3300944/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr W. Abbas	AND	Slough Borough Council

HEARD AT: **Reading Tribunal** (by CVP) **ON:** 30 May 2022

BEFORE: **Employment Judge Douse (Sitting alone)**

Representation:

For Claimant: On his own behalf, assisted by lay representative Rahana Parveen

For Respondent: Mr S. Harding, Counsel

RESERVED JUDGMENT AT A PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The time limit for presenting a response is extended
2. The response presented on 6 January 2022 is accepted
3. The judgment of 16 June 2021 is set aside

REASONS

Background

1. On 4 February 2021, following ACAS conciliation from 24 December 2020 to 4 February 2021, the Claimant brought claims for: Unfair dismissal; Race discrimination; Religious belief discrimination; Disability discrimination.

2. The claim was sent by post to the Respondent - Slough Borough Council - on 17 February 2021. It is the Respondent's position that this was not received, and that the first knowledge they had of the claim was following receipt of the default judgment against them, made on 16 June 2021.

3. The correspondence sending the default judgment by post was dated 8 September 2021 [59], and it was also emailed to Surjit Nagra on 11 September 2021 [63].

4. On 1 October 2021, Surjit Nagra wrote to the Tribunal stating she had not received any documents about the case.

5. On the same date, Kevin McMahon of HB Public Law – to whom the Respondent outsources their legal work - wrote to the Tribunal applying for an extension of time to provide a response. He confirmed the respondent could not include a copy of the proposed ET3 as it did not have a copy of the claim form [66].

6. Correspondence between the Respondent's representatives and the Tribunal was back and forth during October and November 2021.

7. On 21 December 2021, the Tribunal sent the ET1 claim form to the Respondent.

8. On 6 January 2022, the Respondent filed an ET3 [87] and Grounds of Resistance [75].

9. On 6 March 2022, a notice of remedy hearing was sent out for 30 May 2022. [114].

10. The Respondent wrote to the Tribunal on 14 March 2022, stating that an ET3 had actually been presented [113].

11. On 24 March 2022, the Tribunal advised that the response was not accepted and the application for reconsideration and an extension of time to present a set to be determined at a hearing on 30 May 2022 [109]. If the application was refused, the Tribunal would go on to deal with remedy.

Procedure, documents, and evidence heard

12. As the hearing was initially listed for remedy, I confirmed with the Claimant that he understood the purpose of today's hearing.

13. The Respondent had prepared a bundle of documents amounting to 235 pages – references to page numbers below in [ ] are to this bundle.

14. Mr Harding provided a skeleton argument, and a witness statement from Surjit Nagra – Associate Director for Customers, including Human Resources at the Respondent. Ms Nagra did not attend to give oral evidence as she was on a pre-booked trip to the Seychelles. In light of this, I had to determine how much weight to attach to her statement.

15. Mr Harding advised that the Respondent did not wish for a further delay that would eb created if the hearing was adjourned in order for Ms Nagra to attend. The Claimant confirmed that he wanted the hearing to go ahead today.

16. The Claimant provided a position statement via the Document Upload Centre on 27 May 2022, however these were not provided to me until partway through the hearing. He also gave oral evidence.

17. The hearing started late and had a number of breaks so that I had the opportunity to read the various documents that had not been provided in advance.

18. Essentially, the Respondent's submissions were:

18.1 The original claim form was not received by the respondent.

18.2 Default judgment notice was received but no claim form or particulars to which a response could be made.

18.3 The Respondent received a copy of the claim form only on 21 December 2021.

18.4 The Respondent filed a response on 8 January 2022

18.5 In relation to the interests of justice and prejudice, this weighs heavily on the Respondent because:

18.5.1 The allegations are serious

18.5.2 It is a large claim, for £132,032 [119]

18.5.3 The underlying claims are quite weak, with the dismissal relating to a collective redundancy, and the discrimination claims denied by the Respondent

18.5.4 The Respondent engaged with the matter as soon as it became aware

19. The Claimant's position focused on the Respondent's failure to comply with deadlines throughout the process. In particular, he said that the respondent had not even complied with the case management orders of 24 March 2022, to: *"by no later than 21st April 2022, a witness statement setting out the evidence on which it will rely to support its application for the response to be presented out of time."*

20. He also identified points where he says the Respondent was, or should have been, aware of the proceedings and acted upon them:

20.1 The email he sent to Joe Carter – one of the Finance Directors - on 21 May 2021, advising that the Tribunal had accepted the claim [160].

