



EMPLOYMENT TRIBUNALS

Claimant: Ms N Walcott

Respondent: Sainsburys Supermarkets Ltd

Heard at: Watford Employment Tribunal by CVP remote link

On: Wednesday 2nd November 2022

Before: Employment Judge Frazer

Representation

Claimant: Mr F Neckles (Union representative, PTSC union)

Respondent: Mr T Welch (Counsel)

JUDGMENT AND REASONS

JUDGMENT

The Respondent's application dated 14th July 2022 for an extension of time for presentation of responses to the above-numbered claims is allowed under rule 20 of the Employment Tribunals Rules of Procedure 2013.

REASONS

1. This is the Respondent's application under rule 20 of the Employment Tribunals Rules of Procedure 2013 to present its response to the two of the Claimants' claims out of time. Those claims are claims that have been referred to in this application as claims 2 and 3. Claim 1 which was number ending 677 was dismissed upon withdrawal. Claim 2 was presented on 14th September and is numbered ending 678. Claim 3 was presented on 29th September and is numbered ending 064

2. I was referred by Counsel for the Respondent to two authorities which assist with decisions on this point: **Kwiksave Stores Ltd v Swain and others [1996] ICR 49** and **Thornton v Jones 2011 UKEAT0068** which follows **Kwiksave**.
3. In reaching this decision I am to take into account all relevant factors including the explanation for the delay and the merits of the defence. I must also have regard to the balance of prejudice as between each party.
4. I have had regard to the case management order of EJ Lewis dated 24th May 2022. He referred to the files relating to the three claims being indicative of 'muddle and delay'. At that hearing EJ Lewis recorded that the Respondent's solicitor, Ms Pourtival, said that claims 2 and 3 had not been received by her. The tribunal file had shown that claims 2 and 3 had been served on 20th November 2020 along with claim 1 and that responses to all claims were due on 18th December 2020. She stated that as she had not seen those claims there had not been responses to them, which is the explanation advanced today by the Respondent. On that basis EJ Lewis provided for the Respondent to apply for permission to submit responses out of time.
5. The application is dated 14th July 2022. I am satisfied that it complies with rule 20. It is in writing and was copied to the Claimant. It is accompanied by a draft of the response. The Respondent says that upon investigation it found that three separate emails were sent by Watford ET on (*sic*) 20 November to Ben Bradburn: at 1025, 1031 and at 1044. Those emails are in the bundle. The Respondent makes the point that the actual claim forms themselves did not contain case numbers but the emails and notices did. The Respondent's case management system uploads the claims onto a shared online drive from which a solicitor responds to the claim. In this case it was not discerned that there were three separate claims and only 377 was uploaded. This claim was responded to by Ms Pourtival on time.
6. On 22nd February 2021 the Claimant's representative wrote to Watford and queried whether all claims had in fact been sent to the Respondent and if so which claim forms had been sent. This adds to the plausibility of the Respondent's explanation.
7. Following on from this on 24th February 2021 the Respondent advised the Claimant that they had received claim 3311677 but did not appear to have received any others. There was a consolidation email that had been sent to the Respondent by the tribunal on 20th November 2020 but this had escaped the Respondent's representative's notice. On 21st May the Claimant's representative said that she requested the claims. In the event she says that they were not received by the Respondent until after the preliminary hearing - in June of this year.
8. The Respondent sent the application and response approximately a month later which is not unreasonable and mirrors the time given in the rules for service of a response in my finding.

9. I have had regard to the Respondent's explanation. The Claimant submits that there has been deliberate procedural abuse but I find that the Respondent's actions are at best an oversight. It seemed that on the chronology the Respondent was alerted to the existence of the two other claims in the February after the Claimant had enquired as to whether the claims had been served on the Respondent. There seemed to be somewhat of an impasse until the matter reached the tribunal for a case management hearing when the matter was considered by EJ Lewis. The Claimant says that it sent the claims to the Respondent but that the Respondent chose not to respond to them and that this is something I should take into account when looking at the Respondent's actions and explanation. I do take into account that there is a significant elapse of time between the point at which it appears to come to the Respondent's attention that there are other Et1s and the point at which the Respondent says that it receives them and responds to them. This is over a year later.
10. I do consider that there was oversight to start with by the Respondent and that also there was a lack of proactivity within the period between February 2021 and the PH in May 2022. However, having regard to **Kwiksave**, I do not consider that the failure to act can be said to be deliberate. The Respondent would have nothing to gain by defaulting on providing an ET3 and everything to lose namely the risk of a judgment in default. While I did not consider the points made by the Respondent's Counsel about lack of case numbers being on the face of the ET1 to be compelling, the account does suggest more oversight and lack of attention than a deliberate act. There was some overlap in the pleaded cases on the claim forms as well which, while it doesn't perhaps excuse the oversight, does again lend some credence or plausibility to the Respondent's explanation of this being an oversight.
11. I have to look at the prejudice to the Respondent in not allowing it to enter a response. The claims are for a failure to be allowed to exercise the right to be accompanied, for unfair dismissal and detriment arising under the Employment Relations Act 1999 and for discrimination. Those are claims which may result in compensation to be paid by the Respondent and allegations of discrimination are serious. There is nothing before me today which suggests that a fair trial would not still be possible despite the delay. The Claimant will still have the opportunity of advancing a case and could even win whereas the prejudice to the Respondent is greater if it does not have the opportunity of presenting a defence.
12. I have looked at the merits of the defence. This is not a high threshold but one of whether the response is arguable. The Respondent's defence is one which can be run. It says that it did provide an opportunity for the Claimant to have a representative. That will be a matter which turns on the evidence. It says that the reason for dismissal was the Claimant's conduct, which was why she was invited to the disciplinary hearing in the first place. That must make sense because the invitation precedes the Claimant seeking to exercise her right under s.10 ERelAct 1999. In terms of sex discrimination, the Respondent says that there is no *prima facie* case but the Claimant says that there was another individual (male) involved in the altercation/ incident who was the aggressor

and was not dismissed (which may require further information). The Respondent will want to lead evidence to counter why the Claimant says that she was subjected to detriments or dismissed. In relation to the appeal the Respondent's case is that the representative at the appeal hearing was aggressive and covertly recorded the proceedings. Much of this will be a matter of evidence and there is nothing on the face of the response which suggests that none of the defences are not at least arguable. I accept that when looking at the merits of a defence it follows that if a claim has little or no prospects of success on the face of it it follows that the defence will be arguable. The points made by Counsel are all arguable.

Employment Judge A Frazer
Dated: 3rd November 2022

JUDGMENT REASONS SENT TO THE
PARTIES ON

10/12/2022

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS