EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4100446/2023 (V)

Preliminary Hearing held in Glasgow on 21 March 2023, and conducted remotely on the Cloud Video Platform (CVP)

Employment Judge Ian McPherson

Ms Tawia Abbam	**Claimant Represented by: Ms C McInnes - Casework Official [NASUWT]**
South Lanarkshire Council .	**Respondents Represented by: MrS O'Neill - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that: -

(1) Having heard sworn, unchallenged evidence from a witness led by the respondents, and thereafter having heard oral submissions from both parties' representatives, at this Preliminary Hearing, the claimant's representative having stated that she had no objection to the respondents' application, and so without the need to adjourn and issue a reserved judgment, the Tribunal orally **granted** the respondents' application, made under **Rule 20 of the Employment Tribunals Rules of Procedure 2013,** for an extension of time for presenting their ET3 response and, having done so, the Tribunal **allowed** the ET3 response submitted late for the respondents by email on 16 March 2023 to be accepted by the Tribunal, and the case to proceed as defended.

(2) Having done so, the Tribunal instructs the clerk to the Tribunal to serve a copy of the now accepted ET3 response on the claimant's representative, and on ACAS, when issuing this Judgment to both parties.

(3) Further, the Tribunal **ordered** the claim and response to be listed for a 2-hour Case Management Preliminary Hearing to be conducted remotely by CVP before Employment Judge Ian McPherson, if available, whom failing any other Employment Judge sitting alone, at the Glasgow Employment Tribunal, on **Tuesday, 22 August 2023,** commencing at 10:00am, for the purpose of case management, and then listing the case for a substantive Hearing in the listing period of **September, October or November 2023.**

(4) **Case management orders for that further Hearing are issued to parties under separate cover, arising from the case management discussion held with both parties' representatives in the course of this Hearing.**

REASONS

Introduction

1 This case called before me on the morning of Tuesday, 21 March 2023, at 10.00am, for a **Rule 20** Preliminary Hearing, further to amended Notice of Hearing issued by the Tribunal to both parties on 10 March 2022.

2 It converted a previously scheduled one-day Final Hearing in an undefended case into this CVP Hearing to determine the following preliminary issues: (1) whether or not the respondents should be granted an extension of time under **Rule 20** to defend the claim, and (2) if so, to determine further procedure in the claim, by way of case management orders and directions.

Background

3 Following ACAS early conciliation between 11 November and 23 December 2022, the claimant, who is represented by her trade union, NASUWT, presented an ET1 claim form to the Employment Tribunal, on 19 January 2023, complaining that the respondents had unlawfully discriminated against her, directly and indirectly, as also harassment, on the grounds of her race, being black racial group, contrary to **Sections 13, 19 and 26 of the Equality**

Act 2010, in connection with her ongoing employment by them as a probationary teacher.

4 The claim was accepted by the Tribunal on 24 January 2023, and a copy of the claim was served on the respondents, on that date, at their HQ address in Hamilton, requiring them to lodge a ET3 response at the Glasgow Tribunal office by 21 February 2023.

5 In that Notice of Claim, it was explained to the respondents that if their response was not received by 21 February 2023, and no extension of time had been agreed by an Employment Judge before that date, then they would not be entitled to defend the claim.

6 It was further explained that, where no response was received or accepted, an Employment Judge might issue a judgment against them, without a Hearing, and they would only be allowed to participate in any Hearing to the extent permitted by an Employment Judge.

7 Further, the Notice of Claim and Notice of Preliminary Hearing, sent to both parties by the Tribunal on 24 January 2023, stated that the claim would be heard by an Employment Judge sitting alone, at a Case Management Preliminary Hearing to be held via telephone conference call on 21 March 2023, at 11:30am, and that one hour had been allocated for that purpose.

8 The claimants completed PH Agenda was due by 28 February 2023, and the respondents' by 14 March 2023. The claimant's representative lodged a completed claimant's PH Agenda with the Tribunal, by email, on 21 February 2023. On direction of a Legal Officer at the Tribunal (D Doherty), the claimant's representative was advised, under cover of a letter dated 24 February 2023 from the Tribunal, that she was to post a copy of the claimant's PH Agenda to the respondents and confirm that she had done so.

No Response by the Respondents

9 No ET3 response was lodged by, or on behalf of, the respondents, by the due date of 21 February 2023. On 27 February 2023, the listed Case Management Preliminary Hearing, to be held via telephone conference call on 21 March

2023 at 11:30am, was converted into a one-day Final Hearing in an undefended case to by conducted by CVP, and the hearing duration and start time were changed to one-day starting at 10:00am.

10 That amended Notice of Hearing was sent to the respondents, on 27 February 2023, for information only, as they had not lodged a response, and so they would be entitled to attend the Final Hearing but only able to participate to the extent permitted by the Employment Judge who hears the case. Case Management Orders for that Final Hearing were also issued to both parties by the Tribunal on 27 February 2023.

