EMPLOYMENT TRIBUNALS

Claimant: Mr L Tandy

Respondent: Spanjer Chemicals Limited

Heard at: Bristol **On:** 21 October 2022

Before: Employment Judge C H O'Rourke

Representation:

Claimant: Ms M McGee - Counsel
Respondent: Mr G Warriner – Managing Director Respondent

RESERVED JUDGMENT ON APPLICATION FOR EXTENSION OF TIME TO PRESENT THE RESPONSE

The Respondent's application for an extension of time in which to present their Response is refused.

REASONS

1. The Respondent has applied for an extension of time for presenting their Response to the Claim, following the issue, on 23 May 2022, of a Notice of 'Response not Received' and of a Remedy hearing (for today's date). The grounds for that application are set out in the Respondent's email dated 18 August 2022 [38 joint bundle]. The Claimant's solicitors set out their objections to that application in their letter of 6 October 2022 [55]. I heard oral submissions from both parties and evidence from a Mr Glen Warriner, the Respondent's Managing Director.

2. Rule 20 is silent as to the test a tribunal should apply when considering an application and accordingly, I rely on the guidance in Rule 2, the 'Overriding Objective' in exercising my discretion as to whether or not to extend the time limit for presenting the response. The Rule states (as

relevant to this case) that the Tribunal should deal with cases 'fairly and justly', while avoiding delay and saving expense. The phrase 'fairly and justly' is not dissimilar to the 'just and equitable' requirement: equitable meaning fair and impartial. 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, remains 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.

3. In *Kwik Save* the employer's responses in respect of three claimants' claims were entered between 14 and 26 days late. The employer applied for extensions of time, admitting that its failure to comply with the time limits had been due to an oversight. The tribunal judge found the employer's explanation to be unsatisfactory and refused to grant the extensions of time. On appeal, the 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.
   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.

   the balance of prejudice.
   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?

   the merits of the defence.
   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.

4. An uncontentious chronology is as follows:

   a. 16 December 2021 to 16 January 2022 – ACAS Early Conciliation.

   b. 23 February 2022 (all dates hereafter 2022) – claim presented.

c. 9 March – Notice of Claim sent to the Respondent informing them that they had until 6 April to present a response, warning of the consequences of failing to do so.

d. 25 April – no response having been received, the Tribunal wrote to the parties informing them accordingly and referring to Rule 21.

e. 17 May – the Respondent wrote to the Tribunal (not copied to the Claimant) stating that they had received the Tribunal's letter of 25 April and that they believed that their insurers were dealing with the claim, but that they had now discovered that this was not the case. They sought advice from the Tribunal as to their next step.

f. 23 May – a notice of Remedy Hearing, for today's date, was sent to the parties, referring again to the failure to present a Response and stating (incorrectly) that a Rule 21 'default' judgment had been issued.

g. 10 June – the Tribunal wrote to the parties, suggesting to the Respondent that they make the application which is the subject of this Hearing.

h. 27 June – the Respondent's letter of 17 May having been belatedly copied by the Tribunal to the Claimant, his representatives wrote, requesting that the Remedy Hearing proceed.

i. 18 August – the Respondent makes their application, along with a draft copy of their Response and it was directed by the Tribunal that it be dealt with at this Hearing.

j. 6 October – the Claimant writes, objecting to the application.

