



EMPLOYMENT TRIBUNALS

Claimant: Mr M Humphrey
First Respondent: Keith Taurai Bero
Second Respondent: Boardworks Limited

Heard at: Bury St Edmonds via CVP **On:** 19 April 2023

Before: Employment Judge Brady

Representation

Claimant: Mr B Clark (lay representative)
Respondent: Mr Husain (solicitor)

JUDGMENT

The application to extend the time for presenting a response is refused.

REASONS

1. This case was listed today to hear the respondents' application for an extension of time to enter a response.
2. The ET1 was filed on 23 January 2022 and sent to the respondents on 1 March 2022 with an indication in the letter that the response must be received by 29 March 2022.
3. On the ET1, the claimant indicated that he was discriminated against because of a disability and is claiming a redundancy payment.
4. A schedule of loss has not been filed. The redundancy claim is for £17,000 outstanding redundancy pay. The claimant hasn't been employed since leaving his employer but he started his first new role yesterday.
5. The Respondent's case is that the redundancy matter was agreed upon between the parties and that there was a settlement agreement.

6. Rule 20 of the ET Rules states that an employment judge may determine an application for an extension of time for presenting the response.
7. In doing so I must have consideration to the overriding objective to deal with cases “fairly and justly”.
8. The decision in *Kwik Save Stores Ltd v Swain and Others* 1997 is the leading authority on dealing with such applications.
9. In that case 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”.
10. In particular the EAT held that when exercising discretion in respect of the time limit, a judge should always consider the following:
 - a. The employer’s explanation as to why an extension of time is required.
 - b. The balance of prejudice.
 - c. The merits of the defence.
11. **The employer’s explanation as to why an extension of time is required:** the more serious the delay the more important it is that the employer provide a satisfactory and honest explanation.
12. Mr Husain on behalf of the respondent argued that the Notice of Claim had been sent to the company’s previous address. He said that the company’s address was changed in December 2021 and so the respondent did not receive the notice of claim from the tribunal. The respondent only became aware that the case was listed for final hearing when his solicitors contacted him having seen the respondent’s name on the court list 2 weeks prior to the hearing.
13. Mr Clark says that he was aware that the respondent had changed his address and notified the tribunal of the change of address. In an email dated January 24 2022, Mr Clark wrote to Mr Fero saying, “Just to make you aware, we have filed the claims to the employment tribunal, and we are sure that they will be in touch in due course”.
14. Mr Clark also relies on the respondent’s statement which says,
“In 2022 I was copied into an email sent to the employment tribunal by Benjamin Clark who I now understand is the Claimant’s representative. I did not make any contact with the Employment Tribunal at that time as I was under insurmountable pressure regarding my business. I therefore thought that the most efficient approach would be to await formal legal communication from the Tribunal. I was under the impression that I would receive formal communication from the tribunal and then seek legal advice.” Mr Clark argued that this shows that he was aware of the tribunal hearing and did not respond because of the insurmountable pressure of his business.

15. The case was put back to try and establish if the tribunal office could assist to establish what information and correspondence had been sent by email and which had been sent out by post, but unfortunately, the information could not be retrieved, so I indicated to the parties that I would rely on the information provided in the bundle. Neither party objected to this course of action and neither party requested an adjournment to furnish the tribunal with any additional evidence.
16. It is clear from the papers that the Notice of Claim was sent to the respondent's previous address. Mr Husain has argued that this means that the respondent has been prejudiced by the tribunal sending the notice of claim to the wrong address. He states that as the claimant informed the tribunal of the respondent's new address prior to the notice of claim being sent out, the fact that it was sent to the previous address is the tribunal's error and the respondent should not be penalised.
17. I have not heard whether the respondent made any arrangements for forwarding mail from the old address to the new address. The respondent did not contact the tribunal himself to inform them of the change of address.
18. While I accept that there was some confusion over the address, the respondents accept that they were notified by Mr Clark that papers had been filed by email on January 24 2022, and in further correspondence, dated July 2022. That July email, on page 83 of the bundle, uses the case name and number as for the email. It was copied into Mr Bero and to Watford ET and discussed the documentation "as requested by Employment Judge Anstis".
19. From both the email dated January 24 2022 and the email dated July 2022, the respondent had been put on notice that there were ongoing proceedings. At that point, he did not contact his solicitors or the tribunal, and indeed did not enquire about the proceedings until he was contacted by his solicitors 2 weeks prior to the hearing when they asked him if he would like them to act on his behalf.
20. It would have been reasonable for the respondent to make inquiries earlier than this. I do not accept that he was not aware of the proceedings until that date. I do not find that there has been an honest and credible explanation for the delay in providing a response. Had the application been made earlier, (after receiving the email in July for example), the explanation would have been more credible.
21. Secondly, I must consider **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?
22. If the extension of time is refused, the respondent will be unable to defend the claim. This will cause him prejudice and is likely to result in financial

loss, although it seems that an agreement had previously been reached between the parties where the respondent has accepted that money is owed, but the claimant says has not been received.

23. Mr Husain also argues that the respondent will suffer prejudice because the Notice of claim was sent to the wrong address and that that would be unfair. I have dealt with that point above.
24. If the extension of time is granted then the claimant will suffer prejudice by the fact that the proceedings, which have been ongoing for a year, will be extended. Mr Clark says that the claimant suffers from anxiety and depression and that this ongoing case is exacerbating his condition. Mr Clark has also explained that after seeking employment for 18 months, he started a job yesterday and has had to have annual leave today to attend the tribunal, which has again increased his anxiety. Mr Clark has explained that the respondent's application to file a response was received on the day before the final hearing and that caused Mr Humphrey considerable upset.
25. Finally, I must consider the **merits of the defence**.
26. It is difficult to fully assess the merits of the defence at a preliminary hearing. The draft response that has been filed states that the claims are denied and that the matter was settled via a legally binding settlement agreement.
27. Mr Husain has stated that the respondent has been unable to provide any further detail in the response because the claimant has not outlined their claim.
28. Mr Clark says that there was a redundancy agreement, but that it has not been honoured and as a result this claim was filed. He says had the money been paid to Mr Humphrey as agreed, Mr Humphrey would not have brought the case to the Employment Tribunal.

29. Conclusion

30. Having considered all of the relevant issues, I do not consider that the explanation for the delay is satisfactory, particularly in view of the length of the delay and the fact that the respondent was aware that proceedings had been filed. I consider that if the request for an extension is refused, the claimant would suffer greater prejudice by the fact that the proceedings would be further delayed and finally, I do not consider that the respondent has shown sufficient merit in his defence to outweigh the prejudice that the claimant will suffer.
31. I therefore refuse the application to present the response out of time.

Employment Judge Brady

Date 19 April 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

5th May 2023

GDJ
FOR THE TRIBUNAL OFFICE