11 Also, on 27 February 2023, on my instructions, the Tribunal wrote to the claimant's representative seeking further information. I had noted that no acceptable response to the claim had been received. It was therefore possible to issue a judgment without the need for a hearing.

12 However, I considered that there was insufficient information to issue a full **Rule 21** default judgment at that stage and therefore I required Ms McInnes to provide the additional information by 13 March 2023, in particular to provide a detailed Schedule of Loss for the Final Hearing - when an Employment Judge would hear sworn evidence from the claimant.

Respondents' Rule 20 Application for an Extension of Time

13 On 7 March 2023, Mr Sean O'Neill, in-house lawyer with the respondent Council, applied to the Tribunal making two applications, as follows:

7represent the respondent in this matter and hereby respectfully make the following applications to the tribunal:

1. ***under Rule 20, an application for an extension of time to allow the respondent to defend the claim. An extension of 3 weeks from today's date is respectfully requested.***

2. ***under Rule 29, an application for a Case Management Order setting aside the tribunal's earlier Case Management Order of 27th February 2023, which has fixed a final hearing via CVP on***

> ***21st March, and fixes a preliminary hearing with both parties exchanging the usual PH agendas in advance. Alternatively, should the Tribunal prefer, the CVP hearing on 21st March is converted instead to a hearing on the present applications.***
>
> ***By email of 27th February 2023, our Mr Gordon Stewart, solicitor, received notice from the Tribunal advising that a CVP final hearing has been scheduled for 21st of March, following no response to the ET1 having been received by the Tribunal (see email below and attached). Mr Stewart has had no prior involvement in this matter. Mr Stewart however brought the Tribunal's email to the attention of his seniors in the Respondent's Legal Services who in turn brought it to the attention of the Respondent's Personnel Department who undertook the necessary investigation. Having done so they found no record of the claim having been received by the respondent until this morning when notice of two claims arrived, both response deadlines having already passed, one in the present matter and the second in an unrelated claim. The respondent invariably responds timeously to all ET1 forms it is notified of. It is not clear why the respondent has only now become aware of the present claim.***
>
> ***It is the interest of Justice that the above applications are granted and the respondent be permitted to defend the claim. The respondent has not included a draft response to the claim, in terms of Rule 20. A draft response would require detailed instructions and further delay to the respondent's application for the above orders, and we are mindful that a hearing is currently fixed in only 14 days' time."***

14 Mr O'Neill's application was referred to me for instructions, as also Ms McInnes' email of 7 March 2023, stating: "*I can confirm that we do not object to a requested postponement."* Thereafter, on my instructions, the Tribunal wrote to both parties' representatives on 9 March 2023. In that letter, both parties were advised that:

"(1) Judge McPherson has noted the explanation provided for the respondents' failure to lodge an ET3 response by the due date of 21 February 2023, as per the Notice of Claim posted by the Tribunal on 24 January 2023 and addressed to the Council's HQ. As the Judge notes that the Council wish to defend the claim, the Judge notes their application, under Rule 20, for an extension of time to do so, for 3 weeks, i.e. by 28 March 2023. He is prepared to hear from their representative on that application at a Hearing.

(2) Mr O'Neill's application of 7 March does, however, not include a draft ET3 response, as per Rule 20. While the Judge accepts that a full detailed response cannot be lodged, pending receipt of information & instruction from the internal client department at SLC, the Judge considers that it should be possible for the respondents to lodge at least a skeletal response, explaining the basis on which they answer the claimant's allegations, and explain the basis of their proposed defence, and any preliminary issues identified. Please provide that draft ET3 response within the next 7 days, so that the claimant's representative can, in terms of Rule 20(1) have up to 7 days thereafter to give reasons in writing why any such application is opposed, or, as the case may be, agree to an extension of time.

(3) While the claimant's representative has not opposed postponement of the one-day CVP Final Hearing assigned for 21 March 2023, Judge McPherson has decided not to postpone that listed Hearing, but to convert it to a 2 hour open Preliminary Hearing to determine (1) whether or not the respondents should be granted an extension of time under Rule 20 to defend the claim and (2), if so, to determine further procedure in the claim, by way of case management orders and directions.

(4) On 21 February 2023, the claimant's representative intimated to the Tribunal, a completed Agenda for the claimant. As the

respondents had not entered a response, it was not copied to their representative, as per Rule 92.

(5) Judge McPherson has directed that I forward a copy to Mr O'Neill. I attach copy of the email of 21 February 2023 sent @ 14:52 by Claire McInnes, for his attention.

