



EMPLOYMENT TRIBUNALS

Claimant: Miss Leanne Talbot

Respondent: Mr Paul Griffiths trading as BS Embroidery Plus

Heard at: Bristol (by video)

On: 22 August 2023

Before: Employment Judge C H O'Rourke

Representation:

Claimant: Mr N Tillott - solicitor

Respondent: Ms G McGrath – Peninsula representative

PRELIMINARY HEARING JUDGMENT

1. The Respondent's application for an extension of time in which to present his Response is granted.
2. The Respondent is ordered to pay the Claimant's costs, in the sum of £3650 plus VAT.

REASONS

(Having been requested subject to Rule 62(3) of the Tribunal's Rules of Procedure)

1. The Respondent has applied for an extension of time for presenting his Response to the Claim, following the issue, on 1 June 2023, of a Notice of 'Response not Received' [17 main bundle]. The grounds for that application are set out in the Respondent's email dated 6 June 2023 [50]. The Claimant's solicitors set out their objections to that application in their email of 8 June 2023 [55]. I heard oral submissions from both parties and evidence from the Respondent. At the outset of the Hearing, Ms McGrath provided a supplemental bundle (which Mr Tillott had seen). I ordered a short adjournment to read these additional documents, which included the Respondent's statement and then recommenced the Hearing.

2. Rule 20 is silent as to the test a tribunal should apply when considering an application and accordingly, I rely on the guidance in Rule 2, the 'Overriding Objective' in exercising my discretion as to whether or not to extend the time limit for presenting the response. The Rule states (as relevant to this case) that the Tribunal should deal with cases 'fairly and justly', while avoiding delay and saving expense. The phrase 'fairly and justly' is not dissimilar to the 'just and equitable' requirement: equitable meaning fair and impartial. The EAT's decision in **Kwik Save Stores Ltd v Swain and ors [1997] ICR 49, EAT** which set out the correct test for determining what was 'just and equitable' under previous versions of the Rules, remains relevant to the question of whether, having regard to the overriding objective, an application for an extension of time to submit a response under Rule 20 should be granted.

3. In **Kwik Save** the employer's responses in respect of three claimants' claims were entered between 14 and 26 days late. The employer applied for extensions of time, admitting that its failure to comply with the time limits had been due to an oversight. The tribunal judge found the employer's explanation to be unsatisfactory and refused to grant the extensions of time. On appeal, 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*'. 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.
In the EAT's opinion, 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.

4. An uncontentious chronology is as follows:
 - a. 15 February 2023 (all dates 2023) – the Respondent was sent 'an advance copy' of the ET1, which had been filed five days earlier with

the Tribunal. He immediately sent a copy of that to his legal advisors (Peninsula). The claim made serious allegations as to sexual harassment and other breaches of the Equality Act 2010.

- b. 14 March – the ET1 was formally served by the Tribunal on the Respondent, which he again promptly forwarded to his representatives.
 - c. 11 April – the filing date for the Response.
 - d. 17 May - the Respondent refers to being ‘*assigned a representative*’ by Peninsula.
 - e. 1 June – no response having been received, the Tribunal wrote to the parties informing them accordingly.
 - f. 6 June – the Respondent made the application which is the subject of this Hearing and attached a draft Response. That Response is subsequently, at some point, amended.
5. The grounds relied upon by the Respondent (and as amplified in his evidence) are as follows:
- a. While he had sent the ‘advance copy’ ET1 to Peninsula, they had not, due to an issue with their email server, received it.
 - b. Because of that system error, Peninsula only became aware of the claim on 17 May.
 - c. They took instructions from the Claimant and ‘*within just 20 days of being instructed*’ presented this application and initial draft Response, on 6 June.
 - d. The Respondent has an arguable defence, and it is in the interests of justice to permit him the opportunity to defend himself against the Claimant’s allegations.
 - e. The balance of prejudice falls in the Respondent’s favour.
 - f. The Respondent’s evidence can be summarised as follows:
 - i. He was unaware of any specific time deadlines for responding, relying on his advisors in that respect.
 - ii. He assumed that his correspondence to Peninsula had been received and was being actioned. Additionally, he has been

very ill over this period and was focussed on his health. When challenged as to why he had not provided any medical documentation to corroborate this matter, he said that he'd not been asked to do so, in sufficient time, by his advisors.

