



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms. A. Jeffries Tipton

v

**Rowley Care Limited
(debarred)**

Heard at: Birmingham

On: 23 November 2021

Before: Employment Judge Wedderspoon

Representation:

Claimant: Ms. F. Almazedi, Solicitor

Respondents: Mr. B. Hendley, Consultant

JUDGMENT

1. The application to extend time to present the respondent's ET3 is refused.
2. The respondent is debarred from participating in the proceedings save to make representations as to remedy.

REASONS

1. By claim form dated 23 September 2020 the claimant brought complaints of disability discrimination; automatic unfair dismissal by reason of raising public interest disclosure, health and safety detriment and automatic unfair dismissal pursuant to section 100 of the Employment Rights Act 1996.
2. The claimant was employed by the respondent, a care home for the elderly, as a Laundry Assistant and Breakfast Chef, from 1 March 2013 until her dismissal for gross misconduct on 4 June 2020. Early conciliation started on 5 August 2020 and ended on 20 August 2020. The respondent was informed by a "notice of claim" that a response should be submitted by 2 August 2021 if the respondent wished to defend the claim. By letter dated 16 November 2021 the respondent was notified that as it had not entered a response, a judgment may now be issued. By letter of the same date the respondent applied to request an extension of time to submit the ET3 to the Tribunal. It attached a copy of the ET3 and ET3 rider. The application stated

"The contact at the Respondent dealing with the matter is a new manager and was unaware of how to deal with the Tribunal papers, this coupled with working as a nurse during an extremely busy time, the respondent was unable to meet the deadline for submission. It has been difficult to obtain the information for the response as the manager who was not employed at the material time of the claim has found it difficult to obtain the information from other individuals at such a crucial and busy time."

3. The application referred to the overriding objective and asserted no prejudice to the claimant but stated that it will greatly prejudice the respondent given the claim is still at the earliest stage of proceedings and there have been no case management orders issued. The respondent submitted that the application was in the interests of justice.
4. At the preliminary hearing the respondent repeated those submissions and referred the Tribunal to the case of **Pendragon Plc (trading as CD Bramall Bradford) v Copus** and submitting that all relevant factors need to be considered. Mr. Hendley for the respondent stated that a different department in his organisation deals with the drafting of the ET3. He submitted that department went to the manager of the home to obtain more information but the manager did not know anything about the case. The manager amended the ET3 the day after it received the notice from the Tribunal that no response has been received from the respondent. He further submitted that in the context of **Pendragon** the excuse did not matter; the issue is whether the merits of the defence; this case does need to be defended; pursuant to the overriding objective the application should be allowed and the claimant has no prejudice because this has caused no delay or inconvenience to the other side.
5. The Tribunal referred the respondent to the cases of **Kwik Save Stores Limited v Swain (1997) ICR 49** and **Office Equipment Systems v Hughes (2018) EWCA Civ 1842**. The respondent submitted it did not have anything else to add. He submitted that in the interests of justice the respondent should take part as the claimant may get an award she was not entitled to. The respondent disagreed that the claimant was dismissed for making a public interest disclosure; she was missed for giving a V sign to the manager. The respondent accepted that this was not a matter pleaded in the response but believes it was contained in witness statements made available to the claimant for the purposes of the disciplinary hearing.
6. The claimant's solicitor objected to the application for an extension of time because it was submitted that the application was outside what could be considered the scope of reasonableness. From her contact with Mr. Hendley of the respondent he had been the legal advisor to the respondent for some time and she had emailed him on 6 February 2021 to remind him about the details of the impending preliminary hearing. He was aware of the claim. There was no adequate explanation in the light of the respondent's position why the respondent had failed to contact the Tribunal to inform the Tribunal about the situation and even lodge a holding response whilst the matter was investigated. The respondent simply did not contact or alert the Tribunal to the circumstances. Further the claimant's solicitor submitted that the respondent's legal adviser is blaming a lay person (the care home manager); a legal professional has the obligation to contact the Tribunal and not simply just leave it and do nothing. The respondent had more than sufficient time to lodge its response and it is apparent that what happened is the respondent had missed the deadline. The claimant's concern was that the respondent was now seeking to rely upon matters (the alleged V sign given by the claimant) which are not even pleaded in the recently lodged ET3. As for the prejudice relied upon namely that the claimant may receive an award she is not entitled to; the respondent is not debarred from making representations at the remedy stage. Excuses for failing to lodge the

ET3 are without merit. The claimant is prejudiced by the delay of first preparing for the preliminary hearing today and for the final hearing of knowing the respondent's case.