(6) Had the respondents entered a response, their completed PH agenda would have been due by 14 March 2023. It would be helpful if, in advance of the CVP Preliminary Hearing before Judge McPherson on 21 March 2023, they could complete and return to the Tribunal, by email, with a copy to the claimant's representative, a respondent's PH Agenda (Equality Act). The relevant PH Agenda & guidance are accessible using this hyperlink:

https://www.judiciarY.uk/publications/directions-for-employment-tribunals-scotland/

(7) In light of the above, and in terms of his powers under Rule 29, Judge McPherson has meantime set aside the case management orders for an undefended Final Hearing enclosed with the Tribunal's letter to both parties dated 27 February 2023.

(8) Finally, the Judge confirms that his direction of 27 February 2023, for additional information from the claimant, namely a detailed Schedule of Loss, remains in place, and it would be helpful if, in advance of the CVP Preliminary Hearing before Judge McPherson on 21 March 2023, the claimant's representative could complete and return to the Tribunal, by email, with a copy to the respondents 'representative, that detailed Schedule of Loss for the claimant."

Skeletal ET3 Response

15 On 14 March 2023, Mr O'Neill attached a completed respondents' PH Agenda, and he copied it to the claimant's representative in compliance with

Rule 92. At section R2.6 there, he stated that an investigation is being undertaken by the respondents, and that the investigation is forecast to conclude in May 2023. He added that further and better particulars would be required from the respondents once that process was concluded.

16 Thereafter, by email to the Tribunal, sent on 16 March 2023, Mr O'Neill attached a skeletal ET3 response for the respondents, defending the claim, and he copied it to the claimant's representative in compliance with **Rule 92.** In section 6.1 of that ET3 response, it is stated as follows:

"The claimant has raised both a Greivance [sic] ***as well as a Dignity at Work complaint, and each fall under separate*** [sic] ***internal procedures.***

The claimant agreed with the claimant's union representative that the grievane [sic] ***procedure would be postponed pending the outcome of the investigation into her Dignity at Work complaint. And pending the outcome of further investigation, the claimant, as requested in her Grievance, has been moved from Cathkin High School to continue her training at a different school. The claimant has been located at Strathaven Academy since 31st October 2022.***

The Dignity at Work complaint is in the same or similar terms as her present tribunal claim.

The investigation into the Dignity at Work complaint is ongoing. There are many individuals who are captured within the scope of the comaplaint, [sic] ***and several of whom still require to be interviewed before the report of the investigation is concluded and placed before the Nominated Manager, who will decide what action, if any should be taken, including any disciplinary action. The complainer has a right of appeal.***

The investigation is estimated to be ongoing for a further 6 weeks.

In the circumstances, while the respondent defends the serious claims made against it, it is not yet in a position to respond in any real detail to the very specific incidents and allegations the claimant has raised with them, and with the tribunal.

The respondent would respectfully request a sist to tribunal procedures to allow the Dignity at Work investigation and any further procedure to conclude, and for the respondent at that point to respond to the tribunal and the claimant with further and better particulars in response to the details of the claim.

The respondednt [sic] ***believes thatn*** [sic] ***in these in these circumstances, a sist to allow the investigations to conclude is just, equitable and in the overriding objective."***

17 Finally, on 17 March 2023, Ms McInnes, the claimant's representative, sent to the Tribunal, by email, a schedule of loss for the claimant, seeking compensation from the respondents totaling **£13,664.06,** including **£12,000** for injury to feelings, and she copied it to the respondents' solicitor, Mr O'Neill, in compliance with **Rule 92.**

18 All of these papers from the Tribunal's casefile (ET1 claim form, ET3 response, both parties' completed PH Agendas, the respondents' **Rule 20** application, and the claimant's Schedule of Loss) were all available to me at this Preliminary Hearing. Before the *start of this Preliminary Hearing, I had pre-read and considered these papers from the Tribunal's casefile.

Hearing before this Tribunal

19 This Preliminary Hearing took place remotely. It was a videoconference call (V) hearing held entirely by video, and parties did not object to that format. I heard it in my chambers at Glasgow Tribunal Centre. It was to discuss how to determine the respondents' **Rule 20** application, and to discuss how to progress the case in accordance with ET Presidential Guidance.

20 There were, in the course of this Hearing, a few occasions where there were audio and/or video connectivity problems with Mr O'Neill, and Ms McInnes, who were dialing in from home, rather than from the Council's offices, but with perseverance and patience, these issues were resolved by disconnecting and reconnecting, and so the Hearing was conducted without any undue delay or inconvenience.

21 The claimant was not in attendance, but she was represented by Ms Mclnnes. Mr O'Neill appeared as solicitor for the respondents, accompanied by his internal client, Ms Fiona Menzies, Personnel Adviser from the respondents' Education Department.