- iii. He was told by the Peninsula advice team, when he provided them with the 'formal' ET1 and the Tribunal correspondence, sometime in mid-March that the matter was being passed to their legal department and he therefore *'trusted the issue was being dealt with'*.
- iv. He continued to work under that assumption. On 17 May he was *'assigned a legal representative'*.
- v. He had provided Peninsula with as much information as he could. This included an amended version of the Claimant's letter of complaint of 14 November 2022 [55], which did not include her allegations of sexual harassment. In cross-examination, he said initially that he had amended the letter, in order that he could discuss it with his staff, by way of an investigation, without disclosing those allegations to them. He said in his statement that the Claimant did not want her allegations of harassment to be discussed with staff, so he removed those *'from the letter when it was shown to some other staff members'* [S2]. He was challenged as to why he would need to discuss anything with the staff, as the Claimant's allegations are entirely about his behaviour, and he said that she had been bullying others and that needed investigation. He also said that *'they were all asking me questions and I wanted to keep them abreast of what was happening.'* When challenged as to whether, in fact, he had *'shown'* them the letter, he said that he had not, but that he had *'read from'* it. The amendment was made in case they saw it (he also referred to the fact that his sons worked in the business). It was that version of the letter that he then inadvertently sent to Peninsula, resulting in his advisors presenting a Response that was factually incorrect and which they have now had to amend. He denied that he had done this on purpose because he was embarrassed by the allegations.
- vi. He couldn't remember what he had done about checking the first (and incorrect) draft of the Response when it was sent to him, referring to his health, but agreed that in hindsight, he should have checked it more thoroughly.

- vii. He was also challenged as to why having received, firstly, a WhatsApp message from the Claimant on 10 August [67] making serious allegations as to sexual harassment and secondly, a detailed letter of complaint, on 14 November, reiterating those allegations, he had not replied, in any form, to them. He essentially said that as the allegations were entirely untrue, they were not worthy of a response.
 - viii. He was challenged that he is only now asserting that he decided to accept the Claimant's alleged 'resignation' due to bad behaviour on her part.
6. The Claimant's response to the Application objects to it, on the following grounds:
- a. The Respondent has had ample time to respond to the claim but has not taken it seriously or chased his advisors.
 - b. A 20/21-day delay in presenting an already out of time draft Response shows a complete lack of urgency on the advisors/Respondent's part.
 - c. The delay is egregious (nearly two months). Further delay will prejudice the Claimant and incur her substantial additional costs.
 - d. The interests of justice indicate that the application should be rejected.

7. Closing Submissions.

- a. Mr Tillott made the following submissions (in addition to those set out above):
 - i. As required by **Kwiksave**, there has not been an 'honest and satisfactory' explanation for the delay. The Respondent has provided contradictory explanations as to whether or not Peninsula were receiving the documents and what, if any, action he took to pursue the matter. He refers to his ill-health, but at all points, despite that when he received documents from the Respondent, or the Tribunal, he was able to react and forward them to his advisors.
 - ii. When eventually a draft Response was provided, it was materially inaccurate and not rectified for a further thirteen days.

- iii. The Respondent's representatives knew of the claim being issued, by mid-March.
- iv. By not chasing his representatives to action the Response, the Respondent accepted that he was being, as he agreed, reckless.
- v. As to the merits of the Response, we are already now on the second version of that document, with the first having been highly inaccurate. The Respondent's statement is also inaccurate, and he has accepted it to be so, in relation to his amendment of the Claimant's letter. His account of why and what he did in respect of that letter was confused and contradictory. Also, his failure, at the time, to respond to the serious allegations in the Claimant's WhatsApp and letter, in any form, indicates that he has no response to them, as they are true. The Respondent's credibility is in tatters.
- vi. Finally, as to the balance of prejudice, the Respondent has been given ample opportunity to get his Response right, but neither he nor his representatives have treated this matter seriously. The Claimant has been going through a difficult time since her dismissal, which is now being unnecessarily prolonged due to the Respondent's inaction.
- vii. In any event, the Claimant will wish to make a costs application, for the period from 6 June to today.

b. Ms McGrath made the following submissions:

- i. The Respondent is not attempting to ignore both his own and his representatives' mistakes. He has, to the best of his ability, attempted to explain the reasons for the delay. These relate to technical faults with Peninsula's information technology, which the Respondent cannot address.
- ii. He has also been in very poor health.
- iii. **Kwiksave** emphasises 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*'.