5. The grounds relied upon by the Respondent (and as amplified in Mr Warriner's evidence) are as follows:

a. That while they accept that they received the claim form in a timely fashion, they immediately passed it on to their insurers, who they believed would take conduct of the proceedings on their behalf, complying with the relevant time limit. Mr Warriner said that they '*had been pushing from the start of events for our insurers … to pick up the case since 1 October 2021.'*, on the basis that they have insurance to cover such matters. He was questioned further on this matter and said, in effect, that he envisaged the possibility of a claim to the Tribunal as early as that date, hence his wish to involve the Respondent's insurers as early as possible. He accepted that the Respondent had been contacted (in or about January 2022) by

ACAS when Early Conciliation commenced and that on contacting his insurers, he said that '*even in January, they were disputing policy cover'*. He went on to explain that the basis of this dispute was that the insurers considered that the cover applied only to a parent company of the Respondent, not the Respondent itself, which he vehemently disputed was the case.

b. Mr Warriner was asked as to if, by early April (the ET3 deadline being 6 April), he had not received any draft ET3 and grounds of resistance from the insurers, for him to check and approve (as had happened when he eventually instructed solicitors in August), whether he was not concerned about the deadline, he said that he was '*very concerned'* and referred to the discussions with the insurers in January.

c. The Tribunal's 'response not received' letter of 25 April was received by the Respondent. Mr Warriner said that at this point his administrator was away, returning on 17 May and it was left to her to address on her return. The Respondent then made enquiries of their insurers and wrote to the Tribunal on 17 May, requesting its '*guidance'*.

d. On receiving the Tribunal's email of 10 June, they '*continued to liaise'* with their insurers, as they '*still believed that we were correct in believing that they should be representing us in these proceedings'*, which '*after considerable efforts, we realised …*' was not the case, after which they instructed solicitors '*promptly'*. It was only at that point that they were on 'an equal footing' with the Claimant (who had been represented from the outset). Mr Warriner said that their insurers had been '*very negligent'* in this matter, but also said that on receipt of the 10 June Tribunal email, they again passed it to their insurers, based on their previous instructions that they should not engage directly in the matter, for fear of breaching their insurance cover. He also said that '*having tirelessly chased our insurers they finally came back on 4 August with the recommendation that we should file our own defence using a lawyer of our choice whilst they continue to deliberate cover'*, which the Respondent did, at '*considerable expense'*.

e. The claim is a lengthy and complex document, requiring '*careful consideration and evaluation'*. They consider the claim to be unfounded and accordingly that it would be in the interests of justice to have its merits tested in a contested hearing. Mr Warriner was challenged as to why, even by 4 August, when he definitively knew that the insurers were not going to draft the Response, for his consideration and then present it, it still took another two weeks in

which to present this application and a draft response, despite the obvious urgency of the matter, to which he said he said he '*took it on the chin, it was late'* and referred to being on holiday at the time.

f. The delay was not intentional or procedurally abusive, but due to a genuine misunderstanding between them and their insurers. Mr Warriner said that on 24 June their insurers offered a compensation payment '*for their poor service levels to date'*.

g. The balance of prejudice falls in their favour, as the Claimant can continue with his claim, but if they are not able to defend against it, they potentially face paying remedy of approximately £20,000. On questioning from the Tribunal, however, as to whether, based on his previously-stated certainty that his insurers would accept liability for what he asserted was their negligence, the Respondent would not, in fact, be out of pocket for any award and he accepted that, yes that possibility existed, but now considered it couldn't be guaranteed.

h. They contest the Claimant's contentions as to procedural irregularities in their conduct of his dismissal, on grounds of redundancy, but in any event would seek to advance a Polkey argument in that respect. Mr Warriner was questioned on the merits of the prospective response to the claim, with the following matters arising:

    i. He agreed that the draft response [51 (19a)] provided no definition of the '*work of a particular kind'* mentioned.
    ii. He was challenged as to how (at the appeal stage), the Claimant could have challenged the scoring that was allocated to him the selection matrix, when the other members of the team were anonymised and their scores were blank and he said that he wasn't sure that he could divulge that information to the Claimant.
    iii. The Respondent had not formally identified those in the pool for selection (albeit that Mr Warriner stated that the pool was identified to be all employees in the Technical Department and thus obvious to the Claimant).
    iv. He agreed that the identification of the criteria of '*role significance'* was not an objective, but a subjective criterion, it being '*my opinion as to what was essentially significant'*.
    v. The draft Response stated that no admission was made that the Claimant, following the first phone-call from Mr Warriner, advising as to the possibility of the Claimant's position being made redundant, was locked-out of the Respondent's computer server. However, Mr Warriner in fact admitted such in his witness statement. He also agreed that the Claimant

had his access to the Respondent's email system also withdrawn, at the same time. Mr Warriner said that he had '*issues of trust, with our highly sensitive information, if the Claimant was looking for another job'*. He stressed, however that he '*had not already made my mind up and this was not indicative of any pre-decision.'*

