EMPLOYMENT TRIBUNALS

Claimant: **Mr Jaiden Nash**

Respondent: **Costco Wholesale UK Limited**

Heard at: **East London Hearing Centre**

On: **14 February 2024**

Before: **Employment Judge S Knight**

Representation

Claimant: Anthony Johnston (St Philips Chambers)
instructed by Irwin Mitchell LLP

Respondent: Ameer Ismail (Cloisters Chambers)
instructed by Towers & Hamlins LLP

A DECISION having been given orally the parties on 14 February 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. These are reasons for a decision to refuse an application by the Respondent under Rule 20 of the Employment Tribunal Procedure Rules on behalf of the Respondent to extend time for presenting its Response.

The parties

2. The Respondent is a cash and carry warehouse membership club operating through a network of 29 warehouses in the United Kingdom.

3. The Claimant was employed by the Respondent as a Members Services Assistant from 27 July 2022 until 30 September 2022 at one of its warehouses. He worked in the Front End department and was responsible for providing

members and colleagues with general assistance inside and outside the warehouse.

The issues

4. The claim in this case is about race discrimination. The race discrimination claim is advanced as direct race discrimination, and as harassment in the alternative. Claims for unfair dismissal and failure to pay notice pay have been dismissed on withdrawal.

5. Early Conciliation started on 25 November 2022 and ended on 23 December 2022. The claim form was presented in time, on 27 December 2022. A Response was due by 3 February 2023.

6. The Response was late. It was filed on 22 December 2023. It was accompanied by a written application to extend time pursuant to Rule 20.

Procedure, documents, and evidence heard

7. This application was considered at a remote hearing listed to determine the application and then to consider either case management or the Claimant's substantive claim.

8. At the start of the hearing I checked whether any reasonable adjustments were required. No reasonable adjustments were requested.

9. I was provided with a bundle of documents in support of the Respondent's application, and a bundle of documents in support of the Claimant's claim. I also had the Tribunal's case file available.

10. I heard evidence under oath from the Respondent's General Manager.

11. I then heard submissions from the representatives.

The facts

12. The Claimant was dismissed from his employment by the Respondent.

13. After his dismissal, on 3 October 2022 the Claimant emailed the General Manager of the warehouse at which he worked to complain about how he had been treated, and to specifically allege racial discrimination. The same day the email was received and read by the General Manager, although she was out of the office. She replied to say that she would respond on her return after 10 October 2022. This was not an automated message, as she clarified in her evidence. However, she did not respond on her return.

14. On 14 November 2022 the Claimant sent to the General Manager a further email, requesting a response. He did not receive a response. Instead, the General Manager sent a letter which did not respond to the issues raised, and in particular ignored the discrimination aspect of the issues. As the General Manager clarified in evidence and as would be obvious to any reader of the letter, litigation in the Tribunal was realistically in prospect at that stage.

15. The Respondent says that it did not receive notice of the claim until 19 December 2023. It says that on 19 December 2023 it received a record of a preliminary hearing which was sent to its head office. It says that is the first it knew of these Tribunal proceedings.

16. On the ET1 the Claimant had correctly entered the address of the warehouse at which he worked. It is agreed between the parties that the warehouse is able to accept post. The Respondent's evidence, which I accept, is that the process for receiving post is that it goes to the named recipient, and if it does not have a named recipient, it goes to the administrative office. Most post which arrives in the administrative office, if it was important, would then be sent on to the General Manager.

17. Prior to 19 December 2023, the Tribunal sent to the Respondent at its Chingford warehouse without a named contact on the letter the following correspondence:

    (1) A notice of claim enclosing the ET1, dated 6 January 2023;

    (2) A notice of hearing for 26 May 2023, dated 25 January 2023;

    (3) A notice that no Response had been received, dated 24 April 2023;

    (4) A notice of hearing for 12 December 2023 (wrongly stated in the heading as being 2024 but corrected in the text of the letter), dated 10 October 2023.

18. There is no reason why this correspondence would not have been received by the Respondent. I find as a fact that all of these pieces of correspondence were received, and they have been ignored.

