EMPLOYMENT TRIBUNALS

Claimant: Mr S Purkiss

Respondents: 1. Entomics Biosystems Ltd (T/A Better Origin)
2. Fotis Fotiadis
3. Miha Pipan

Heard at: Bury St Edmunds (via CVP)

On: 25 August 2023

Before: Employment Judge Graham

Representation
Claimant: Ms G Nicholls, Counsel
Respondents: Mr J Susskind, Counsel

JUDGMENT

1. The Claimant's application under Regulation 10A(2) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, for an Employment Judge to consider afresh the decision of the Legal Officer dated 31 March 2023 to grant an extension of time to the Respondent, is granted.

2. Having considered that decision afresh, the Respondents' application for an extension of time to file their Response is granted.

3. The Claimant's complaint of notice pay/wrongful dismissal is dismissed upon withdrawal. The remaining complaints will proceed to a hearing.

REASONS

Background

1. The Claimant's application dated 23 August 2023 challenges the decision of the Legal Officer Ashiedu Ourouhu dated 31 March 2023 to grant the Respondents an extension of time to file their ET3 Response to 28 April 2023. The ET3 was originally due to be filed on by 24 March 2023.

2. The Claimant filed his ET1 claim form on 11 February 2023 and complained of detriment for having made protected disclosures and for raising health and safety concerns, and also automatic unfair dismissal. The Claimant also complained that he was owed notice pay, however that claim has since been resolved. The Claimant relies upon in the region of 34 alleged protected disclosures and says that he suffered in excess of 20 alleged detriments, as well as his dismissal.

3. The Claimant says that the information he disclosed tended to show:

    i. The First Respondent was or was likely to be endangering the health and safety of its staff and customers;
    ii. The First Respondent was or was likely to be failing to comply with its legal obligations;
    iii. The First Respondent was or was likely to be committing a criminal offence; and/or
    iv. The environment was or was likely to be damaged.

4. The Claimant makes serious allegations against the First Respondent and also its Chief Executive (the Second Respondent) and also its Chief Scientific Officer (the Third Respondent).

5. On 23 March 2023 the Third Respondent requested an extension of time for the Respondents to respond to the claim on the basis that the ET1 claim form had not been received. It appears from the Third Respondent's email that they became aware of the claim by ACAS on 17 March 2023, and that they had asked ACAS for a copy of the claim form on 20 March 2023 however ACAS was unable to comply and they were referred to the Tribunal instead.

6. A telephone call to the Tribunal on the same date (23 March 2023) revealed that the claim form had been posted to the Respondent's registered office on 24 February 2023 and that the Response was due the following day (24 March 2023). An email dated 20 March 2023 appears in the hearing bundle and shows that the Respondents' HR Director, Claire Seymour, contacted the Tribunal to state that they had been contacted by ACAS in relation to the claim but had not received a copy of the claim form, and asking the Tribunal to issue a copy via email.

7. I understand that there had been pre-litigation correspondence between the Claimant's lawyers and the First Respondent, however the application from the Third Respondent of 23 March 2023 was not copied to the Claimant or his lawyers. I make no criticism of the Respondents for not copying in the Claimant's lawyers as without receipt of the ET1 they would not have known who the Claimant had instructed. Nevertheless, Rule 20 required that the application be copied to the Claimant, however this was not done. I assume that the Third Respondent was unaware of the Employment Tribunal Rules, nevertheless this was a breach of Rule 20.

8. On 31 March 2023 the Tribunal's Legal Officer granted the Respondents an extension of time until 28 April 2023 in which to file their Response. This was on the basis that the Respondents had not received the claim form and also because no objection had been received from the Claimant. The Legal Officer said that the decision had been reached by applying the principles

in ***Kwik Save Stores Ltd v Swain and ors*** **[1997] ICR 49** as follows:

i. The Respondent had a valid reason for needing a short extension of time;
ii. The delay was short and would not prejudice a fair hearing;
iii. Refusing the application would cause severe prejudice to the Respondent whereas there is very little to the Claimant; and
iv. It was therefore in the interests of justice to grant the extension of time.

9. It is clear that the decision of the Legal Officer was reached on the basis of an error. The Claimant had not objected to the application because he had not been copied into it. The Respondents' application of 23 March 2023 was copied to Ms Seymour and I note that the end of her email address is different to that of the Respondents. It is possible that the Legal Officer assumed (incorrectly) that Ms Seymour was acting for the Claimant, although this is no more than an assumption on my part. In any event, whatever the basis for the finding that the Claimant had chosen not to object, this was an error. Had the Legal Officer realised that the Claimant had not been copied in then it would have been usual practice to remind the Respondents that they should do so, or for the Tribunal to have forwarded a copy to the Claimant. This was not done.