6. The Claimant's response to the Application objects to it, on the following grounds:

    a. No corroborative evidence has been provided as to the Respondent's efforts to engage with their insurers.

    b. No action was taken by the Respondent between 17 May and 18 August – a period of three months, and four months after the original time for presentation.

    c. There is no explanation as to the apparent delay by the Respondent in taking legal advice, following receipt of the Tribunal's guidance email on 10 June.

    d. The prejudice to the Claimant is the (so far) eight months' delay in having his case heard, with attendant stress and effect on his ability to recall events.

7. Closing Submissions.

    a. Ms McGee made the following submissions:

        i. The Respondent was on notice of a potential claim, as early as October 2021, when they first contacted their insurers.

        ii. Any doubt as to that situation must have been removed once Early Conciliation commenced.

        iii. Mr Warriner accepts that the Respondent has received all relevant correspondence from the Tribunal.

        iv. However, despite this, it took until 17 May 2022, for the Respondent to engage in this process and to make its first contact with the Tribunal. Despite, however, being specifically told by the Tribunal, on 10 June, what steps were necessary, it was not until 18 August, some two months later that those steps were taken.

v. The key reason relied upon by the Respondent for this delay was their assumption of insurance cover, despite, as Mr Warriner stated, knowing, as early as January that that issue was in dispute, but nonetheless letting the matter go on, without looking at arranging alternative representation, until 4 August.

vi. Reliant on the requirement in *Kwik Save* for a respondent to provide a satisfactory explanation, this Respondent has provided no corroborative evidence of any contact with or chasing of their insurers. Nor is there any corroborative evidence of the tone of the insurer's stance on whether or not cover was available, thus indicating the reasonableness, or otherwise of the Respondent's reliance on the prospective provision of such cover. In any event, this is an issue between the Respondent and their insurers, not between them and the Claimant. The principle in *Dedman v British Building and Engineering Appliances [1973] IRLR 379 EWCA*, while applicable to time limits for the bringing of unfair dismissal claims, nonetheless indicates that reliance cannot be placed on the failures of advisors. The Respondent will have recourse against their insurers.

vii. The insurers were not the Claimant's employer and as Mr Warriner accepts, could not have presented a response to the claim, without his approval, but despite him receiving no such draft response, when he knew of the 6 April deadline, he still took no action, over a four-month period, exhibiting a complete lack of any sense of urgency in this matter. It is noteworthy that in *Kwiksave* the delay was two to three weeks and in the case of *Moroak v Cromie [2005] ICR 1226 EAT*, only 44 minutes.

viii. As to the merits of the defence, we have only the ET3, which is little more than a blanket denial. It is accepted that there were no consultation meetings, albeit that the Respondent asserts that letters of invitation were sent to the Claimant, which he allegedly ignored, but it is significant that at no point did the Respondent enquire of the Claimant as to whether he'd received any such letters, or queried his non-attendance. The 'particular kind of work' was not defined, the Claimant was unable to interrogate the anonymised and blank scoring matrix and a very subjective criterion was used. Finally, contrary to what is asserted in the ET3, the Claimant was locked out of the Respondent's server and email system

immediately after first notification of the 'possibility' of redundancy, indicating a pre-conceived outcome.