19. Prior to 19 December 2023, correspondence had also repeatedly been sent to the General Manager directly by email. This correspondence included the case number and name of the case in the subject line. It included:

    (1) An email of 16 May 2023 from the Claimant's solicitors to the Tribunal, copying in the General Manager.

    (2) An email of 26 May 2023 from the Claimant's solicitors to the Tribunal, copying in the General Manager.

    (3) An email of 2 June 2023 from the Tribunal to the Claimant, copying in the General Manager.

    (4) An email of 7 July 2023 from the Claimant's solicitors to the Tribunal, copying in the General Manager.

    (5) An email of 14 July 2023 from the Claimant's solicitors to the Tribunal, copying in the General Manager.

    (6) An email of 11 December 2023 from the Tribunal to the Claimant, copying in the General Manager.

20. In determining what happened to the emails, the Respondent's representative

asked me to take judicial notice of how email systems work when they categorise emails. I doubt that this is a matter that truly falls within the remit of judicial notice. In any event, I have not needed to take judicial notice of anything. The documentary and oral evidence is sufficient to decide this issue.

21. Having heard the evidence of the General Manager and considered the documentary evidence related to the emails, I find that each of the emails was received by the General Manager. The Respondent's IT department have found the emails in the "deleted / trash" folder of their Gmail system. I have no hesitation in concluding that they were all seen and actively deleted by the General Manager. They were not found in a spam folder. There is no reliable documentary evidence in the material placed before me that they were in fact sent to spam. Indeed, it would be surprising if correspondence from both the Tribunal and the Claimant's solicitors were sent to spam. I have no hesitation in rejecting such an explanation, in part because it is obvious that the General Manager had ignored the complaints raised by the Claimant before the Tribunal proceedings began but when proceedings were realistically in prospect. She did not take the mater seriously. In that light it is vastly more likely that she deleted the items herself than that they somehow found their way into the deleted / trash folder by some other means.

Law

22. The legal issues in this case were not in dispute.

23. In exercising powers under the Tribunal Procedure Rules the Tribunal must give effect to the overriding objective of dealing with cases fairly and justly.

24. The power to extend time for the presentation of a Response is contained in Rule 20 of the Tribunal Procedure Rules, as follows:

> "20.—(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.
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> (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."

25. The case of *Kwik Save Stores Ltd v Swain* [1997] ICR 49 EAT (19 June 1996) sets out factors that the Tribunal must consider in determining whether to extend time pursuant to Rule 20. These will include (1) the employer's explanation as to

why an extension of time is required; (2) the balance of prejudice; and (3) the merits of the defence.

Conclusions

26. I firstly consider the employer's explanation as to why an extension of time is required.

27. The reason for the delay in filing the Response is that on 10 occasions the Respondent was notified of the claim and it decided to do nothing about it. On at least 6 of those occasions a senior manager – the General Manager – decided to do nothing about it. The Respondent says that it responded to the claim as soon as its head office became aware of it. That appears to be true. But the Respondent appears not to ensure that correspondence relating to claims is drawn to the attention of its head office. The Respondent has no one but itself to blame for that.

28. I then consider the balance of prejudice of allowing or refusing the application.

29. If I refused the application then the Respondent would plainly be prejudiced by being unable to answer the claim. Further, a finding of having discriminated would cause reputational damage to the Respondent. Further, the individuals who are alleged to have carried out discriminatory acts would not be able to defend themselves. However, that is the fault of the Respondent in not responding to the claim. Further, any prejudice to individuals can be addressed by appropriate levels of anonymisation of those individuals in the judgment without the need for an order under Rule 50 of the Tribunal Procedure Rules, by expressing any reasons in a way which do not allow for jigsaw identification. Such prejudice to individuals can also be addressed by noting the Respondent's actions in not responding to the claim are what prevent individuals from answering the allegations against them. Of course, while considering the impact of an allegation of discrimination against a person or organisation, it is important to note that an accusation of discriminating against someone is nowhere near as bad as actually being discriminated against.

