EMPLOYMENT TRIBUNALS

Claimant: **Ms J Grizzle**

Respondent: **A J Architectural Pressings Ltd**

Heard at: **In public via CVP in Birmingham** **On: 12th April 2024**

Before:

Representation
Claimant: Mrs Lawrence-Russell (trade union representative)
Respondent: Mr Alan Williams (solicitor)

RESERVED JUDGMENT ON A PRELIMINARY ISSUE

1. The respondent's application to submit its response out of time for an extension of time is granted.

2. The claim remains listed for a **final hearing** to take place at Birmingham Employment Tribunal, 13th Floor, Centre City Tower, 7 Hill Street, Birmingham B5 4UU, on **30 September and 1, 2 and 3 October 2024.**

3. **Case Management Orders** are given in the attached document for the preparation of the case to the final hearing.

4. A **preliminary hearing** for case management will take place by video (CVP or other video platform to be identified by the tribunal) 30th August 2024**.** The case will be heard by an Employment Judge sitting alone. The hearing will start at 10.00 am. You must be online earlier than the start time.

REASONS

Claim and Procedural History

1. This is the third preliminary hearing in this case. EJ Woffenden chaired a previous hearing on 1 August 2023 at which she identified the issues in the case and listed a hearing on 28 November to consider an application which

the respondent intimated it would be making under rule 20. The respondent made the application under rule 20 on 9 August 2023. EJ Coghlin KC chaired a hearing on 28 November 2023 making orders that the respondent produce witness evidence and an amended draft particulars of its response by 12 January 2024 for the application under rule 20 to be considered at this public preliminary hearing today. EJ Coghlin KC also listed the matter for a full final hearing on 30 September and 1, 2 and 3 October 2024.

2. At the hearing today the respondent confirmed that the basis of their application for an extension of time to allow it to enter a response remains as set out in the application of 9 August 2023. The claimant opposes that application. In considering the respondent's rule 20 application today I heard witness evidence from Ranbir Kaur Atwal, the respondent's Company Secretary / Operations Manager. I considered the bundle of documents of 167 pages as well as the Tribunal file, the updated grounds of response ('Updated ET3 pars of response AJ Pressing'), the Google screen shot of the respondent's business address and submissions both written and oral from the parties' representatives.

3. The procedural history of the case is as follows below.

4. The claimant's employment ended on 3 October 2022.

5. Early conciliation ran from 30 November 2022 until 11 January 2023.

6. The claimant submitted her ET1 on 10 February 2023.

7. On 14 February 2023 the tribunal sent a notice of claim to the respondent, enclosing the ET1, and informing the respondent that a response had to be received by 14 March 2023. At the same time the tribunal sent a notice of a case management preliminary hearing on 1 August 2023. The ET1 was initially sent to the wrong address: 126 Middlemore Road, Unit 126, Smethwick, instead of 33a Middlemore Road, Smethwick.

8. The respondent says that it did not receive this correspondence which I accept having heard the evidence of Ranbir Kaur Atwal.

9. On 5 May 2023 the tribunal sent a further notice of claim, again enclosing the ET1, this time to the respondent's correct address of 33a Middlemore Road. This notice informed the respondent that the deadline for a response was 2 June 2023. Also on 5 May 2023, the tribunal sent a further notice of the hearing on 1 August 2023.

10. In the written application for an extension of time submitted on behalf of the respondent on 9 August 2023, the respondent's solicitor, Mr Alan Williams from Peninsula who was also representing the respondent before me today, said that after initially being sent to the wrong address (as already described), the Claim Form was re-served on the respondent, and appeared to accept that the respondent did not thereafter respond in time.

11. There was some confusion raised at the preliminary hearing on 28 November, that the dates given in this regard did not seem to correspond with anything on the tribunal file: the application says the Claim Form was re-

served on 22 June 2023, and that the respondent had until 20 July 2023 in which to respond.

12. Mr Sutcliffe, for Peninsula, who appeared for the respondent on 28 November, but was not the author of the 9 August 2023 application (which was Mr Williams who appeared for the respondent today), told the Tribunal that his instructions were that the 5 May 2023 correspondence was not received by the respondent at any stage prior to 1 August 2023. He was unable to explain the reference in the 9 August application to service having happened in June.