ix. As to the balance of prejudice, it falls in the Claimant's favour, as he has now been waiting a year for this matter to be resolved, with the attendant stress that has caused him (as set out in his witness statement). Time limits are there for a reason. Granting the application will impose yet further delay, of probably many further months, leading to further expense for the Claimant.

b. Mr Warriner made the following submissions:

i. He could see that a couple of the incidents set out, such as the withdrawal of access to the server and the email system, were questionable, but were not meant to indicate prejudice against the Claimant's case.

ii. He agreed that he had failed to provide any evidence of contact with his insurers, which he accepted, in retrospect, was a mistake.

iii. There has to be some responsibility on the Claimant to reach out to his employer, in an effort to avoid redundancy, which he said the Claimant had not done, in contrast to another employee also facing redundancy.

8. Conclusions. I refuse the Respondent's application, for the following reasons:

a. The delay is egregious, at least four months, which, applying *Kwik Save*, emphasises the importance of the Respondent providing a satisfactory and honest explanation. However, in this case, the explanation is far from satisfactory and the honesty of it is uncorroborated, for the following reasons:

i. While it almost totally depends on blaming the insurers, no corroborative evidence whatsoever has been provided as to the insurer's stated position in respect of cover, or the efforts asserted by the Respondent in contacting them. This is despite this absence of evidence being flagged up in the Claimant's response to the application two weeks before this Hearing. Even on Mr Warriner's evidence, it seems to be the case that as early as January, the insurers were disputing the existence of cover, but, nonetheless he decided to proceed, on the apparent assumption that regardless, the insurers

would provide cover, to do nothing to effectively resist the claim, for the best part of five months, apart from sending one email to the Tribunal in late May.

ii. Even when, again on his evidence, it is beyond doubt, on 4 August that the insurers were not going to provide cover, the Respondent still permitted two weeks to pass by before filing their application, indicating a complete lack of urgency on their part.

iii. While Mr Warriner sought to rely on the fact of the limited administrative resources of his Company, it does have plus of 30 employees, to include an administrator and as such, particularly when compared to the many 'one-man band'/small family companies who do manage nonetheless to meet the time limit, should have been able to comply. It is simply not acceptable for him to take no action whatsoever, for three weeks, simply because his administrator was away.

b. I consider that the balance of prejudice falls in the Claimant's favour. It has already been a year now since his dismissal and a final hearing is likely to be many months off, before he could reach a final conclusion of this matter. If unfairly dismissed, he is being denied the remedy due to him and which based on his earnings since, he clearly needs. In contrast, the Respondent seems entirely confident that their insurers will, in due course, accept that they are obliged to honour the cover and thus, based on Mr Warriner's account of their inaction and indecisiveness, it would seem likely that they will accept liability for any award, particularly if it is crystallised in a Remedy Judgment.

c. In respect of the merits of the Response, I note the likely weaknesses in the Respondent's case, particularly when the principal burden of proof rests upon them, as follows:

i. The Claimant's assertion that in the first phone call from Mr Warriner, notifying him of the issue, he was being presented with a fait accompli as to his redundancy is strongly supported by Mr Warriner's decision to immediately thereafter remove his access to the Respondent's computer system.

ii. I draw the inference from Mr Warriner's admitted poor handling of the submission of his Company's response and his stated unfamiliarity with employment law that he was likely not to have approached the redundancy process in as thorough a

fashion as might be expected, leaving the Respondent open to allegations of both substantive and procedural errors.

9. Weighing and balancing these factors against each other, I find that the failure to provide a satisfactory explanation for the excessive delay is the major factor weighing against granting the application. While the other two factors, as to balance of prejudice and merits are perhaps less clear-cut, they are, I consider, tipped in the balance by that major factor. I therefore consider, applying Rule 2 that is 'fair and just' to refuse the application.

10. Judgment. For these reasons, the application is refused.

Employment Judge O'Rourke
Dated: 28 October 2022

Judgment sent to the Parties on
08 November 2022

FOR THE TRIBUNAL OFFICE