EMPLOYMENT TRIBUNALS

Claimant: Ms Susan Moyes

Respondent: Melton Mowbray Royal British Legion Club Ltd

On: 21 October 2022

Before: Employment Judge Ahmed (sitting alone)

At: Leicester

Representation
Claimant: Mr Theo Lester of Counsel
Respondent: Mr Andrew Peacock (Chairman) and Mr Joe Jackson (Vice-Chairman)

JUDGMENT AT A PRELIMINARY HEARING

The decision of the Tribunal is that:

1. Pursuant to Rule 20 of the Employment Tribunal Rules of Procedure 2013 the Respondent's application for an extension of time is granted and the Response is accepted. The date of acceptance is 21 October 2022. The Respondent therefore has leave to defend these proceedings.

2. The Rule 21 Judgment of 30 August 2022 is accordingly set aside;

3. The Respondent's time for applying for a reconsideration of the decision of 25 August 2022 is extended to 23 September 2022.

4. The decision of 25 August 2022 to refuse an extension of time is reconsidered and revoked.

5. The case shall be listed for a telephone Preliminary Hearing to give case management directions and orders with a time estimate of 90 minutes. The date of that hearing shall be fixed in due course.

REASONS

1. This hearing was originally listed to determine the issue of remedy following a Rule 21 judgment. That arose as a result of the failure by the Respondent to present a Response in time. An application for an extension of time (made within the original time limit) was refused. When a further application was made the Tribunal directed that the issue would be considered as a preliminary point at the already convened remedy hearing.

2. At this hearing the Claimant was represented by Mr Lester of counsel. The Respondents appeared in person through Mr Andrew Peacock, the newly elected (or appointed) Club Chairman and Mr Joe Jackson, the new Club Vice Chairman. Neither of them are legally qualified.

3. The factual background for the purposes of today's hearing is not in dispute. On 21st June 2022 the Claimant presented a claim form (ET1) to the Employment Tribunal bringing complaints of disability discrimination, unpaid holiday pay and an unlawful deduction of wages.

4. The Claimant was employed by the Respondent as a Bar Manager from 15 May 2022 to 16 January 2022, the latter being the effective date of termination. In her very detailed ET1 the Claimant says that she suffers from Ehlers-Danlos syndrome which is a rare heritable disorder of the connective tissues. As a result the Claimant suffers from unusually flexible joints, very elastic skin and fragile tissues. The condition can result in minor injuries becoming unusually serious.

5. Although the Respondent shares the name with the well-known national charity it is however an entirely separate entity. That appears to be accepted by the Claimant as the Royal British Legion were originally cited as a second Respondent but upon representations from the national charity they were removed from the proceedings and the claim against them was dismissed upon withdrawal.

6. The complaints of disability discrimination are specifically of direct discrimination under section 13 Equality Act 2010 (“EA 2010”), discrimination arising from disability under section 15 EA 2010 and a failure to make reasonable adjustments under sections 20 and 21 EA 2010. It is unnecessary to go through the detail of those complaints or the allegations at this stage.

7. The ET1 was accepted by the Tribunal on 29 June 2022and sent to the Respondent on the same date. The Respondent had until 27 July 2022 to submit its Response (ET3).

8. The Respondent appears to have left it to Mr Graham Eustace of the Club to deal with the matter. Mr Eustace, who did not attend today, signed some of his emails as “acting on behalf of the club committee” or at times “on behalf of the Club”. It is clear from the Tribunal file that he was in correspondence with Ms Sejal Patel, the Claimant’s solicitor, from at least 18 July when he sent her a fairly lengthy email setting out the Club’s position. It is unnecessary to go through the contents of that email in any detail but it does confirm an intention to defend the proceedings and it

goes on to deny there was any form of discrimination against the Claimant. However, Mr Eustice did not complete or submit the prescribed Response form at that stage.

9. On 26 July 2022 Mr Eustace, a day before time was due to expire, Mr Eustace wrote to the tribunal seeking an extension of time. He did not say how long he wanted but did say that there was a Special General Meeting on 9th August to form a new committee in order for the club to continue. From that it may be inferred that he was seeking a few weeks extra time. A copy of that application was sent to the Claimant for comments on 5th August 2022. The Claimant's solicitors replied on 10 August objecting to the application.

10. On 25th August 2022 the application for an extension of time was considered by an Employment Judge without a hearing. The decision of the Employment Judge was as follows:

"The Respondent's application for an extension of time in which to submit a Response is refused as no reasonable explanation for the extension has been given. A Rule 21 judgment will now be issued. The hearing on 21 October will be converted to a remedy hearing and the Respondent may participate to the extent allowed by the Employment Judge at the hearing."

11. On 30 August 2022 a Rule 21 judgment was issued which simply stated that the claim succeeds and remedy is be determined at a hearing to be listed.