22 Discussion then ensued about the format and purpose of the Preliminary Hearing. The principal item of business was item (1) whether or not the respondents should be granted an extension of time under **Rule 20** to defend the claim, and I enquired of Mr O'Neill whether Ms Menzies was present as a witness, to give evidence in support of the respondents' written application of 7 March 2023, where the Tribunal would require to consider the test laid down by the Employment Appeal Tribunal about dealing with **Rule 20** applications for extension of time, in **Grant v Asda [2017] UKEAT/0231/16 ; [2017] ICR D17.**

23 In reply, Mr O'Neill stated that he had not intended to lead Ms Menzies as a witness, but simply to make an ex *parte* statement in support of his written application, but he further stated that he was not familiar with the EAT judgment I had referred to in **Grant v Asda.** Ms Mclnnes, as a trade union official, not a solicitor, stated that she too was not familiar with the test laid down in **Grant v Asda,** but she did not object to further time being granted to the respondents.

24 Having heard both parties' representatives, I decided that as I was aware of the judicial guidance in **Grant v Asda,** it was only appropriate, and fair to both parties, that I should share its terms with them, give them an opportunity to consider it, and then further discuss with both of them how this Preliminary Hearing might best be conducted.

25 We agreed a 15 minute adjournment for that purpose, after I posted in the CVP chatroom a *Bailli* website hyperlink to the EAT judgment, and I invited them both to consider specifically paragraphs 16, 17 and 18 of the judgment by the then Mrs Justice Simler, then EAT President, and now Lady Justice , Simler in the Court of Appeal of England & Wales. During the adjournment, cameras were off, and mikes muted, for all participants.

26 When we resumed proceedings, in public session at 10:21am, Mr O'Neill indicated that he would now lead evidence from Ms Menzies, as a witness for the respondents, and, after being sworn, she gave her evidence.

27 I do not make findings in fact here as, in the event, her evidence was unchallenged, as Ms McInnes stated that she had no questions of clarification to raise by way of cross-examination of Ms Menzies' evidence in chief. I asked a few questions of clarification.

28 I found Ms Menzies to be a straightforward witness, speaking to matters to the best of her knowledge and belief, although it became clear that she did not have the full details of the circumstances in which the respondents' copy of Tribunal correspondence was found, in the Council's offices on 7 March 2023, nor full details of the respondents' ongoing internal investigations into the claimant's Dignity at Work grievance, as the fact finding is being undertaken by another officer of the Council, identified as a Ms Sheila Stevenson, a Personnel Officer.

29 On explaining why the respondents were seeking an extension of time to lodge a late ET3 response defending the claim, Ms Menzies stated that she became aware of the Tribunal claim when correspondence from Glasgow ET to the Council was found, on 7 March 2023, within a tray in the Council's HQ, but as it had not been date stamped by their mail room, she could not say when Tribunal correspondence had been received, nor why it was not actioned, other than to say that "a ***blatantly inexperienced member of staff dealt with it."***

30 She was insistent that this would have been a clerical assistant, and not a manager, or Head of Service .Further, Ms Menzies accepted that this perhaps demonstrated a need for better supervision, or training for mail room staff, about the importance of legal documents, and them being passed to a manager on receipt, given two sets of correspondence from the Tribunal (in this case, and another, which she did not identify, other than to say it was within the Finance & Corporate Resources department, not Education) were found on the same day.

31 When asked by Mr O'Neill to give some evidence about the background to this Tribunal case, Ms Menzies was open and candid in her evidence, stating that she and the claimant's representative, Ms McInnes, had had earlier discussions about the claimant's case, during the period of ACAS early conciliation, when Ms Innes had discussed matters about a possible informal resolution with a Ms Gale Robertson, a Personnel Adviser, and Ms McInnes had previously intimated to Ms Menzies that the claimant would be raising an ET claim against the Council.

32 Further, Ms Menzies was accepting that, while the claimant's Dignity at Work complaint and grievance was lodged in October 2022, the fact-finding investigation is still ongoing, some 6 months later, and that process has not yet concluded. She believed that the claimant and her representative knew that the Council would defend the claim, but conceded that it would have been better for the claimant had matters been fully investigated before the Tribunal claim was heard.

33 Ms Menzies explained that, in part, the delay in the ongoing investigation process is due to the fact that Ms Stevenson only works 2.5 days per week, which necessarily limits her availability, plus she is doing other investigations too, as an experienced investigator within the Council. Further, she explained, she understood that Ms Stevenson's initial interviews about the claimant's case had led to further potential witnesses being identified, so Ms Menzies understood that there were still a number of persons (actual number not known to her) to be interviewed, before Ms Stevenson could complete her report, and submit it to a nominated manager for review.

34 Ms Menzies understood that Ms Stevenson provided Ms McInnes with regular updates about the status of the fact-finding investigation, and that more interviews are scheduled for April 2023, as Ms Stevenson is on annual leave in March, and the schools are closed for two weeks in April.

