Case No:- 3314887/2023.

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G Gimenez	v	Audio Trading UK Limited

Heard at: Bury St Edmunds (by CVP) **On:** 16 & 17 December 2024

Before: Employment Judge Laidler

Appearances:
For the Claimant: Mr A McPhail, Counsel
For the Respondent: Ms S Bewley, Counsel

JUDGMENT having been sent to the parties on 20 January 2025 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The Respondent had taken no part in these proceedings until this Hearing when the Tribunal was presented with an application for an extension of time to present its response, with draft response and also requesting a stay of the concurrent County Court proceedings.

The History of the Tribunal Claim

2. ACAS Early Conciliation was entered into between 5 October and 16 November 2023 and the Certificate gives the Respondent's address as 138 Wigmore Street, W1 3SG. The ET1 Claim Form was issued on 15 December 2023 giving the same address for the Respondent.

3. The Particulars of Claim in the Tribunal case set out unfair constructive dismissal, wrongful dismissal, unpaid holiday pay and shortfall of wages from August 2022 and unpaid expenses. Although in the particulars the Claimant reserved his rights to bring a potential breach of contract claim, he specifically stated in paragraph 2 that claims for discreet breach of contract with regard to the failure to pay bonuses and effect due pay rises were not brought in the Tribunal and would be brought in the Civil Courts.

4. It appears, however, from the Particulars of Claim for the County Court action (seen in the bundle at page 22) that only the failure to increase basic pay on 17 March 2018 and any anniversary thereafter was brought in the County Court and not the bonus issue. The amount claimed is £82,359 plus interest to March 2024 calculated at £17,271.

5. At page 40 in the bundle was an acknowledgment by the Tribunal of the claim, which was sent to the Claimant, but that does not show when it was sent to the Respondent and at what address. On the Tribunal file, seen by the judge, it shows it was sent that day 19 February 2024 to the Wigmore Street address and that the date for the response was stated as being 18 March 2024. No Response having been received by that date, the letter was sent to the Claimant's representative dated 23 July 2024, asking for full quantification of the claim. That was copied to the Respondent at the Wigmore Street address.

6. When the Claimant's solicitors replied to that letter, they advised the Tribunal that the Respondent had knowledge of the Tribunal claim as it, the Claimant's solicitor, had sent a copy to those instructed in the civil proceedings to the Respondent with its letter before action of 21 February 2024 (page 47 of today's bundle).

7. The Tribunal has seen the County Court proceedings in its bundle. Sintons Solicitors were instructed on 10 April 2024, they wrote to the Claimant's representative (page 228) stating they were instructed in relation to both the Tribunal and County Court claims but they had not received the County Court claim direct from the Court.

8. At paragraph 22 of its defence and counter claim, the Respondent specifically referred to the Tribunal claim stating,

> "It appears that by his ET claim the Claimant seeks inter alia those damages sought in this County Court claim. If that is the case his claim for such damages must be dismissed either by the Tribunal or by this Court."

9. It was therefore clearly aware of the Tribunal proceedings, but still had not engaged with them.

10. This Hearing was listed as an attended Hearing in the Cambridge Employment Tribunal and notice of it was sent to both parties on 30 August 2024, but still the Respondent took no action.

11. The Tribunal has not seen any information or documents of any interaction between the parties until 6 December 2024, when the Claimant's solicitors sent a supplemental bundle for this Hearing to the Respondent's solicitors. They received an out of office email and chased a number of times and also, tried to telephone without success.

12. Only on 10 December 2024 (page 59) did Sintons advise the Claimant's solicitors they were not instructed to represent the Respondent at this Hearing. No explanation was given.

13. For this Hearing the tribunal had written submissions, an application from

the Respondent's counsel and a draft grounds of resistance. There was no witness statement from anyone with knowledge of what had happened at the Respondent and neither did anyone attend who could have given oral information.

14. Ms Bewley stated from instructions at paragraph 18 of her submissions, that the Respondent did not receive the ET claim when sent, due to refurbishment of its London location and restructuring of staff that had taken place. By the time the relevant people at the Respondent became aware of the tribunal claim, the relevant time limit had passed. No information, however, has been provided of who first knew about it, when and what they then did. Ms Bewley states that,

> "There was a misunderstanding with the Respondent's solicitors and the Respondent as to whether the matter was being progressed".

15. In oral submissions she explained that the Respondent believed the solicitors were dealing with all matters, the County Court and the tribunal claim, but there is no evidence before this tribunal that was the case.

16. In her written submissions Ms Bewley acknowledged that,

> "The Respondent accepts, however, that this is unlikely to amount to a good enough reason on its own as to why the application was not made sooner, but there are further relevant factors."

17. In fact, very little information was given as to why the claim was not responded to and why it has taken this long to make the application for an extension of time.

18. It is correct that grounds of resistance have been presented with the Application. These deny the claims and although running to 37 paragraphs, to a large extent they state that either matters are denied or, they are,

> "…neither admitted nor denied".

19. The Respondent had suggested that there was a mediation listed in the County Court in January 2025, but it turns out (and this is no criticism of Ms Bewley who was acting on instructions) that that is not the case but is a Case Management Conference.

20. As has been made clear, the Respondent is defending the County Court claim.

Relevant Law

21. Employment Tribunal Rules of Procedure 2024. Rule 21 provides:

Applications for extension of time for presenting response

21.— (1) A respondent may make a written application to the Tribunal for an extension of time for presenting a response.

(2) The application must—

(a) set out the reasons why the extension is sought,

(b) except where the time limit has not yet expired, be accompanied by a draft response, or an explanation as to why that is not possible, and

(c) specify if the respondent wishes to request a hearing.

(3) A claimant may within 7 days of receipt of a copy of the application give reasons in writing to the Tribunal explaining why the application is opposed.

(4) The Tribunal may determine the application without a hearing.

(5) If the Tribunal refuses to grant an extension of time, any prior rejection of the response must stand. If the Tribunal grants an extension of time, any judgment issued under rule 22(2) (effect of non-presentation or rejection of response, or case not contested) must be set aside and rule 22(3) ceases to have effect.

Effect of non-presentation or rejection of response, or case not contested

22.—(1) This rule applies where—

(a) the Tribunal has not received a response by the time specified in rule 17(1) (response), or by an extension of time granted under rule 21 (applications for extension of time for presenting response),

(b) any response received has been rejected and no application for a reconsideration is yet to be determined, or

(c) the respondent has stated that no part of the claim is contested.

(2) The Tribunal must decide whether on the available material (which may include any further information which the parties are required by the Tribunal to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Tribunal must issue a

judgment accordingly, otherwise, a hearing must be fixed. Where the Tribunal has directed that a preliminary issue should be determined at a hearing, a judgment may be issued by the Tribunal under this rule after that issue has been determined without a further hearing.

(3) The Tribunal must provide the respondent with notice of any hearing or decision of the Tribunal but the respondent may only participate in any hearing on that claim to the extent permitted by the Tribunal.

22. The Tribunal has taken account of the case of Kwik Save Stores Ltd v Swain [1997] I.C.R. 49 in which it was made clear that,

> "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 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 of granting the extension of time, but it is not always decisive, there may be countervailing factors, it is this process of judgement that often renders the exercise of the discretion more difficult than the process of finding facts in dispute and applying to them a rule of Law not tempered by discretion."

23. The merits of the defence are something else to be taken into account in the exercise of the discretion. The court in Kwik Save stated:

> '…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.

24. In Thorney Golf Centre Limited v Reed [2024] EAT 96, the Employment Appeal Tribunal stated that the more serious the delay the more important it is that the Respondent provide a full and satisfactory explanation.

The Tribunal's Conclusions

25. Full and detailed reasons have not been given as to why the response was not filed on time, or this application for an extension of time made sooner. There is no witness statement from anyone at the Respondent and neither did anyone from the Respondent attend this Hearing to explain its position orally. There has been nothing from the previous solicitors who were instructed in connection with both matters. Although other factors are to be taken into consideration, this is a crucial point on the facts of this case.

26. The Respondent was aware of tribunal proceedings, was defending the County Court proceedings and had solicitors actively engaged in those.

27. It is difficult to factor into the equation the merits of the defence when the grounds of resistance to a large extent merely deny the allegations.

28. Of course, there will be prejudice to the Respondent if it cannot defend these proceedings but a relevant factor ,on the unusual facts in this case, is that it is still able to and is defending the civil claim.

29. Although prejudice is a very important factor, where full explanation has not been given for the delay, it cannot be just and equitable and in accordance with the overriding objective for this tribunal to allow a Respondent who has taken no steps whatsoever to attend this Hearing with an application for an extension of time and to grant that because it will be prejudiced if it cannot take part. There has to be a balancing exercise. In this case it is in favour of the Claimant and in not granting the extension of time.

Stay

30. It is open under the Rules for the Respondent to apply to be allowed to participate to an extent that this tribunal determines.

31. In paragraph 2 of the Particulars of Claim for these proceedings, the Claimant stated that he does not pursue discreet breach of contract claims in respect of the failure to pay bonuses and effect due pay rises, stating that the appropriate forum would be the civil court.

32. The Tribunal saw the Particulars of Claim for the civil claim (in the bundle at page 96). It is only the failure to increase basic pay on 17 March 2018 and any anniversary thereafter, that is brought and not the bonus. The amount claimed in the County Court is £82,359 plus interest of £17,271 to March 2024.

33. In the Tribunal proceedings the first matter the Claimant pleaded when he listed the matters that go to his constructive dismissal claim at paragraph 57, is the failure to put in place contractually due pay rises from the third year of his employment and thereafter. The Schedule of Loss before this tribunal is based on gross salary which the Claimant says should have applied at the time of termination, although in red he has also stated the figures if the base salary of £80,000 was used. The final salary he uses for the Schedule of Loss, including the pay rises, is £120,409 per annum which he asserts should have been paid had the Respondent complied with its contractual obligation to award guaranteed salary increases.

34. The EAT reviewed the authorities in Lycatel Services Limited v Schneider [2023] EAT81. It was stated that,

> "It is common ground that the question that a Tribunal has to answer is set out in the case of Bowater, that is taking into account all the relevant circumstances including the complexity of the issues, the amount involved, the technicality of the evidence and the appropriateness of the procedures in which forum would this claim most conveniently and appropriately be tried."

35. It went on to consider that there is a distinction between whether the tribunal can deal with the claim and whether it would be more appropriate for it to do so. There is a general principle, it stated that the tribunal must hear the claim before it.

36. It is of course correct that there were different facts in that case where it was the Respondent to the Employment Tribunal claim who had issued in the High Court. In the case before this tribunal, the Claimant has chosen to litigate the breach of contract in the County Court.

37. The Lycatel case also emphasised the undesirability of multiplicity of proceedings.

38. It is appropriate to stay these proceedings in the Employment Tribunal where the Claimant has chosen to bring a breach of contract in the County Court and the pay rises are relevant to the issue of remedy in these proceedings. This was a matter that had concerned the tribunal on reading the papers even before it was known that the Respondent was now represented and the parties accept it is something that the tribunal could have done of its own volition.

39. It would be wrong for this tribunal to give a default judgment accepting the Claimant's evidence that he was entitled to those pay rises and award losses for constructive unfair dismissal accordingly, only for the County Court to then hear the evidence on those pay rises and potentially come to a different conclusion.

40. One option that this tribunal has considered is whether it would be appropriate to enter judgment on all the claims brought before it with remedy stayed. However, it seems that further complications could then arise in view of the Claimant's pleaded case before this tribunal. By entering that default judgment the tribunal would be accepting that one of the matters going to breach of contract and of mutual trust and confidence, was the failure to put in place

contractually due pay rises.

41. A stay is therefore granted pending the County Court proceedings, but the parties are to advise the tribunal of the up to date position within 14 days of the Case Management Conference that is to be heard in late January 2025.

Respondent's participation in these proceedings

42. With regard to the Respondent's participation in this matter, if and when it should return to the Employment Tribunal, having regard to the Rules and the case of Limoine v Sharma [2020] ICR 389 permission is granted to the Respondent to make submissions in any subsequent remedy hearing, but no more.

43. It is not accepted that case law envisages a Respondent who has failed to submit a Response should be entitled to cross examine on liability in the way that has been suggested by counsel on its behalf. Neither, as it was also submitted, should it then be entitled to make submissions on liability. It has not defended the proceedings and an extension of time has not been granted to enable it to do so.

44. It would not be appropriate for the Claimant to be cross examined when there is in effect no defence and no evidence from the Respondent. That would be circumventing that position and raising matters before the tribunal that have not been put in evidence by the Respondent.

45. What is permitted and accepted as appropriate, is that the Respondent be permitted to make submissions at a remedy hearing.

Approved by:

Employment Judge Laidler

Date: 10 March 2025.

Judgment sent to the parties on

14/03/2025

For the Tribunal office

not include any oral Judgment or Reasons given at the Hearing. The transcript will not be checked, approved or verified by a Judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/