10. The ET3 and Grounds of Resistance were filed on 28 April 2023.

11. The Claimant's lawyers did not receive the decision of the Legal Officer dated 31 March 2023 from the Tribunal. Having read that decision it says that it was copied to the Claimant's lawyers, however they deny receipt. It appears that two important pieces of post have not reached their intended recipients in this matter, however that is not the fault of either party and is an unfortunate fact of life that sometimes post does not reach its intended destination. The Claimant's lawyers first became aware of the decision on 9 May 2023 when informed by the Respondents' lawyers who subsequently forwarded on a copy of the Legal Officer's decision on 17 May 2023.

12. The decision letter makes it clear that parties can ask for the decision of the Legal Officer to be considered afresh by an Employment Judge *"within 14 days of the date of the letter/decision is sent to the parties."* The parties are explicitly referred to Regulation 10A(2). The Claimant did not make an application at that time, and no application was submitted until 23 August 2023, some three months later. This was a considerable delay.

13. In the interim the Claimant's lawyers wrote to the Tribunal on 18 May 2023 to ask for copies of the correspondence including the Respondents' application. In that correspondence they indicated that the Claimant would have objected had his views been sought, and secondly that he was considering making an application for a reconsideration. That correspondence was not placed before me until 28 July 2023 and I responded the same day and directed that the Tribunal staff should forward a copy of the Respondents' application to the Claimant's lawyers and further that "*if the Claimant is seeking reconsideration of the decision of the legal officer of 31 March 2023, then he should say so, bearing in mind the time limit for doing so under Regulation 10A."* This response was not sent to the Claimant by the Tribunal until 11 August 2023.

14. I understand from correspondence within the hearing bundle that the Claimant's lawyers requested a copy of the extension application from the Respondents on 11 May and 15 August 2023 and it was provided by the Respondents' lawyers on 16 August 2023. From the material before me it does not appear that the Tribunal passed the Claimant the Respondents' application despite his request for a copy of it.

Submissions

15. I have heard submissions on both sides. I do not intend to repeat them in detail here, save to note that the Claimant argues that he had been denied the opportunity to make his objections at the time and he would have objected had his views been sought. Ms Nicholls argues that the decision should be considered afresh either on the basis of Regulation 10A(2) or Rule 29, and she places reliance on the judgment in ***Serco Ltd v Wells*** **[2016] ICR 768** and said that if I was with her on that then I should allow the Claimant seven days in which to provide his written objections.

16. Given the delays to date, and also the requirements of the Overriding Objective, I did not consider that a further delay of 7 days would be appropriate. I considered that this would be disproportionate to the issues and would create unnecessary formality. I therefore I asked Ms Nicholls what the Claimant's objections would have been. Ms Nicholls informed me that the Respondents had not provided a sufficient explanation for their application, they had been on notice that the claim was coming but there was no interrogation as to why the claim had not been received by the Respondents and that further information would have been needed regarding the level of veracity of the Respondents' application. Ms Nicholls said the Claimant also queried how the Respondents came to know about the claim having been issued, and he also queried how the Respondents had been able to put in a fully pleaded Response when they did.

17. Mr Susskind for the Respondents accepted that the application was not copied to the Claimant but urged me to consider the Overriding Objective and reminded me that proceedings had moved on in the months since the application and that what the Claimant was ultimately seeking, namely ruling out the Response, was both drastic and draconian. Mr Susskind told me that the reconsideration was neither necessary nor in the interests of justice for something minor and historic, and that the Respondents' reasons for the original application were forceful back then and even more forceful now and he asked me to reject the Claimant's argument about how the Respondents had been able to put in a fully pleaded defence when they did as this was not an argument he would have made (or been able to make) back in March 2023. Mr Susskind also disputes that the Tribunal has jurisdiction to consider this application now, many months after the original decision was made. Mr Susskind says that none of the Claimant's objections today were in his application.

Law

18. Regulation 10A of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 provides:

Legal officers

10A—(1) The Lord Chancellor may appoint legal officers who may, in accordance with section 4(6B) of the Employment Tribunals Act, carry out such functions set out in regulation 10B as the Senior President of Tribunals shall authorise in a practice direction.

(2) Within 14 days after the date on which a Tribunal sends notice of a decision made by a legal officer to a party, that party may apply in writing to the Tribunal for that decision to be considered afresh by an Employment Judge.

…

19. The Employment Tribunal Rules of Procedure provides:

Overriding objective

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Extending or shortening time

5. The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.

Case management orders

29. The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. [Subject to rule 30A(2) and (3)](a) the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend

or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

20. *In* ***Serco Ltd v Wells*** **[2016] ICR 768** the Employment Appeal Tribunal held that in order to uphold the principles of certainty and finality, and to respect the integrity of judicial decisions, challenges to orders should ordinarily only be addressed by a judge in a higher jurisdiction. Case management orders will not be susceptible to variation or revocation by a judge of equivalent jurisdiction except in limited circumstances, and where it is necessary in the interests of justice and that:

"The draftsmen of the current Employment Tribunals Rules have used the expression "necessary in the interests of justice"; in my judgment that should be interpreted through the prism of the principle I have just articulated; variation or revocation of an order or decision will be necessary in the interests of justice where there has been a material change of circumstances since the order was made or where the order has been based on either a misstatement (of fact and possibly, in very rare cases, of law, although that sounds much more like the occasion for an appeal) or an omission to state relevant fact and, given that definitions cannot be exhaustive, there may be other occasions, although as Rix LJ put it these will be "rare" and "out of the ordinary."