13. Jas Singh, a director of the respondent, emailed the Tribunal on 25 July 2023. He referred to the claim, its case number and the hearing listed for 1 August 2023. He said "I have just been informed about this today when someone has contacted us from Croner, we never received any paperwork for this either by email/post."

14. Croner, like Peninsula, is an employment law consultancy. I accepted the evidence given by Ranbir Kaur Atwal that Croner had contacted the respondent on 25 July 2023 to offer their assistance saying they had obtained the tribunal's list and seen reference to the 1 August 2023 hearing.

15. By letter dated 26 July 2023 from the Tribunal the respondent was informed of the consequences as set out in Rule 21(3).

16. On 27 July 2023 the tribunal replied to the respondent's email of 25 July, stating that the claim form and other correspondence had been served on the respondent at its registered office, and that the extent to which the respondent would be allowed to participate in the hearing would be a matter for the judge's discretion.

17. The preliminary hearing took place on 1 August 2023 before EJ Woffenden. As the judge recorded in her case management summary,

    "at 9.23 am on the morning of the hearing, the respondent emailed the tribunal again and referred to an email it had received from the claimant's representative earlier that morning and stated it was not aware of the case or any hearing and did not even know what time the hearing was supposed to start. I gave directions that the notice of hearing and ET1 form be sent to the respondent."

18. At the hearing on 1 August the claimant appeared by a trade union representative. The respondent attended by way of its solicitor, but he did not take an active part in the hearing. EJ Woffenden identified the issues and made provision for any rule 20 application to be made by the respondent if so advised, including directing that the hearing be listed for 28 November at which any such application would be considered.

19. On 8 August 2023 the tribunal sent a written notice of hearing listing the 28 November preliminary hearing. Although this notice was in generic terms, suggesting that the hearing being listed was for general case management, both parties understood (as recorded by the EJ as confirmed at the hearing on the day) that the purpose of the hearing would be to consider any rule 20 application.

20. The respondent made an application under rule 20 on 9 August 2023 (though it was dated 8 August). The application said (at para 20) that it enclosed a draft Response and rider. However, although the application was accompanied by a draft ET3 which made clear (at section 6.1) that the respondent contests all of the claimant's claims, no rider was attached. The draft ET3 said that "particulars of response will follow shortly".

21. Those particulars were however only provided on 20 November 2023. No explanation was offered for that delay at the preliminary hearing on 28 November, although it is noted that Mr Sutcliffe suggested that the respondent may not have been able to do so very shortly after 1 August 2023. Mr Williams stated today that it was due to Peninsula's allocation of work, a situation which I consider inefficient at the least and not fit for purpose of representation of clients in Tribunal proceedings.

22. On 20 November the respondent sent those particulars to what appears to be the claimant's email address, and not to her representative whose name and contact details are given in section 11 of the ET1. The result of that was that Mrs Lawrence-Russell had not seen the particulars until the day before the preliminary hearing when they were provided as part of the bundle prepared by the respondent for the hearing on 28 November 2023.

23. Peninsula had been assisting the respondent in relation to a potential dispute with the claimant for some time and completed the grievance investigation producing a report titled the 'Peninsula Face2Face Report' which is in the bundle from pages 103 to 167. I accepted that they went on the record as the respondent's representatives on 25 July 2023.

24. EJ Coghlin KC concluded that he was not in a position to decide the respondent's application under rule 20 due to two important matters not being clear; namely the respondents explanation for the delay in responding to the claim and whether or not the claim was received when it was re-served on 5 May 2023 and secondly understanding the merits of the defence based on the draft particulars of response and how much of the claimant's case was in fact disputed and how much was admitted or not contested. He therefore listed today's open preliminary hearing to consider the application, and gave orders for the witness evidence to be given and proper particulars of the respondent's response to the claim.

25. The respondent on being given this so-called second bite at the cherry was ordered by no later than 12 January 2024: to send to the claimant a witness statement (or statements) setting out all the relevant facts in relation to the receipt or (as the case may be) non-receipt of the correspondence which was sent to the parties on 5 May 2023 and the steps taken thereafter (including in the period up to and including 21 November 2023) to produce and serve (1) a draft ET3 and (2) draft particulars of response. To send to the claimant any documents on which it intended to rely in support of its application under rule 20 and to send to the claimant and to the tribunal draft particulars of the respondent's response to the claimant's claim, as set out in her claim form and the rider thereto and as clarified in the List of Issues attached to the case management order of EJ Woffenden dated 2 August 2023. Such particulars to set out the respondent's proposed response to each allegation made by the claimant. Where the respondent denies an allegation, it was ordered to

set out its reasons for doing so, and if it intends to put forward a different version of events from that given by the claimant, it must state its own version.

26. The parties were further ordered to co-operate to agree the contents of a bundle of documents, and the respondent to prepare and send that bundle by 23 February 2024. At point 15 of the Case Management Order of EJ Coghlin KC it was made clear that "If any of these orders is not complied with, the Tribunal may: (a) waive or vary the requirement; (b) strike out the claim or the response; (c) bar or restrict participation in the proceedings; and/or (d) award costs in accordance with the Employment Tribunal Rules."

27. Despite the orders set out above, the respondent did not send the witness statement, bundle and amended draft particulars of response until the day before this hearing when they were emailed to both the Tribunal and the claimant's representative on 11 April 2024 at 14:13, some 90 days later than ordered. Mr Williams, the respondent's representative, had no explanation for yet a further delay in meeting Tribunal Orders, other than workload. On questioning if the respondent had been in contact with their representatives Ranbir Kaur Atwal gave evidence that after 8 August 2023 the first contact was when she emailed Peninsula asking if anything was needed on 17 November 2023. She confirmed that after 28 November 2023 she had chased up Peninsula in February 2024 but had not heard anything further until yesterday (11 April 2024).

Relevant Law

28. Rule 16(1) of The Employment Tribunals Rules of Procedure (the "Rules") requires that a response is made on the correct form and contains all the requirement information. This must be returned to the Tribunal within 28 days of the date on which the copy of the claim form was sent by the Tribunal.

29. In *Grant v Asda* 2017 ICR D17, EAT, the EAT held that it was not open to the Tribunal to restart the clock on the 28-day limit (in circumstances in which a Respondent did not receive a copy of the claim form) by re-sending the ET1. In this situation the Respondent should submit a late response coupled with an application to extend time under Rule 20.

30. Rule 18(1) states that if a response is presented outside the 28-day limit (or any extension of that limit granted within the original limit) then it will be rejected by the Tribunal unless an application for an extension of time has already been made or the response includes or is accompanied by such an application.

31. Rule 20(1) requires that an application for an extension of time must be presented in writing and copied to the Claimant, and set out the reasons why the extension is sought. If the time limit for presenting the response has already expired then it must be accompanied by a draft of the response or otherwise by an explanation of why that is not possible.

32. Rule 6 states that a failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the

Tribunal may take such action as it considers just, which may include all or any of the following -
(a) waiving or varying the requirement;
(b) striking out the claim or the response, in whole or in part, in accordance with rule 37;
(c) barring or restricting a party's participation in the proceedings;
(d) awarding costs in accordance with rules 74 to 84.

33. Whereas under the Tribunal Rules 2004 the time limit could only be extended where the Tribunal was satisfied that it was 'just and equitable to do so', this requirement has not been carried forward into the 2013 Rules. Rule 20 is instead silent as to the test that should be applied when considering an application. It therefore appears that the Tribunal has absolute discretion to extend a time limit. However, the Overriding Objective is likely to carry significant weight in a Tribunal's exercise of this discretion.

34. I have relied 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.

35. In *Kwik Save* 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, a judge should always consider the following:

(a) 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.

(b) 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?

(c) 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.

36. This approach has been followed in subsequent cases including *Pendragon plc (trading as CD Bramall Bradford) v Corpus 2005* ICR 1671, EAT, where it was held that the issue of the time limit remained a matter for case management and judicial discretion rather than jurisdiction; and *SKS Ltd v*

Brown EAT 0245/07 and *Camden Federation of Tenants and Residents Association v Hayward* EAT 0423/13, where default judgments were set aside in both these cases because of a failure by the respective employment judges to properly apply the guidance set out in *Kwik Save*.

