



EMPLOYMENT TRIBUNALS

Claimant: Ms M Marino
Respondent: London Borough of Newham

PRELIMINARY HEARING

Heard at: East London Hearing Centre (by CVP)
On: 17 February 2023
Before: Employment Judge F Allen

Representation

For the claimant: In person
For the respondent: Mr D Moher, Solicitor
Interpreter: Ms Crespo Hale
Language: Spanish

REASONS

Written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, in respect of the decision to extend time for submission of the ET3 response. The following reasons are provided:

1. The case was listed for a 3-hour preliminary hearing for the Tribunal to decide the following issues:
 - 1.1 Claimant's application an anonymity order pursuant to Rule 50 of The Employment Tribunals Rules of Procedure 2013.
 - 1.2 Respondent's application for an extension of time to provide their ET3 response.
2. I checked at the beginning of the hearing that the claimant and interpreter understood each other and that the language was Spanish. The claimant said that she wanted to conduct the proceedings in English and only use the interpreter if she needed help. I retained the services of the Spanish interpreter for the entire hearing who interpreted when required having given an

- interpreter's affirmation.
3. I checked, with the parties, the documents that I should have for this preliminary hearing which were as follows:
 - 3.1 Claimant's bundle of 196 pages including her witness statement
 - 3.2 Claimant's additional bundle of 77 pages
 - 3.3 Respondent's bundle of 57 pages
 - 3.4 A document titled 3a which is an email from the respondent to the Tribunal and copied to the claimant dated 13 September 2022
 4. Both parties made submissions in respect of the respondent's application for an extension of time to provide their ET3 response and I was referred to specific pages in the bundles provided which I read.

THE LAW

5. The relevant rules are contained in the Employment Tribunal Rules of Procedure 2013. Rule 20 states:

“(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.”
6. The relevant principles as to extensions of time for lodging a Response were set out in the case of *Kwik Save Stores v Swain and others* (1997) ICR 49. Although that case concerned a previous version of the rules the relevant principles remain applicable.
7. In *Swain*, the EAT made it clear that the overriding principle in deciding whether to grant an extension is whether it is just and equitable to do so. 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 - 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.”

8. In the case of Grant v Asda UKEAT/0231/16/BA Simler J President stated at paragraph 18 that:

“The approach set out by Mummery J was subsequently adopted in relation to the 2004 Rules in Pendragon plc (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.”

9. In Moroak (t/a Blake Envelopes) v Cromie (2005) IRLR 535, the EAT said that if it was in the interests of justice to extend time and admit a late Response a Tribunal should ordinarily do so.
10. In the case of Thornton v Jones UKEAT/0068/11 the consideration was given to whether there was a procedural abuse or intentional default. The then EAT President Underhill J stated at paragraph 18 that if the delay is the result of a genuine misunderstanding or an accidental or understandable oversight, the Tribunal may be much more willing to allow the late lodging of a response.

Respondent's application for an extension of time to present their ET3 response.

11. The claim was presented on 25 August 2022 and the claimant brings claims for automatic unfair dismissal as a result of making protected disclosures, age discrimination, race discrimination, sex discrimination and money claims. Early conciliation started on 23 August 2022 and ended on the same date.
12. In the claim form the claimant applied for interim relief and the hearing of the interim relief application was listed and heard on 20 September 2022 before the respondent had filed its Grounds of Resistance. The respondent attended and was represented at the interim relief hearing.
13. The respondent's position is that they have not, to date, received the Notice of Claim from the Tribunal. On 23 November 2022, a Rule 21 Notice was sent to the respondent's representative by email. On 23 November 2022 the respondent's representative responded stating that the respondent became

aware of the claimant's claim when the claimant sent the notice of the preliminary hearing to consider the Claimant's application for interim relief on 12 September 2022 and had not received, from the Tribunal, the Notice of Claim despite requesting one on two occasions.

14. On 30 November 2022 the respondent filed an ET3 with detailed response. The form did not provide the name of the respondent in the correct box at 2.1 of the ET3 although the name of the respondent is provided in the detailed response attached to this form. An amended ET3 with this box completed was filed on 17 February 2023.
15. The claimant says that time should not be extended as the respondent has been sent the Notice of Claim by the Tribunal and the claimant sent the respondent the ET1 on 14 September 2022, which was received, by the respondent, on 15 September 2022. The claimant also says that the ET3 filed on 30 November 2022 does not have all the required information.
16. The Tribunal records show that the Notice of Claim was sent to the respondent on 7 September 2022 with a response date of 5 October 2022, but this was sent, by post, to the council office rather than the London Borough of Newham's Legal Department.
17. I accept that the respondent's Legal Department did not receive the Notice of Claim sent by the Tribunal on 7 September 2022. Although the respondent received documentation from the claimant by email, under Rule 15 of The Employment Tribunals Rules of Procedure 2013 it is for the Tribunal and not the claimant to send a copy of the claim form to the respondent with details of how and when to respond.
18. The respondent acted immediately and on the same day that the Rule 21 notice was emailed to them from the Tribunal. The respondent notified the Tribunal that they had not received, from the Tribunal, the Notice of Claim. Not receiving the Notice of Claim from the Tribunal is a reasonable explanation for not providing a ET3 response in time. Although the ET3 filed on 30 November 2022 does not have the respondent's name in Box 2.1, it is provided in the Heading to the detailed response which is attached to the form and arguably the requirements of Rule 17(1) of the Employment Tribunals Rules of Procedure 2013 are met as the attached detailed response forms part of the ET3 response. Additionally the Tribunal did not reject the response for a failure to supply the minimum information under Rule 17(2).
19. Given the immediate response of the respondent to the Rule 21 notice and that the respondent has engaged with the proceedings, so far, attending the interim relief hearing on 20 September 2022, attending the preliminary hearing on 17 February 2023 and making requests to the Tribunal for the Notice of Claim to be sent to them, I am satisfied that this was not a case where the respondent was deliberately failing to take action and ignoring correspondence.
20. The respondent has provided a detailed response and strongly defends the claim. The factual position in this case is unclear, and there is a real prospect

of the respondent, at the very least, undermining the claimant's factual assertions. It cannot be said that the defence has no merit.

21. There is no delay to the hearing timetable. No case management hearing has taken place but is listed on 16 August 2023 and the claimant remains in a position to advance her claim at a hearing. There would be a greater prejudice to the respondent than the claimant if the extension of time is not granted as the respondent would not be allowed to defend the proceedings.
22. Having regard to all the points put forward by both parties and applying the principles in Kwik Save Stores v Swain and others (cited above) and having regard to the overriding objective and need to deal with cases fairly and justly I grant an extension to the respondent to submit their amended ET3 dated 17 February 2023. The Rule 21 notice dated 23 November 2022 is set aside.

**Employment Judge F Allen
Dated: 17 May 2023**