12. On 1 September 2022 the Tribunal confirmed to the parties that the remedy hearing would take place on 21 October 2022.

13. On 23 September 2022 Mr Peacock and Mr Jackson wrote to the tribunal setting out the position afresh, namely that a new Club committee had been appointed and they were not aware that court documents had not been sent in time. They sought an extension of time but did not complete a draft of the Response which they were now obliged to do under Rule 20.

14. At this hearing I read out and explained to the Respondents the provisions of Rule 20. In particular I explained that until the Response was accepted the Respondent did not have the right to take part in the proceedings except to the proceedings which was of course necessary to be able to defend them. I also explained that it was necessary for a draft Response to be completed on the prescribed form. I considered it appropriate to allow them to participate to the extent of completing this form and to give a written explanation for the delay. I arranged for blank Response form to be given to the Respondent to complete. Following a short adjournment Mr Peacock and Mr Jackson both completed the Response forms separately although of course it is only necessary for there to be one such form. Mr Lester was given a copy of both the draft Response and an accompanying note giving further reasons for the delay. Mr Lester was given the opportunity to make representations.

THE LAW

15. The relevant rules are contained in the Employment Tribunal Rules of Procedure 2013. Rule 20 states:

"(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."

16. Rule 19 of the 2013 Rules is headed 'Reconsideration of rejection' and states:

"(1) A Respondent whose response has been rejected under Rule 17 or 18 may apply for a reconsideration on the basis that the decision to reject was wrong or, in the case of a rejection under rule 17, on the basis that the notified defect can be rectified.

(2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and it shall state whether the Respondent requests a hearing.

(3) If the Respondent does not request a hearing, or the Employment Judge decides, on considering the application, that the response shall be accepted in full, the Judge shall determine the application without a hearing. Otherwise the application shall be considered at a hearing attended only by the Respondent.

(4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the response shall be treated as presented on the date that the defect was rectified (but the Judge may extend time under rule 5)."

17. The relevant principles as to extensions of time for lodging a Response were set out in the case of **Kwik Save Stores v Swain and others** (1997) ICR 49. Although that case concerned a previous version of the rules the relevant principles remain applicable.

18. In **Swain**, the EAT made it clear that the overriding principle in deciding whether to grant an extension is whether it is just an equitable to do so. In deciding whether it is just an equitable the type of factors of the tribunal is likely to have regard to will be:

18.1 the explanation for the delay;

18.2 the merits of the defence and

18.3 the balance of prejudice.

19. In **Moroak (t/a Blake Envelopes) v Cromie** (2005) IRLR 535, the EAT said that if it was in the interests of justice to extend time and admit a late Response a Tribunal should ordinarily do so.

20. In **Pendragon plc v Copus** (2005) ICR 167, the EAT made it clear that the absence of a good explanation for the failure to submit a response in time, whilst an important consideration, was not of itself a bar to allowing a Respondent to submit a Response in time.

CONCLUSIONS

21. First of all on a procedural note any reconsideration of the decision of 25 August 2022 must ordinarily be conducted by the same Employment Judge.

Unfortunately, that was not practicable for today. Accordingly, the Acting Regional Employment Judge has, prior to this hearing, substituted me and authorised me to consider the application in his stead. There has also clearly been a material change in circumstances. I therefore consider that I am open to reach a different conclusion.

22. I begin with Rule 20 which I consider to be the only real relevant provision for today's purposes. This requires the Respondent to complete a draft response on a prescribed form as a precondition to any late application for an extension. It must be accompanied by a written explanation. The Respondent has completed a draft Response and also produced a written explanation in addition to the oral submissions which were permitted. Both of the written documents were copied for Mr Lester. His objections relate largely to the delay in making the application, the fact that the Club was aware of the deadline as is evident from the application for an extension and the fact that it ought to have been readily apparent that the prescribed form must be completed. He goes on to argue that the issues that the Respondent raises today have been raised previously and already rejected.

The explanation for the delay

23. The explanation for the delay is primarily that the matter was left in the hands of Mr Eustace who failed to take necessary steps to protect the position of the Club. There was a state of flux until the new Chairman and Vice Chairman were appointed. It was not clear whether the Club was to continue operating. The new officers only came on board in September and only then did they truly appreciate the scale of the problem. It is suggested that Mr Eustace should have sought legal advice but he failed to do so. The Respondent intends to seek legal advice as soon as possible after today if extension of time is granted and if they are given leave to defend.