Conclusions

37. I have carefully considered the representations made by and on behalf of the parties and the balance of prejudice to the parties if the application for an extension of time to file the Response is or is not granted. I have taken all the factors of the case into account but taken particular note of the following.

The respondent's explanation as to why an extension of time is required.

38. The original date for the receipt of the response was 14 March 2023, on the re-serving of the claim on the correct address, the date for the response was 2 June 2023. It is accepted that the original claim sent to the wrong address was not received. Whilst there was no explanation as to why the re-served claim to the correct address was not received, I accepted the evidence of Ranbir Kaur Atwal, that the respondent did not know of the proceeding before the employment tribunal until 25 July 2023.

39. Although an application for an extension of time was sent on 9 August and included a draft ET3, the draft details of response which must be sent with such an application was not sent until 20 November 2023, and that draft response was considered not sufficient and a further amended copy not sent until 11 April 2024. Whilst the delays have been lengthy, I consider that the actual 'honest' answer for those delays up to the 25 July was that the Respondent was not aware of the Tribunal claim and from 25 July the 'honest' answer and explanation for the delays is default 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 the Response and comply with Tribunal Orders. I find that the Respondent promptly passed on the documentation once received on 25 July 2023 and were entitled to expect that their advisors would action it.

40. Whilst this is not a 'satisfactory' answer, I don't consider that the respondent should be fixed with the consequences of their 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).

41. 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 has been listed for 30 September, 1, 2 and 3 October 2024, is not excessive and does not greatly prejudice the Claimant (provided the Case Management Orders which I have issued are complied with in time). Any unnecessary costs incurred by her as a consequence can be restored through a costs order. In contrast, the respondent, would only be able to participate in any future hearings to the extent permitted by the Judge hearing the matter and be unable to defend themselves against the claim which contains serious

allegations of discrimination, victimisation and harassment. There is a high public interest that such cases are decided on their merits, and with the respondent to those allegations, and the individuals said to have been responsible for the acts in question, having the fullest chance to defend themselves.

The merits of the defence

42. From the amended draft Response I am clear that the claimant's case is disputed and there are denials to be tested in evidence in relation to the discrimination, victimisation and harassment. It should be noted that the amended draft Response continues to contain blanket denials to points raised and does not set out alternative versions of events than given by the claimant as they were ordered to do, however the response denies any discrimination and likewise whilst upholding part of her grievance the grievance investigation did not make any finding of discrimination. I do note however the likely weaknesses in the respondent's case in relation to the constructive dismissal given the comments and outcome of the grievance investigation.

Would the respondent, if its request for an extension of time is refused, suffer greater prejudice than the claimant if the extension of time is granted?

43. In terms of delay, as the claim has been listed for a final hearing and remains listed for that full hearing on 30 September, 1, 2 and 3 October 2024, the claimant does not suffer any delay in the disposal of her claim. The prejudice that the claimant will suffer is that she will not have the opportunity to potentially take advantage of a "default" judgment that might be entered under rule 21 of the Rules (as far as I can see, no such judgment has yet been entered), and certainly she will not have the opportunity to take advantage of the respondent being unable to participate in the defence of the claim. The prejudice to the respondent is more extensive than that to the claimant. If I grant the application then the claimant will be put in the position she would have been had the Response been filed on time.

44. I consider that any prejudice to the claimant is greatly outweighed by the prejudice the respondent will suffer in being denied the opportunity to defend the claims in circumstances where it did not know of them within the ordinary time period and acted promptly to remedy the position once it did, but was then let down by their representatives. While the question of the merits of the response is perhaps less clear-cut, I consider this is tipped in the balance by the major factor of the balance of the prejudice to the parties, and matters that can be determined in greater details at the final hearing. I therefore consider, applying Rule 2 that it is 'fair and just' to grant the application.

45. **Judgment.** For these reasons, the application is granted and the Response (as set out in the 'Updated ET3 Pars of Response AJ Pressing' sent on 11 April 2024) is accepted.

Employment Judge Knowles

Date 12/04/2024

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