20.2 The mail Caroline Eccles sent to Keith McMahon on 1 November 2021 [141], referring to having *"discovered a claim"*, which the Claimant says means the claim form.

21. Due to the delays, the hearing finished at 12.25pm. This did not allow sufficient time for consideration and delivery of an oral judgment, and certainly not time to deal with remedy in the event that the Respondent's application to extend time was refused.

Findings of fact

22. On 4 February 2021 the Claimant brought claims for: Unfair dismissal; Race discrimination; Religious belief discrimination; Disability discrimination.

23. The Tribunal sent the claim to the Respondent at their registered address on 17 February 2021.

24. During the Covid-19 pandemic and the lockdown periods, the Respondent's offices were closed and staff attended the offices intermittently to deal with emergencies.

25. During this time, the Respondent had processes in place for post that was received. Administrative Council staff that attended the offices, to deal with this were to ensure that the documents were either digitised or sent to the named person. If

confidential, the letters would be sent to the service area to be dealt with by the relevant officers, and would be scanned and sent by email.

26. Within the Human Resources service specifically, one officer attended every day to deal with the post and any emergency issues. All post received within the service is logged on the central system.

27. On 20 May 2021, the Claimant sent an email to Joe Carter advising that he was appealing against the decision to terminate his fixed term contract.

28. Mr Harding was able to inform me that at the relevant time, Mr Carter was Director of Transformation, and that his Linked In profile shows him as having retired in January 2022.

29. Towards the end of his email, the Claimant says:

"However, my case has been accepted by Employment Tribunal and, I am waiting for the hearing date from the court as SBC is not concerned about its attitude and, do not & did not try to act on the word called JUSTICE. If SBC and Kam Hothi who is behind this awkward situation, then there was no prerequisite for me to approach the Employment Tribunal."

30. The correspondence from the Tribunal sending the default judgment to parties was dated 8 September 2021 [59], and was emailed to Surjit Nagra on 11 September 2021 [63].

31. Surjit Nagra forwarded the judgment to HB Public Law.

32. On 1 October 2021, Surjit Nagra wrote to the Tribunal advising she had not received any documents about the case. On the same date, Keith McMahon of HB Public Legal wrote to the Tribunal and made an application for an extension of time. It pointed out that the Respondent could not include a copy of the proposed ET3 as it did not have a copy of the claim form to respond to [66].

33. On 31 October 2021, the Tribunal wrote to the Respondent advising that an application to extend the time limit for a response had to be accompanied by a draft ET3 [68].

34. HB Public Law were discussing the issue internally, in particular by emails between Keith McMahon and Caroline Eccles [141].

35. On 9 November 2021, Keith McMahon wrote to the Tribunal advising that the Respondent did not have the ET1 to reply to [70].

36. On 30 November 2020, Rashmi Chopra of HB Public Law wrote to the Tribunal advising that she had taken over conduct of the case [71], and requested to be provided with the original claim and for a hearing to consider the reconsideration application.

37. On 21 December 2021, the Tribunal sent the ET1 claim form to the Respondent's outgoing officer Keith McMahon [73], rather than to Rashmi Chopra.

38. Following closures for the Christmas and New Year period, on 6 January 2022, the Respondent presented an ET3 [87] and Grounds of Resistance [75].

39. On 6 March 2022, a notice of remedy hearing was sent out for30 May 2022 [114].

40. The Respondent wrote to the Tribunal on 14 March 2022, confirming that an ET3 had been presented [113].

41. On 24 March 2022, the Tribunal determined that the response was not accepted and the application for reconsideration and an extension of time to present it was to be determined at the hearing on 30 May 2022 [109]. If the application was refused, the Tribunal would go on to deal with remedy.

The law

42. Rule 20(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states:

"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."

43. Additionally, the overriding objective within Rule 2, requires the Tribunal to deal. with cases justly.

44. The EAT's decision in **Kwik Save Stores Ltd v Swain and ors 1997 ICR 49**, **EAT,** which set out the correct test for determining what was 'just and equitable' under previous versions of the rules, is still relevant to the question of whether, having regard to the overriding objective, an application for an extension of time to submit a response under rule 20 should be granted. In particular, the EAT held that, when exercising a discretion in respect of the time limit, a judge should always consider the following:

44.1 The employer's explanation as to why an extension of time is required

44.1.1 In the EAT's opinion, the more serious the delay, the more important it is that the employer provide a satisfactory and honest explanation. A judge is entitled to form a view as to the merits of such an explanation.