Decision

21. I found the submissions of both sides to be helpful and clear, however there are elements of both which I did not agree with. I find that Parliament had intended that there where Legal Officers make a decision of this nature then parties would have the right to ask for an Employment Judge to consider it afresh. This is not strictly the same as a reconsideration of a judgment under Rule 70, but involves re-taking the decision. It is clear that the Claimant was denied that right at the material time through no fault of his own. The Claimant was entitled to be informed that the application had been made, and he was entitled to object. That did not happen. I take on board that the end result may be the same, which I will come to later, nevertheless the Claimant was denied the right to which Parliament had intended that parties should have.

22. Having taken all of the factors into account it is my view that it is appropriate to grant the Claimant's application to consider afresh the decision of the Legal Officer and that I have jurisdiction to do so. This is because due to a combination of errors on the part of the Respondents and the Tribunal in March 2023, the Claimant was denied the opportunity to submit his objections at that time. It is appropriate that the Claimant be given the opportunity to do so now. I do so on the basis of both Regulation 10A(2) and my powers to extend time under Rule 5.

23. I consider that the reference to "decision" within Rule 5 is wide enough to encompass a decision of a Legal Officer. It is therefore unnecessary for me to consider the application under Rule 29, and in any event I would note that the reference of the judgment in ***Serco Ltd v Wells*** was not directly on point

as that relates to a decision of another judge of equivalent jurisdiction. In the immediate matter we are dealing with a decision of a Legal Officer in circumstances where Parliament has intended that a specific process under Regulation 10A(2) should exist for considering afresh their decisions. Accordingly ***Serco*** is of limited assistance.

24. I noted that the Claimant's application should have been made within 14 days of the date of the decision. The Claimant could not have challenged the decision until on or after 17 May 2023, and he could not have addressed the Respondents' reasons for the application until 16 August 2023. However, only limited attempts were made by the Claimant to obtain the Respondents' application, the first was an email to the Respondents on 11 May, the second was an email to the Tribunal on 18 May, and the third was an email to the Respondents months later on 15 August 2023.

25. There is no explanation why the Respondents did not send a copy of the application to the Claimant sooner. Equally there is no explanation why the Claimant did not chase the Respondents or the Tribunal in the period between 18 May and 15 August 2023. Rule 2 requires the parties to assist the Tribunal in furthering the Overriding Objective and this includes avoiding delay. Had both parties acted more quickly, then this matter could have been considered on the papers much earlier, and not taken up Tribunal hearing time today. The delay in the Claimant being provided with the underlying application is a significant factor in my decision to extend time. In the circumstances it is appropriate for me to exercise my discretion to extend time under Rule 5.

26. I have considered afresh the Respondents' application of 23 March 2023 to extend time by applying the principles in ***Kwik Save***. I found that the Respondents did have a valid reason for an extension of time having not received the ET1 claim form. I also found that the delay of just over a further month was short and would not prejudice a fair hearing. I also found that refusing the application would create severe prejudice to the Respondents who would not have been able to defend what I have already found to be voluminous and serious allegations against them. Conversely, I have found very little, if any, prejudice to the Claimant in granting the application. The only prejudice is minor delay. I found the Claimant's objections to be unpersuasive and I agree with the Respondents that there was no requirement for the Respondents to have referred to investigations or interrogations about missing post in their application – I considered that to be unnecessary and disproportionate. It was also clear from the Respondents' original application that they had become aware of the ET1 via ACAS. I also agreed with the Respondents that the Claimant was also seeking to rely on matters he could not have relied upon at that time (for instance the speed or manner in which the ET3 Response was eventually produced) so I have rejected those. Whilst I disagreed with the Respondents on the issue of jurisdiction, I have found their arguments for granting an extension of time to be compelling. Accordingly, having considered the application afresh I have reached the same decision as the Legal Officer that a time extension should be granted until 28 April 2023.

27. The issue of granting an extension of time to parties is a routine case management decision, and this is clear from the fact that Parliament has delegated this function to Legal Officers. A challenge to that decision ought

not to have resulted in taking up hearing time today. This issue could have been dealt with on the papers months earlier had both parties acted more swiftly. I therefore encourage both parties to cooperate in future and to assist the Tribunal in furtherance of the Overriding Objective.

28. Case Management Orders have been issued separately.

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Employment Judge Graham
25 August 2023

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Date 3 October 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE