



EMPLOYMENT TRIBUNALS

Claimant: Mr D Allen

Respondent: Remedy Café & Kitchen Limited

Heard at: Manchester Employment Tribunal

On: 31 October 2022

Before: Employment Judge Mark Butler

Representation

No parties present. Decided on the papers, in chambers.

JUDGMENT

1. The judgement of the employment tribunal is that the time limit for presenting the ET3 is extended to 06 June 2022. Pursuant to Rule 20(4) of the Employment Tribunal Rules of Procedure, the tribunal's judgment of 23 May 2022 is hereby set aside.

REASONS

INTRODUCTION

2. The claimant brought complaints of arrears of pay and other payments, which amounted to a claim of having been subjected to unauthorised deductions from his wages. He brought this claim when he presented a claim form on 03 October 2021. The respondent was notified of this claim and was required to present a response to the tribunal by 10 November 2021, if it intended on defending the claim.
3. No response was received by the tribunal by the deadline of 10 November 2021. Nor was there an application to extend time for presenting the ET3 at this point.
4. As a result of no response having been received, judgment under Rule 21 was entered in favour of the claimant. This was in the gross sum of £692.75.

5. The respondent, by correspondence dated 06 June 2022, submitted an application to extend time for the presentation of the ET3. This application was presented alongside a draft ET3. The respondent also presented medical evidence to support its application.

PROCEDURAL HISTORY

6. I consider it prudent to lay out the short procedural history in this case.
7. The ET1 was presented on 03 October 2021. This claim was accepted.
8. A notice of claim was sent to the respondent on 13 October 2021. An ET3, should the respondent wish to defend the claim, was to be presented to the tribunal by 10 November 2021. No ET3 was received by this deadline.
9. The tribunal wrote to the parties on 22 December 2021. In this letter it explained that the respondent had not presented a response to the claim. And that under rule 21 of the ET Rules of Procedure judgment may now be issued.
10. The case was initially listed for final hearing on 08 February 2022. However, this was postponed and re-listed to take place on 22 December 2022 (this was later vacated on the Rule 21 judgment being entered).
11. On 02 February 2022, Ms McIntosh, a director of the respondent, emailed the tribunal to explain that she had received notice of a forthcoming hearing but that due to a bout of unforeseen circumstances she had been out of the office for the previous four months, and was unable to complete any work relating to matters of this nature. She also explained that she was the only party within the respondent with authorisation to handle legal matters. In consequence, she explained that the respondent was seeking a postponement of the upcoming final merits hearing, as well as requesting an extension of time to provide a response to the claim. She attached a document from her doctor to confirm the circumstances affecting her.
12. Ms McIntosh, emailed the tribunal again on 23 February 2022. In this email she explained that she had emailed the tribunal on 02 February 2022 requesting an extension of time to submit the respondent's ET3. In response to this email, on 09 March 2022, Regional Employment Judge Franey directed Ms McIntosh that she would need to submit an ET3 as soon as possible with an explanation why the responses submitted late together with an application for an extension of time to accept the response.
13. Ms Macintosh at this point did not present an ET3, nor an application for an extension of time to present an ET3, nor did she provide any further explanation behind the delays.
14. The claimant was asked to quantify his claim under cover of letter dated 06 April 2022. On quantification of his claim, judgment under rule 21 was entered. The judgement is dated 23 May 2022.
15. The respondent wrote to the tribunal, through a now appointed legal representative, on 06 June 2022. The respondent presented (i) an application to present an ET3 out of time, (ii) an explanation as to why the ET3 was not presented before this date, (iii) a draft ET3 and (iv) a medical note from Ms McIntosh's doctor. In short, the respondent was seeking an extension of time on the following basis:
 - a. Ms Katie McIntosh was the respondent's director, who was the only person within the business authorised to deal with legal matters.

- b. She had been out of the business for several months.
 - c. This was due to her father suddenly passing away, various mental health challenges and suffering two bouts of COVID.
16. The correspondence came to me whilst on duty. I directed that the tribunal wrote to the parties on 15 August 2022 to explain the following:
- a. That although the respondent's application for reconsideration of the judgment was received more than 14 days after the date on which it was sent to the parties, I considered that it was in the interests of justice, given the explanation received, to extend time and to consider the application.
 - b. That the parties had 14 days from the date of the letter to object to the application being considered on the papers (29 August 2022).
 - c. That the claimant could also put forward written submissions as to why the application should not be accepted, again within 14 days of the date of the letter (29 August 2022).
 - d. That if neither party raised any objections, then the reconsideration application would be determined on the papers.
17. No objections were received to this matter being decided on the papers, without the parties present.
18. There is one small matter that I would like to correct at this point, although this does not impact on the nature of today. I must have approached the letter of 15 August 2022 with reconsideration under rules 70-73 of the ET Rules of Procedure in mind (given the reference to 14 days to make an application), whilst, for accuracy purposes, it should and is being approached pursuant to Rule 20 of those same Rules. This does not alter the exercise I have to undertake today, as the considerations involved are reflective of one another.
19. The claimant presented two sets of written submissions in response to my letter. The first being received on 29 August 2022, and the second on 23 September 2022. Both documents have been considered, despite the second having been sent to the tribunal late.