- iv. The Appellant has explained why he sent an amended version of the Claimant's letter to Peninsula, and which then lead to the flawed initial Response.
 - v. The allegations against him are very serious ones, with the risk for him of severe reputational damage and which therefore he must be allowed to defend himself against.
 - vi. The balance of prejudice therefore falls in his favour. The additional delay to the progress of the claim has not been great and it would be unlikely to be much further advanced that it currently is.
8. Conclusions. I grant the Respondent's application, for the following reasons:
- a. While the delay is lengthy, I consider that the actual 'honest' answer for that delay is negligence on the Respondent's advisors' part. It is not for a litigant, having engaged professional advisors to then be blamed for not chasing them if they fail to progress his Response. The Claimant promptly passed on whatever documentation was sent to him and was entitled to expect that his advisors would action it. I accept that he was unaware of the relevant time limits, being again entitled to expect his advisors to look to that matter and there is no evidence that when his advisors finally decided to progress his Response that they advised him as to the urgency of doing so, as that Response was already well out of time. This is not a 'satisfactory' answer, but I don't consider that the Claimant should be fixed with the consequences of his advisors' failures (there being no equivalent, in respect of the application of Rule 20, as far as I am aware, of the 'Dedman Principle' - **Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53, CA**: '*If a man engages skilled advisers to act for him — and they mistake the time limit and present [the claim] too late — he is out. His remedy is against them.*' and I note that that principle is not followed in respect of discrimination claims.)
 - b. I consider that the balance of prejudice falls in the Respondent's favour. The delay, in the context of the overall progress of the case (particularly as it can, and has, been listed early next year) is not excessive and does not greatly prejudice the Claimant. Any unnecessary costs incurred by her as a consequence can be restored through a costs order. In contrast, the Respondent, through very little fault of his own, would have a default judgment made against him in respect of very serious allegations, with real

consequences for his reputation and even his business, without the opportunity to defend himself against them.

- c. In respect of the merits of the Response, I note the likely weaknesses in the Respondent's case, particularly when, as is usual in the matter of allegations of sexual harassment, there are no other witnesses, or other corroborative evidence, and therefore individual credibility will be crucial, to be as follows:

i. The Respondent's complete failure, at the time, to respond to the Claimant's specific and detailed allegations against him.

ii. His questionable editing of her letter; and

iii. The sometimes confused and contradictory nature of his evidence today.

9. Weighing and balancing these factors against each other, I find that the 'honest' reason for the delay being outside his control and the balance of prejudice being in his favour, those factors weigh in favour of granting the application. While the question of the merits of the Response, is perhaps less clear-cut, it is, I consider, tipped in the balance by those major factors and a matter that can be determined in greater detail at the final hearing. I therefore consider, applying Rule 2 that is 'fair and just' to grant the application.
10. Judgment. For these reasons, the application is granted and the Response (as set out in the Amended Response in the bundle) is accepted.

Costs

11. As indicated in advance, the Claimant applied for her costs arising from the need to respond to the Respondent's application. Mr Tillott outlined the sequence of events since receipt of the Respondent's application, pointing out the lack of response from his representatives, up to and including the day before this Hearing, obliging him to prepare the document bundle without their input (Ms McGrath was only instructed yesterday). A further supplementary bundle was only provided by the Respondents this morning. He stated that considering the Respondent's representatives' scale and resources, their handling of this matter had been 'appalling'.
12. He stated that were it not for the Respondent's/his representative's negligence, the claim would have proceeded without delay and that work he and his colleagues have had to undertake to deal with the application and today's hearing would have been entirely unnecessary.

13. While a hearing would have been needed, either today, or at some point, for case management, it would not have been as lengthy, perhaps one hour, compared to three, and involved much less preparation. He estimated those costs to be £3650 plus VAT.
14. While Ms McGrath contested the amount claimed, she did not seek to seriously challenge that the Respondent's conduct of the case had been unreasonable.
15. Conclusion. I concluded that a costs order was clearly appropriate as, as I have found, the Respondent's/his representative's conduct of the case had been unreasonable, in failing, negligently, to address the claim, causing unnecessary delay and expense for the Claimant. She has been prejudiced, as a consequence, but as identified above, that prejudice can be addressed by an appropriate costs order. As to the amount, I saw no reason to doubt Mr Tillott's summary of his and his colleagues' costs. His hourly rate, set at County Court rates, would easily amount to a sum of £3650 plus VAT, when considering the need to peruse the Respondent's application, take instructions, research the law, draft and discuss a response(s) to that application, address the obvious flaws in the first Response and then to prepare a bundle of documents, with repeated unanswered correspondence to the Respondent's representatives in his attempt to prepare that bundle. Finally, he was presented with a witness statement and further documents from the Respondent, at the last moment and then had to prepare and attend at a hearing at least two hours longer than it needed to be.
16. Judgment on Costs. The Respondent is ordered to pay the Claimant's costs in the sum of £3650 plus VAT.

Employment Judge O'Rourke

Dated: 22 August 2023

JUDGMENT SENT TO THE PARTIES ON
19 September 2023 By Mr J McCormick

FOR THE TRIBUNAL OFFICE