30. The Claimant would be prejudiced by any delay that arose from allowing the claim to be defended by extending time for filing the Response. This case has been delayed by about a year by the Respondent's inaction. Delays are scandalous. Delay is capable of bringing the justice system into disrepute. Justice delayed may be justice denied, as people wait years for compensation which they are due, all that time being out of pocket. Avoiding delay, so far as compatible with proper consideration of the issues, is an essential component of the overriding objective of dealing with cases fairly and justly. The parties are required to assist the Tribunal in furthering the overriding objective. Costs for legal expenses cannot compensate the Claimant for the delay in this case, and therefore would not address the prejudice he has suffered by the delay.

31. As a result, both sides would suffer prejudice by losing this application.

32. I note at this point by way of an aside that part of why delay is to be avoided where compatible with proper consideration of the issues is that delay not only

affects the case it occurs within: it also causes knock-on delays to other cases in the system. That of course does not relate to prejudice in this case, but it is relevant to consideration of the overriding objective.

33. I then turn to the issue of the merits of the Response.

34. The Response in this case is not a knockout response. It is not possible for me to say on the material that I have seen that it is a strong Response. The ET3 and Grounds of Response are lacking in particulars in response to the specific allegations made by the Claimant. The Respondent has not served witness evidence which deals with the substantive allegations, so I do not know what the Respondent's detailed case would be. The Respondent said that it was not proportional for them to do so, but it is for the Respondent to present all the evidence they need to in order to support their application. Their choice to not bring evidence at this stage means that the Tribunal is deprived of knowing of material that may assist them.

35. I am told that the Respondent's case is that the Claimant did not do well in his probation and was often late, so he was dismissed. However, on the material in front of me it is unlikely that a Tribunal would conclude that the Claimant was late on more than 3 occasions. There are no contemporaneous records of the Claimant being late on more than 3 occasions. There are contemporaneous records from the Respondent of the Claimant being late on 3 occasions, and these records align with the Claimant's own account. That is powerful evidence that the Claimant's account is correct. The Respondent could have provided evidence of the Claimant's start times to show he was late on more occasions, but it has opted not to adduce that evidence today. It is clear that they made that decision despite knowing that the number of times the Claimant was late was a relevant issue, because they called witness evidence from the General Manager to say that the Claimant was late on more than 3 occasions. I have no difficulty in concluding that against the background of the General Manager's previous poor evidence a Tribunal would very likely prefer the Claimant's evidence and the contemporaneous documentary evidence that has been presented to the Tribunal about the number of times that the Claimant was late.

36. In relation to the probation, the Respondent relies on a single document to say that the Claimant was not doing well. That is not signed off by the Claimant or a senior manager, despite there being space for that to be done on the document. There is no evidence showing any link between that document and the decision-making process on the dismissal. It is also an appraisal from relatively early in the Claimant's probation. There is no evidence that any concerns which one manager may have had about the Claimant were raised with him as one would expect if the dismissal was not discriminatory but a result of the Claimant's lack of competence leading him to fail probation.

37. The Respondent also says that 2 of the alleged discriminators involved in the dismissal are from ethnic minorities. There is no actual evidence of this although it appears in the ET3. In any event, it may simply be answered that people from ethnic minorities may still discriminate on racial grounds. This may be a good point that the Respondent could put across at a final hearing, but it is not a point which makes the Response overall clearly a strong one. It also only relates to the

dismissal, and not to other detriments which the Claimant alleges occurred during the course of his employment.

38. I conclude by looking overall at what justice requires.

39. The Respondent is responsible for a year's delay in the progress of the case by failing to file their Response for about 10 months and despite 10 pieces of correspondence being sent to them. Both sides would be prejudiced by this application being decided against them. The case for the Respondent is not particularly strong. Weighing up all of the issues and considering the overriding objective of dealing with cases fairly and justly, justice does not require an extension of time. The application under Rule 20 was therefore refused.

40. I therefore decided to refuse the Respondent permission to participate in the liability part of the hearing except for making submissions on the law.

Employment Judge S Knight
Date 28 February 2024