not changed) and the claimant says that she did attempt to comply with directions issued by the Tribunal on 22 March 2022. The claimant suggests that there were some unanswered questions of the respondent relevant to delay on 8 July 2022.

5. **Prejudice**

The claimant was a long serving employee of the respondent, close to retirement. The claimant says that she had no alternative than to resign when she did so. The claimant was expecting a remedy hearing on 12 July 2022, but were the respondent to succeed in being allowed to file its response the claimant would have to wait, possibly for a case management hearing and definitely for a full hearing, which would take some months to come on. This we are told would result in financial hardship to the claimant, although the amount of such hardship was not spelt out, save that if the claimant had to wait for a full hearing she would be out of compensation for a period. The claimant says that if there is any hardship to the respondent, the respondent brought this on itself. On the other hand the respondent says not being allowed to defend the case would result in it being liable for a substantial sum of money. The schedule of loss claims £46,000 plus. The respondent says the evidence on liability would not be tested and that there was no prejudice to the claimant because of the delay.

6. **Merits of the draft response**

Whilst the respondent says the claim form lacks particularisation, the claim form was sufficient for Employment Judge Jones to grant Judgment. The claim form is clear about Mr Musgrave's conduct and the claimant's conduct

consequential upon it and the effect upon her of Mr Musgrave's and ultimately the committee's conduct, which the claimant says caused her to resign. So far as the draft response is concerned the respondent accepts the claimant's hours and pay were considered by the respondent and that Mr Musgrave occasionally mentioned them. The respondent contains a number of denials, but accepts that Mr Musgrave was told to refrain from discussing the claimant's hours and pay. The respondent accepts that the claimant's hours and pay were discussed at management committee meetings. The respondent accepts that in November 2021 the claimant raised Mr Musgrave's conduct.

7. **Determination of the respondent's application**

(After listening to the legal submissions made by and on behalf of the respective parties and upon reading the documents placed before the Tribunal:)

7.1. The Tribunal has had regard to the case Kwik Save and in coming to its decision the exercise of its discretion, taking into account all relevant factors in the manner there in described and as set out in paragraph 2 of this decision.

7.2. The respondent says that from or about 13 April 2022 it was making enquiries with its insurers and contact was made on 26 April 2022. Nothing more happened until 20 May 2022 when the insurers instructed solicitors. There is no real explanation for the delay between 26 April 2022 and 20 May 2022. We should imagine that both insurers and solicitors have sufficient experience to pursue matters expeditiously where there are time limits, including whether the first response was filed validly or not. In any case there was a further unclear delay between 20 May 2022 and 24 June 2022 when the respondent made this application. There was also a gap between the default Judgment on 26 May 2022 and 24 June 2022.

7.3. Going back to the filing of the claim it is unclear as to the respondent's part in early conciliation (between 21 December 2021 and 23 December 2021). What is clear is that the respondent received a letter before action on or about 15 March 2022 and so the respondent was on notice. Further the claimant issued her claim on 18 March 2022, which the respondent clearly received on or about 22 March 2022, making clear when and how a response had to be filed. This was on 19 April 2022 and, amongst other things, on the appropriate form, which was not done for the first response. Despite the respondent's pleaded inexperience in these matters, the attempted response of 13 April was made but is clear that between that date and 24 June 2022 the respondent did nothing meaningful to participate in these proceedings.

7.4. The Tribunal accepts that the claimant's claims, if successful, would result in a substantial sum of money being granted but if the claimant were successful the amount would still have to be tested. It should not be forgotten that the claimant was a long serving employee nearing retirement and that her case has been paused, no doubt with time and maybe cost by this application. The claimant if successful would certainly be out of her money for a period. It is true that liability

evidence would not be tested were the application to be refused. For that reason the Tribunal must consider the merits of the draft response.

7.5. The claim is set out in the claimant's claim form. There are elements of the draft response which have similarities to those in the claim form, which we have set out at paragraph 6 of this decision. As has been said the response also sets out a considerable number of denials. The main issue on merits is that the respondent merely needs to defend the alleged dismissal because it is a constructive dismissal. The claimant has to prove the dismissal. However, exercising my discretion, I am of the view that there is insufficient in the response (and sufficient in the claim) to indicate where the balance of merits lies and in this case I find that the balance merits lies with the claimant.

7.6. For that reason, taken with the unclear delays, I exercise my discretion to refuse the respondent's application for an extension of time in which to file the response.

7.7. It is not necessary to make a finding on the question of prejudice. This is one of those cases where that question could be decided either way.

7.8. The respondent's application of extension in which to file a response is therefore hereby refused and the adjourned remedy hearing will take place on 21 September 2022 at 10.00am.

Employment Judge Shulman

8 August 2022