24. I am satisfied that these factors amount to a reasonable explanation for the delay. I make no criticism of Mr Eustace as he is not here and cannot argue in his own defence but it is clear that if he had realised that all he had to do was to cut and paste the contents of his e-mail to Ms Patel onto the Response form and send it to the Tribunal with the rest of the form being completed that is likely to have been sufficient. As an unqualified person he would not be alone in failing to understand legal processes. The fact that unrepresented parties do not appreciate the importance of completing the prescribed form is not unusual. I am satisfied that those now in charge would have dealt with things differently had they become involved earlier. It would be unjust to punish the Club for a failure by one of their former officers, albeit unknowingly, for failing to adequately protect the Club's position. Mr Eustace was clearly not ignoring the claim and was fully engaged in dealing with it. It was just that he did not appreciate what he needed to do. I do not accept that the reasons for the delay have all been considered before and rejected.

The merits of the defence

25. The Respondent will dispute that the Claimant was a disabled person by reason of the stated condition. They will also dispute they had the relevant knowledge of disability.

26. Both of those matters are potentially arguable and either of them would afford a complete defence. Knowledge of disability is required for both the section 13 and section 15 EA 2010 complaints and for the section 20/21 EA 2020 complaint the

knowledge would be of the relevant provision, criterion or practice (PCP). I must make it clear that I am not making any finding of fact on the issue today as it will need to be considered in more detail at some other point but there is nothing in the material before me today to suggest that the Respondent had relevant knowledge of disability from documents such as occupational health reports or sick notes for example. The job application form completed by the Claimant did not identify any such condition and the discussions about the Claimant's condition and the discussions via text or WhatsApp messages in the bundle are all conducted after the termination of employment.

27. The complaint of direct disability discrimination is not easy to follow. There is no identified comparator and the reference to a hypothetical comparator with a broken leg is confusing. The complaint of a failure to make reasonable adjustments appears somewhat contrived in its construction of the relevant PCPs and may even be out of time. The crux of the case seems to be the issue of whether the Claimant's dismissal (as the alleged unfavourable treatment) was something arising from disability. Even if the Claimant was able to show that it was the Respondent ought at least to have the opportunity to argue that it was a proportionate means of achieving a legitimate aim. I consider that it is just and equitable to allow the Respondent to argue all of these matters a full hearing.

<u>The balance of prejudice</u>

28. This factor undoubtedly favours the Respondent. The Claimant is seeking damages and compensation of £38,170.00, a very substantial sum. All of the various elements claimed according to the schedule of loss relate to the claim of disability discrimination. It is noteworthy that there are no sums set out as to the alleged deduction of wages claim which makes one wonder whether there is in reality any such claim. After all, if that complaint cannot be quantified for a remedy hearing I am not sure when it would. The Claimant did not attend this hearing so she would not be able to supplement the schedule with oral evidence. It may be that the box in the ET1 has been ticked in error or done simply to protect the Claimant's position but in either case the Respondent would appear to have a good defence to such a claim.

29. The Claimant has failed to specify any loss of accrued holiday pay. On the face of it therefore it is arguable that this particular claim also has no substance.

30. Overall, it seems to me to be just and equitable and in the interests of justice to allow the Respondent to defend a substantial claim of £38,170.60. It would not be just and equitable to drive them from the judgment seat on a technicality.

31. I now turn to Rule 19 in relation to the decision to refuse an extension of time insofar as it relevant. It seems to me that once an application for an extension has been granted under Rule 20 it is unnecessary to consider Rule 19 but in the event that it is, I shall do so. I should also add that there is nothing in the Rules to prevent a decision made once to be made again if necessary.

32. Whilst the decision of 25 August 2022 was made on the information currently before the Employment Judge at the time, there is more information available today. In the light of the additional information I consider it to be in the interests of justice to revoke the decision for the reasons given above.

33. Pursuant to Rule 5, I consider it appropriate to extend time to do so. The original time for seeking a reconsideration of the 25 August decision expired on 8 September. The Respondent made an application on 23rd September which was clearly regarded by the Tribunal as an application for reconsideration as the Tribunal converted this hearing to one which would consider the Respondent's application for an extension as a preliminary point at the start of the remedy hearing.

34. Between 8 and 23 September the Claimant was waiting for a remedy hearing. There was thus no prejudice whatsoever by reason of the delay. It is appropriate to extend time.

35. The overall result is that the Respondent now has leave to present its Response out of time under Rule 20. This means that the Rule 21 Judgement is automatically set aside by virtue of Rule 20(4). The decision of 25 August 2022 is revoked insofar as it is necessary to do so.

36. Whilst there are two Response Forms the relevant Response accepted shall be the one completed by Mr Peacock. I imagine that once the Respondent has obtained legal advice it may need to be amended.

37. There will then be a further Preliminary Hearing – this time by telephone – to make case management orders. The parties will receive notice of that hearing and details of how to join in due course. It is not appropriate to do so until the Respondent has had an opportunity to obtain legal advice.

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Employment Judge Ahmed

Date: 25 October 2022

JUDGMENT SENT TO THE PARTIES ON

3 November 2022

FOR THE TRIBUNAL OFFICE