LAW

20. The following parts of the ET Rules of Procedure are relevant to the matter I am determining today:

Response

16.—(1) The response shall be on a prescribed form and presented to the tribunal office within 28 days of the date that the copy of the claim form was sent by the Tribunal.

(2) A response form may include the response of more than one respondent if they are responding to a single claim and either they all resist the claim on the same grounds or they do not resist the claim.

(3) A response form may include the response to more than one claim if the claims are based on the same set of facts and either the respondent

resists all of the claims on the same grounds or the respondent does not resist the claims.

Rejection: form presented late

18.—(1) A response shall be rejected by the Tribunal if it is received outside the time limit in rule 16 (or any extension of that limit granted within the original limit) unless an application for extension has already been made under rule 20 or the response includes or is accompanied by such an application (in which case the response shall not be rejected pending the outcome of the application).

(2) The response shall be returned to the respondent together with a notice of rejection explaining that the response has been presented late. The notice shall explain how the respondent can apply for an extension of time and how to apply for a reconsideration.

Applications for extension of time for presenting 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.

(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.

Effect of non-presentation or rejection of response, or case not contested

21.—(1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.

(2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone.

(3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.

21. Mummery J in **Kwik Save Stores Ltd v Swain [1997] ICR 49** set out the principles to be applied by a tribunal when considering an application under Rule 20. These require the Tribunal to consider all relevant documents and other factual material put before it to explain both the non-compliance and the basis on which it is sought to defend the case on its merits. In exercising their discretion, the employment judge must take account of all relevant factors which would include the explanation (or lack of explanation) for the delay and the merits of the defence. The Tribunal must come to a conclusion which is objectively justified on the grounds of reason and justice which takes into account the possible prejudice to each party.

CONCLUSIONS

22. In reaching my conclusion on this matter, I have carefully considered the factors set out in **Swain** (above).
23. The reason given for the failure to present the ET3 in time, and the subsequent delay, is that Ms McIntosh, the person who would be responsible for doing this on behalf of the respondent, was not able to do so due to various health impairments. This is supported by a doctor's letters. Most particularly, the document dated 06 June 2022. This explains that:

"She succumbed to Covid in November 2021 and was unwell for 4 weeks. In December her father became critically ill and after a protracted terminal illness passed away on 25 January 2022.

From February to April, as a result of the bereavement along with work related stress and mounting anxiety she became increasingly depressed. Unfortunately these symptoms were aggravated by the contraceptive implant

On 4 May 2022 she was diagnosed as having Covid again and was unwell for 3-4 weeks, only just feeling like she is returning to normal physical health. Not surprisingly, however she is still feeling stressed, anxious and exhibiting signs of depression.

All of the above have had an adverse effect on her ability to carry out daily activities, especially dealing with challenging business decisions and demands."

24. One matter that does concern me is that Ms McIntosh was aware of the claim by 02 February 2022, as she emailed the Employment Tribunal. A further email was sent by Ms McIntosh on 23 February 2022. She had the opportunity to take some action at this point but did not. However, this does need to be read against the circumstances which she found herself in (noted above).
25. I do consider that there is a reasonable explanation for the delay in the respondent lodging an ET3.
26. Turning to the merits of the case. The respondent does provide grounds of resistance, which presents a defence that has potential merit.
27. In particular, the respondent raises a defence that all hours worked were properly paid and that any deductions made were authorised by the claimant's contract of employment. If the respondent is correct on these matters, then its defence will likely succeed. These disputes can only be resolved by the tribunal hearing evidence. In those circumstances, there is potential merit in the defence,

assuming that facts are found which support the respondent's position.

28. For the avoidance of doubt, the Tribunal has not come to any view on whether the Claimant or the Respondent is correct. I am merely taking the respondent's case at its highest, to assess whether its defence has any merits.
29. There is a prejudice to the Respondent if the application is not allowed as it would not be permitted to defend the claim and would have to pay compensation where compensation may not be due.
30. There is a prejudice to the Claimant if the application is allowed. He presently has a judgment in his favour which he could enforce and that would be set aside if the application is allowed. However, any prejudice is tempered by the fact that he would not then be prevented from pursuing his claim and would have the opportunity to meet the Respondent's defence. If he is successful then he would secure a judgment in his favour and the only prejudice would be a short delay in the matter being resolved.
31. The Tribunal considers that the balance of prejudice falls in favour of the Respondent; refusing the application denies it the opportunity to defend the claim whereas granting the application does not prevent the claimant from putting his case.
32. Having considered the **Swain** factors and relevant circumstances, the Tribunal grants the Respondent's application. Time to present by the respondentan ET3 is extended to 06 June 2022, and the ET3 that was presented on that date is now accepted. In terms of Rule 20(4), the judgment of 23 May 2022 is hereby set aside.
33. This case will now be re-listed for final hearing, with directions to prepare the case for that hearing.

Employment Judge **Mark Butler**

Date_31 October 2022_____

JUDGMENT SENT TO THE PARTIES ON
5 December 2022

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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