35 In answer to Mr O'Neill's questions to her about future timelines for completion of the respondents' internal investigation, and outcome by the nominated manager, Ms Menzies advised that, she anticipated that Ms Stevenson

should be able to complete her report by the middle to end of May 2023, and then, as per the Council's internal procedures, the nominated manager has one week to review, and decide on next steps, and the claimant has a right of appeal.

36 Asked by Mr O'Neill about the impact on the Council if the extension of time was not granted by the Tribunal, Ms Menzies stated that that would be a reputational issue and damage to the Council, and that could include financial loss as well.

37 If it were to be granted, however, she commented that the feedback she had received from the claimant's new Head Teacher at her new school is that the claimant is comfortable and happy at Strathaven Academy, until the outcome of the Dignity at Work investigation is known, and that, as far as she (Ms Menzies) could see, the only prejudice to the claimant is the extra time delay in dealing with her Tribunal claim.

38 If the application were granted by the Tribunal at this Hearing, Ms Menzies stated that everything was ***'intertwined with the Dignity at Work complaint"*** She added that the Council would like the opportunity to fully exhaust the internal procedures, and conclude them, and that the claimant can appeal as well, and that the Council would ultimately prefer the Tribunal proceedings to be put ***"on hold"*** She further stated that the grievance was put on hold, pending the outcome of the Dignity at Work investigation.

39 She clarified that the claimant is a continuing employee of the Council, as a probationary teacher, with her probation due to end in June 2023, unless extended for any reason. She had received positive feedback from her new school, and understood the claimant was enjoying working there.

40 As detailed earlier, Ms Menzies' evidence went unchallenged by Ms Mclnnes, who declined the opportunity afforded to her to cross-examine the Council's witness. In answer to my points of clarification, Ms Menzies stated that she believed the Council's procedures say an investigation should be concluded within 14 days, however, she added, the Council has always made it clear to

employees and their representatives, that the timescale involved is inevitably going to be longer.

41 When asked about witnesses still to be interviewed by Ms Stevenson, Ms Menzies said she understood it was a large number, but she could not clarify how many, or provide other details. After the initial interviews, other persons had been identified for interview, and the investigation has been ***"cascading'.***

42 On the matter of reputational damage to the Council, that she had spoken of in her evidence in chief, she clarified that a ruling by the Tribunal unfavourable to the Council can cause reputational damage, and impact on the perception of the Council, and how it deals with and looks after its employees.

43 When briefly re-examined by Mr O'Neill, Ms Menzies stated that the scope of the fact-finding investigation was ***"two-pronged,"*** looking at how senior management dealt with the concerns raised by the claimant, and the claimant's allegations against staff in Cathkin High School. She also stated that the campus police officer had conducted their own investigation, and she understood no further action had ben taken by the Police.

Relevant Law

44 As neither party addressed me on the relevant law, I advised both of them that, consistent with my Rule 2 duty to deal with the case fairly and justly, I could inform them, in general paraphrased terms, of the applicable legal test for a Rule 20 application, and then invite their comments, by way of addressing the factors identified in the EAT case law.

45 I explained to them both that this would include me seeking the explanation or lack of explanation for the delay in presenting a response to the claim, the merits of the respondents' defence, the balance of prejudice each party would suffer should an extension be granted or refused, and so why they invited me to grant or, as the case may be, refuse the respondents' application for an extension of time.

46 Specifically, I invited them both read to them from paragraphs 16, 17, and 18 of the judgment of Mrs Justice Simler DBE, then President of the Employment

Appeal Tribunal, in **Grant v Asda [2017] UKEAT/0231/16/ BA,** and reported at **[2017] ICR D17,** the full terms of which extracts I reproduce here for ease of reference:

"16. ***Rule 20*** *of the* ***ET Rules*** *provides as follows:*

"(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."

17. Again, unlike its predecessor, ***Rule 20*** *permits an application for an extension of time after the time limit has expired. Rule 20 is otherwise silent as to how the discretion to extend time for presenting an ET3 is to be exercised. Guidance on the approach to be adopted by tribunals in exercising their discretion was given in* ***Kwik Save Stores Ltd v Swain*** *[1997] ICR 49 EAT, a case concerning a respondent's application for an extension of time under the* ***Employment Tribunal Rules 1993.*** *Mummery J gave guidance at pages 54 to 55:*

"The discretionary factors

The explanation for the delay which has necessitated the application for an extension is always an important factor in the exercise of the discretion. An applicant for an extension of time should explain why he has not complied with the time limits. The tribunal is entitled to take into account the nature of the explanation and to form a view about it. The tribunal may form the view that it is a case of procedural abuse, questionable tactics, even, in some cases, intentional default, in other cases it may form the view that the delay is the result of a genuine misunderstanding or an accidental or understandable oversight. In each case it is for the tribunal to decide what weight to give to this factor in the exercise of the discretion. In general, the more serious the delay, the more important it is for an applicant for an extension of time to provide a satisfactory explanation which is full, as well as honest.