44.2 The balance of prejudice

44.2.1 Would the employer, if its request for an extension of time were to be refused, suffer greater prejudice than the complainant would suffer if the extension of time were to be granted?

44.3 The merits of the defence

44.3.1 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 the employer might be held liable for a wrong which it had not committed.

Conclusions

The employer's explanation

45. It is unfortunate that Ms Nagra was not present to answer the Tribunal's questions. However, I am able to accept much of what she says in her statement at face value, supported by Mr Harding's submissions.

46. It has not been unusual for offices to not be fully unattended during the pandemic, causing issues with receipt of documents. Even pre-pandemic, things might go missing in the post.

47. I do also consider that the Respondent will have been aware of the potential claim due to involvement with ACAS. However, claims do not always proceed to Tribunal after conciliation, so this does not amount to a situation where the Respondent should have made their own enquiries into whether a claim had been made.

48. In relation to the Claimant's point that he further notified the Respondent of the Tribunal claim via an email to Mr Carter, I don't accept that this is the case. The email to Mr Carter was in relation to an internal appeal. It is a lengthy communciation, and it is only at the end that the Tribunal claim is mentioned. In any event, Mr Carter is not an HR official, nor someone that the Claimant refers to as having bene involved in any of the matters relating to his claims.

49. I also do not accept the Claimant's assertion that the Respondent had the claim form because Caroline Eccles refers to a claim being discovered. 'Claim' is a general term, and does not necessarily denote the claim form itself. Similarly, discovery does not necessarily mean physically discovered – in this case it is clearly reference to finding out or being notified. If the Respondent had belatedly found the documents, this could still have been the basis for an application to extend time – they would not need to create a false explanation that the ET1 was never received, not have prolonged matters by repeatedly requesting the missing paperwork.

50. Considering the length of delay, I find that the application for an extension was made on 1 October 2021. The explanation why a draft response could not be provided – not having the claim form to respond to – complied with the provisions of Rule 20(1).

51. Whilst this is more than six months after the time for a response taking account of the Respondent's explanation, they only became aware of the claim in September 2021. They therefore made the application to extend time a matter of weeks after this.

52. Following this, the completed ET3 and grounds of resistance were presented just a short time, taking account of the Christmas and New Year break, after the Respondent had received the ET1 from the Tribunal.

The balance of prejudice

53. The Claimant will naturally be prejudiced if the application is granted, as the conclusion of the case will be delayed. It had been listed for a remedy hearing, and the process would effectively start again with case management and scheduling of a merits hearing before a full Tribunal panel.

54. On the other hand, the Respondent faces a potentially substantial award against it, based on the schedule of loss submitted by the Claimant, for serious allegations of discrimination. Although at this stage the specific details of the schedule have not been considered by the Tribunal, and Mr Harding's skeleton includes disputes of various amounts, the potential award is still large.

55. In balancing these opposing effects, I find that the prejudice weighs more heavily on the side of the Respondent. Refusal of their application means they are not permitted to defend the claim at all, can only participate in a remedy hearing as far as the Tribunal allows, and could face a large financial penalty.

56. By comparison, granting the application means the Claimant will still be allowed to bring his claims, and may succeed, albeit with some delay to the final outcome.

The merits of the defence

57. Within their grounds of resistance, the Respondent notes that the Claimant's particularisation of his claims is limited, as such their response is restricted in parts. It is correct that the ET1 does not particularise the claims, instead refers to the details being

contained within the internal grievance which is attached. However, it is noted that the Claimant was unrepresented at the point he presented his claim.

58. In relation to the unfair dismissal claim, the Respondent's defence is that the termination of the contract occurred because of redundancy.

59. In relation to the discrimination claims, although the Respondent takes issue with the lack of detail, they have denied the claims and put forward bases of defence to them generally. This includes details of and references to various items of documentary evidence, to support the Respondent's case. They also raise legal points regarding the Tribunal's jurisdiction to dela with a number of the claims based on time limits, and because they don't relate to a protected characteristic.

60. I therefore find that the defence is not without merit, and this could be tested at a full hearing.

61. Taking everything into account, I determine that the overriding objective to deal with this case justly means that the Respondent's application must be granted.

62. The time limit for presenting a response is extended – the ET3 and Grounds of Resistance presented on 6 January 2022 are accepted.

63. The judgment of 16 June 2021 is set aside.

Employment Judge K Douse

Dated: …25 August 2022……

Sent to the parties on: ……....

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For the Tribunal Office

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