



EMPLOYMENT TRIBUNALS

Claimant: Mr P. GUTKOWSKI
Respondent: CREATIO LIMITED
Before: Employment Judge Dyal

RECONSIDERATION JUDGMENT

1. The application for an extension of time to enter a response is refused.
2. The application to set-aside the judgment of 10 January 2023 is refused and that judgment is confirmed.

REASONS

1. It was not practicable for Employment Judge Tsamados and I was accordingly appointed by Acting Regional Employment Judge Balogun to deal with the matter.
2. The claim was presented on 4 September 2022. It gave (accurate) postal contact details for the Respondent.
3. The notice of claim was posted to the Respondent on around 15 September 2022. It stated that a response was required by 13 October 2022. No response was received.
4. On 10 January 2023, Employment Judge Tsamados gave judgment in the Claimant's favour pursuant to rule 21. The judgment was sent to the parties on 11 January 2023.
5. On 17 March 2023, the Respondent wrote to the tribunal stating that it had not had sight of the notice of claim or the judgment until 22 February 2023 because

no staff were working in the office on a regular basis, the post had been put in the cupboard by a cleaner and no-one was informed. The same thing had happened in another tribunal claim. [I note that in the other tribunal claim, 2300266/2023, an application for an extension of time was sought a day after the response was due and the application included a draft response. It was thus quite different to this claim.]

6. The Respondent applied for an extension of time to enter the response pursuant to rule 20(4) and for the judgment to be set aside.
7. In the letter the Respondent referred to *KwikSave Ltd v Swain* [1997] ICR 49. It said there was some merit in the defence and that the Claims would be defended in their entirety in the Grounds of Resistance.
8. However, no ET3 or Grounds of Resistance were in fact provided. On 19 March 2023, the Respondent wrote again and said that part of the delay had been down to consulting outsourced HR, their lawyers and insurers.
9. On 19 March 2023, the Claimant responded objecting to the Respondent's application.
10. On 18 May 2023, Employment Judge Wright wrote to the parties, stating that the interests of justice did not require a hearing and that judgment should be reconsidered without a hearing. She gave the parties until 25 May 2023 to make any further representations.
11. The Claimant made further representations on 21 May 2023.
12. The Respondent did not make any further representations by 25 May 2023. However, on 1 June 2023, it wrote to the tribunal through Mr Long. He said that he had been away and returned to find the tribunal's letter of 18 May 2023. He asked where, how and by when to send in the defence details to the judge. He then made three further points purporting to defend the claim substantively, albeit very briefly and by reference in part to calculations by 'external accountants' that could be sent in.

Law

13. Rule 20 makes provision for an extension of time. Among other things it provides that a draft response should accompany the application if the application is made after the time limit has expired.
14. The leading guidance remains that of Mummery J (as he was) in *Kwik Save Stores Ltd v Swain* [1997] ICR 49:

...In such cases it is incumbent on the applicant for an extension of time to place all relevant documentary and other factual material before the industrial tribunal in order to explain (a) non-compliance with the Rules and (b) the basis on which it is sought to defend the case on the merits. Depending on the nature and circumstances of the case, that may be

done by letter to the tribunal, or by affidavit verifying the factual position or at an oral hearing....

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 if 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 to them 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 M.R. in Costellow v. Somerset County Council [1993] 1 W.L.R. 256, 263:

- i. "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 liable 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 exercised in a fair, reasonable and principled manner. That will involve some consideration of the merits of his case.

Mr. Hand cited the decision in Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc. [1986] 2 Lloyd's Rep. 221 as illustrating the importance of considering the merits factor. That was a case of an application to set aside a default judgment. The Court of Appeal held that, when defendants, who had initially made a deliberate decision not to defend the plaintiff's claim, later applied to set aside the judgment obtained in default, it was necessary for the court, in the exercise of its discretion, to consider whether the defendants had merits, whether they had a real prospect of success in defending the case. It was for the court to form a provisional view about the possible outcome of the case. That was a necessary exercise because one of the "justice" factors in the exercise of a discretion is that there should normally be a proper adjudication, i.e. a decision after hearing evidence and argument from both sides.

In our view, similar considerations apply if an industrial tribunal is minded to refuse an extension of time which will have the effect of denying a respondent a hearing on the merits. In that case the Court of Appeal decided that the defendants had not shown that they had a reasonable prospect of success. The court was therefore entitled to refuse the exercise of discretion, taking account of the defendant's earlier decision to let the judgment go by default.

Discussion and conclusion

15. I refuse the Respondent's application to extend time and to set aside the judgment.
16. On its own case it has been aware of the claim since February 2022. Rule 20 requires an application for an extension of time to enter the response to be accompanied by a draft response (when as here the application is made out of time).
17. It is remarkable that even now the Respondent has not sent in a draft response.
18. The email of 1 June 2023 asks how, where and by when to send the defence (i.e. response). It was entirely obvious that the defence needed to be sent to the employment tribunal. The Respondent had contact details for it. They are publicly available in any event.
19. The tribunal's rules provide that the application for an extension of time should be accompanied by a draft response. The rules are publicly available. The Respondent was aware that it had missed a time limit and it was incumbent on it to investigate what it needed to do next and do it. I see no reasonable excuse for failing to provide, even by now, a draft response.
20. It unclear whether, substantively, there is a meritorious defence to the claims. There are a few short fragments of correspondence in which the Respondent asserts that it has a reasonable defence and that that this could be shown in e.g. external accountants' calculations and/or grounds of resistance. However, what is before the tribunal is basically an assertion that there is a good defence and little more.

21. I would accept, however, that there is a risk that if I refuse to extend time the Respondent will be left with liability for a claim that it is ill-founded.
22. I find it unimpressive that the Respondent failed to meet the further deadline of 25 May 2023. The mere fact of being out of the office is no excuse. Business (and other) people are regularly away. Systems need to be in place to deal with important matters if they arise in such periods.
23. Looking at matters in the round, notwithstanding the risk to the Respondent I have identified I do not think it would be in the interests of justice to accept the Response out of time (there is not even a draft before me) nor to set aside the judgment. On the contrary, weighing the factors in the balance they favour confirming the judgment.
- a. there has been lengthy delay;
 - b. there would be yet further delay if I extended time;
 - c. the Respondent's conduct of the proceedings - even if looking only at the period since it says it discovered the claim - has been slow and very unimpressive;
 - d. even now there is no draft response before the tribunal;
 - e. there is a strong interest in finality.

Employment Judge Dyal

Date 12/06/2023