In some cases, the explanation, or lack of it, may be a decisive factor in the exercise of the discretion, but it is important to note that it is not the only factor to be considered. 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. An important part of exercising this discretion is to ask these questions: what prejudice will the applicant for an extension of time suffer if the extension is refused? What prejudice will the other party suffer is the extension is granted? If the likely prejudice to the applicant for an extension outweighs the likely prejudice to the other party, then that is a factor in favour in granting the extension of time, but it is not always decisive. There may be countervailing factors. It is this process of judgment that often renders the exercise of a discretion more difficult than the process of finding facts in dispute and applying them to a rule of law not tempered by discretion.

It is well established that another factor to be taken into account in deciding whether to grant an extension of time is what may be called the merits factor identified by Sir Thomas Bingham MR in Costellow v Somerset County Council [1993] 1 WLR 256, 263:

"a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate."

Thus, if a defence is shown to have some merit in it, justice will often favour the granting of an extension of time, since otherwise there will never be a full hearing of the claim on the merits. If no extension of time is granted for entering a notice of appearance, the industrial tribunal will only hear one side of the case. It will decide it without hearing the other side. The result may be that an applicant wins a case and obtains remedies to which he would not be entitled if the other side had been heard. The respondent may be held Hable for a wrong which he has not committed. This does not mean that a party has a right to an extension of time on the basis that, if he is not granted one, he will be unjustly denied a hearing. The applicant for an extension has only a reasonable expectation that the discretion relating to extensions of time will be exercisedin a fair, reasonable and principled manner. That will involve some consideration of the merits of his case."

*18. The approach set out by Mummery J was subsequently adopted in relation to the **2004 Rules** in **Pendragon pic (t/a CD Bramall Bradford) v Copus** [2005] ICR 1671 EAT. In our judgment, it applies with equal force to the **2013 Rules.** So, in exercising this discretion, tribunals must take account of all relevant factors, including the explanation or lack of explanation for the delay in presenting a response to the claim, the merits of the respondent's defence, the balance of prejudice each party would suffer should an extension be granted or refused,*

> *and must then reach a conclusion that is objectively Justified on the grounds of reason and justice and, we add, that is consistent with the overriding objective set out in* ***Rule 2*** *of the* ***ET Rules."***

47 **Rule 20(3)** provides that an Employment Judge may determine a **Rule 20** application without a Hearing. The claimant's position was not clear in advance of this Hearing, as Ms McInnes had not written to the Tribunal to say clearly and unequivocally that the respondents' application was not opposed by the claimant, in which event the matter could have been dealt with on the papers only.

48 Consistent with the Tribunal's overriding objective, under **Rule 2,** to deal with cases fairly and justly, including avoiding delay, and saving expense, it was appropriate to proceed, at this Hearing, to consider the respondents' **Rule 20** application to the Tribunal at this Hearing, having heard from both partis' representatives.

49 As I explained to Ms Mclnnes, the mere fact that the claimant was not opposing the extension of time being granted was but one of the relevant factors that the Tribunal had to consider.

Respondents submissions

50 Ms Menzies' evidence having concluded, I invited Mr O'Neill, solicitor for the respondents, to address the Tribunal first with his closing submission. He invited the Tribunal to allow his application for an extension of time.

51 Mr O'Neill stated that the draft ET3 response had been lodged, but it was very narrow in scope due to the procedural status of the respondents' fact-finding investigation, and only when it concludes will the respondents be able to reply to the claim in detail. He requested that the claim be sisted to allow the investigation to be concluded, and then further and better particulars could be added by the respondents. He submitted that it is in the interests of justice for both parties that the investigation is allowed to conclude, due to the seriousness of the allegations made by the claimant.

52 Further, he added, on 7 March 2023, the respondents sought, without delay, to contact the Tribunal, once the Notice of Claim came to the respondents' attention, as the Tribunal's correspondence had been ***"filed inappropriately by a junior member of staff, one of a new batch of clerical staff."*** He had then submitted a skeletal ET3 response on 16 March 2023, at the request of the Tribunal, and this is not a case where the respondents, aware of a claim against them, had done nothing until after a Default Judgment was granted against them.

53 In light of the EAT judgment in **Pendragon pic,** Mr O'Neill submitted that the Tribunal in exercising its discretion must take account of all relevant factors, including the explanation or lack of explanation for the delay in presenting a response to the claim, the merits of the respondent's defence, the balance of prejudice each party would suffer should an extension be granted or refused, and must then reach a conclusion that is objectively justified on the grounds of reason and justice and that is consistent with the overriding objective.

54 Taking the explanations provided at this Hearing into account, and on balance of prejudice to the parties, he further submitted that it would be disproportionately against the respondents if the extension of time was not granted, as the claimant remains an existing employee of the Council, and she expects the respondents to defend her claim.

55 Mr O'Neill further submitted that there is "no ***real prejudice to the claimant"*** if the application is granted, but for a matter of some weeks' delay. He then submitted that Tribunal proceedings should be sisted to allow investigations to conclude, and that there would be reputational loss to the respondents, if the application was not granted. There would also be, he added, significant risk of considerable financial cost to the Council, if the claim proceeded as undefended.

56 At this point, Mr O'Neill then referred to an unreported ET Judgment which he identified as being by EJ Housego at East London in a case known as **C Scott v Fisher Jones Greenwood LLP & others 3213171/2020,**

57 When I asked if he had a copy for the Tribunal, and Ms Mclnnes, to peruse, as no advance notice had been given of it, he stated that he could provide a copy, as he wished to draw reference to it, where that employer's application for an extension of time had been refused.

58 Mr O'Neill stated that he wanted to show how matters had been dealt with by that other Judge, and compare its facts and circumstances to those of the present case at this Hearing, where it was a junior clerical member of staff who had been involved in this case, as opposed to the head of department in the **Scott** case, who was a senior partner of the law firm and an employment law solicitor.

59 I asked him to provide a copy, either by adding a hyperlink to the CVP chatroom facility, or by emailing it to my CVP clerk, with copy to Ms Mclnnes. He agreed to do so, saying that it is just and equitable for this Tribunal to exercise its discretion by allowing the application for an extension of time, and for the claim to be dealt with on its merits in due course.

60 Proceedings adjourned at 11:07am for him to do so. He posted on the CVP chatroom a hyperlink to the **Scott** case from ***Casemine.com,*** but as I could not open that link, I them myself located from' the ***Gov.Uk*** website of ET decisions the **Scott** judgment, and I put it up on the CVP chatroom. He had emailed a copy of it from ***Casemine.com*** to my CVP clerk, at 11:14am, and the clerk emailed it to Ms Mclnnes.

Claimant's reply

61 Having heard from Mr O'Neill, as the respondents' solicitor, and the **Scott** judgment having been circulated, when proceedings resumed, at 11:25am, I then invited Ms Mclnnes, the claimant's representative, to address me, and explain the terms for her position about the respondents' application for an extension of time.

62 In addressing the Tribunal, Ms Mclnnes stated that she had received, and read both the **Grant,** and **Scott** judgments, and that the claimant does not object to the extension of time being granted to the respondents. Having

listened to Ms Menzies' evidence to the Tribunal, Ms McInnes stated that she was aware, as an NASUWT caseworker, that she would be raising a Tribunal claim against the Council, and that this case is about racially experienced trauma suffered by the claimant at Cathkin High School.

63 She added that, when she had submitted the claimant's PH Agenda, she saw nobody from the Council had been in touch, and that ***"set alarm bells"*** for her. She stated that she expected the respondents to engage in the Tribunal process, so she thought something must have gone wrong. She added that she tried to alert the Council, and spoke with Ms Menzies, on a non-working day, but she could not recall exactly what date.

64 Further, Ms McInnes stated that she had nothing to say about the case law cited by me, or Mr O'Neill. She explained that as far as the claimant is concerned, the Tribunal claim had been lodged on a protective basis, as time was running, and a schedule of loss has now been provided. The claimant is at her new school, and they can wait until there is an outcome from the Dignity at Work complaint, and move on from there. While a fixed date for the outcome would be helpful, she commented that would be better than a sist to an indeterminate date, which is what Mr O'Neill seemed to be looking for.

65 Based on her trade union experience as a NASUWT caseworker, Ms McInnes observed that it is her experience, across all Scottish local authorities, and not just this Council, that the formal internal processes are taking a protracted length of time, and that is shown by the delay from October 2022 to date. She added that if there was to be a sist, it might be only until the outcome from the Dignity at Work complaint was known.

66 By way of reply, Mr O'Neill suggested that it might help if we could get a closer date from Ms Menzies, rather than leaving things open-ended. That would allow for a realistic date to conclude the respondents' investigation in the depth that it warrants, and without further delay, given the complaint was raised in October 2022.

67 At my invitation, Ms Menzies was asked for comment. She stated that the end of May 2023 was realistic to conclude the report, go to the nominated

manager, and for a decision to be reached. On that basis, Mr O'Neill then requested a sist until the end of May 2023, to allow the investigation to conclude, and the fact-finding report to be produced.

68 Ms McInnes had nothing further to say.

Oral Judgment

69 Having heard oral submissions from both the claimant's representative and the respondents' solicitor, I stated that I was not reserving my Judgment, on the respondents' **Rule 20** application, for an extension of time, and I gave oral Judgment there and then, as per paragraph (1) of my Judgment above, allowing the respondents an extension of time, and to defend the claim.

70 Having heard the sworn, unchallenged evidence from Ms Menzies, the witness led by the respondents, and thereafter having heard oral submissions from both parties' representatives, at this Preliminary Hearing, where Ms McInnes stated that she had no objection to the respondents' application, I gave oral judgment without the need to adjourn and issue a reserved Judgment. This written Judgment commits to writing the record of that oral Judgment.

71 In writing up this Judgment, it is appropriate that I explain my reasoning.

72 In so deciding to grant the respondents' application, I was satisfied that it is in the interests of justice to allow their application, for the phrase ***"in the interests of justice"*** means justice to both parties, and so, in due course, if the case is not resolved extra-judicially between the parties, the case can be listed for a Final Hearing for full disposal, including remedy if appropriate, including any preliminary issues that might arise from the respondents' stated grounds of defence, once further and better particulars are given, after the outcome of the Dignity at Work complaint is known, to augment the current skeletal ET3 response.

73 In balancing prejudice as between the parties, I took into account that if I refused the late ET3 response, then the respondents would not be able to defend the claim brought against them, and could end up with a judgment

against them, and an order for them to pay disputed sums to the claimant, and that without having had the opportunity to put forward their case in evidence.

74 On the other hand, prejudice to the claimant will be relatively slight, and all that she loses, at this stage, is the loss of a windfall of being able to get an undefended judgment in her favour.

75 In those circumstances, allied to the important fact that the claimant does not oppose the application, I decided that the prejudice to the respondents outweighs any prejudice to the claimant, and that it is appropriate to let in the late ET3 response, and the merits of parties' respective positions can be adjudicated upon by the Tribunal at a Merits Hearing, after hearing evidence from both parties, in due course.

76 Further, I wish to record that Mr O'Neill's reference to the **Scott** judgment was of no assistance to me. It was an unnecessary distraction for 2 reasons. Firstly, it is distinguishable on its own facts and circumstances, and its narration of the relevant law was not up to date. While it refers to **Kwik Save Stores Ltd v Swain [1997] ICR 49 EAT, Grant v Asda** is what I expect professional agents to now cite and refer to, as have other representatives when presenting **Rule 20** applications.

77 Secondly, I take this opportunity to inform both representatives that when making closing submissions to a Tribunal, they should only cite reported case law authorities that set forth an important legal principle from the higher Tribunals and Courts that are binding upon an Employment Tribunal, and not other unreported, and non-binding, judgments from other first instance Employment Tribunals.

78 Finally, a few closing observation for the respondents. In both Ms Menzies' evidence, as foreshadowed in Mr O'Neill's written application, and indeed in his own closing submissions to this Tribunal, it is clear that, on 7 March 2023, notice of two Tribunal claims were discovered in the respondents' HQ mailroom, both response deadlines having already passed, one in the present matter and the second in an unrelated claim.

79 I have noted the statement made that the respondents invariably responds timeously to all ET1 forms it is notified of. It is not clear why the respondents did not become aware of the present claim, at an earlier stage, but they are now, and I trust that they have put in place an urgent review of their mail room procedures.

80 The other observation relates to the ongoing delay in addressing and concluding the claimant's Dignity at Work complaint. While it is a matter for the respondents how they allocate and prioritise their staff resources, the delay to date in this case seems inordinate.

81 While Ms McInnes gave her trade union observations on this matter, and while I was not provided with a copy of whatever is the respondent's internal Grievance and / or Dignity at Work Procedure, and so I cannot benchmark it against best practice, or even the 4 CAS ***Code of Practice on Disciplinary and Grievance Procedures,*** it does seem to me, from the limited information provided by Ms Mehzies in her evidence, that the respondents' handling of such grievances and / or complaints, might be worth revisiting, in terms of being dealt with up to final outcome within a reasonable period of time.

Further Procedure

82 It then being 11:34am, we then proceeded to have a case management discussion about future procedure at the Tribunal.

83 Arising from that discussion, we agreed the claim and response would be listed for a 2-hour Case Management Preliminary Hearing to be conducted remotely by CVP before me, if available, for reasons of judicial continuity, whom failing any other Employment Judge sitting alone, at the Glasgow Employment Tribunal, on Tuesday, 22 August 2023, commencing at 10:00am, for the purpose of case management, and then listing the case for a substantive Hearing in the listing period of September, October or November 2023.

84 Case management orders for that further Hearing are issued to parties under separate cover, arising from the case management discussion held with both parties' representatives in the course of this Hearing.

85 The Hearing concluded at 11:46am, with my thanks to all in attendance for their contribution.

G.Ian McPherson

Employment Judge

23 March 2023

Date of Judgment

Date sent to parties 27 MAR 2023