The Law

7. The starting point is the rules of procedure. Pursuant to Rule 20 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states
“(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.”
8. In considering any such application the Tribunal must take account of the overriding objective under rule 2 namely dealing with the case justly and should consider all the relevant factors under rule 2.
9. In the case of **Kwik Save v Swain (1997) 1 ICR 49** the Employment Appeal Tribunal gave guidance as to the approach to be adopted by tribunals in exercising their discretion in an application for an extension of time for lodging a response. Mummery J gave guidance at paragraphs 54 and 55
“The discretionary factors: the explanation for the delay which has necessitated the application the application for an extension is always an important factor in the exercise of the discretion. An applicant for an extension of time should explain why he has not complied with the time limits. The tribunal is entitled to take into account the nature of the explanation and to form a view about it. The tribunal may form the view that it is a case of procedural abuse, questionable tactics, even in some cases intentional default in other cases it may form the view that the delay is the result of a genuine misunderstanding or an accidental or understandable oversight. In each case it is for the tribunal to decide what weight to give to this factor in the exercise of the discretion. In general, the more serious the delay, the more important it is for the applicant for an extension of time to provide a satisfactory explanation which is full as well as honest. 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 is to ask these questions; what prejudice will the applicant for an extension of time 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 in granting the extension of time but it is not always decisive. There may be countervailing factors.”
10. In the case of **Pendragon Plc trading as CD Bramall Bradford v Gary Copus (2005) UKEAT/0317/05** the Employment Appeal Tribunal approved the

principles in Kwik Save. In considering rule 33 (6) of the former Employment Tribunal rules Burton J stated that the absence of a good reason is not determinative of an application. It simply makes it a matter which the tribunal considering an extension must have regard to. It does not rule out consideration of all the other matters which inevitably must be considered on a discretionary decision by the tribunal including but not limited to the reasonable prospect of success.

11. The Court of Appeal confirmed in the case of **Office Equipment Systems Limited v Hughes (2018) EWCA Civ 1842** that the underlying principle applied in the civil courts that on an assessment of damages all issues are open to a defendant save to the extent that they are inconsistent with the earlier determination of the issue of liability is applicable to the employment tribunal.

Conclusions

12. The respondent and its legal advisers were aware of the proceedings brought by the claimant. The Tribunal is sympathetic to the predicament of the care home in the context of the pandemic and of the difficulty a new manager to the care home may have found in obtaining information. However, the respondent has been represented by legal professionals at all material times.
13. There has been a long delay of some three months before the lodging of a response to the claims. The explanation given by the respondent is that a different department of the legal firm instructed by the respondent had difficulties obtaining instructions from the client. This explanation is unsatisfactory because it fails to explain why a legal professional failed to lodge a holding defence or seek more time to lodge the response prior to the expiry of the time limit. There is certainly no suggestion here that either the client or legal professional was unaware of the proceedings brought by the claimant. There is no suggestion that the delay was a result of a genuine misunderstanding or an accidental or understandable oversight. The respondent's instructed professional did nothing to inform the Tribunal about the situation knowing that there was a deadline to be met in terms of lodging a response. The respondent's position is not further assisted by the fact that on 6 September 2021 the claimant's solicitor reminded the respondent that there was an upcoming preliminary hearing which should have put on notice the respondent of the need to get its house in order. The Tribunal weighs this unsatisfactory explanation for a breach of the rules in the exercise of its discretion but it is not determinative of the application.
14. The Tribunal takes account of the all relevant circumstances and the respective prejudice to both sides. If the respondent is not granted the application, it cannot participate in the liability hearing which will determine serious issues. In respect of the actual prejudice asserted at today's hearing, the claimant may well be awarded a sum which the respondent considers she is not entitled to. However, this is somewhat mitigated by the right of the respondent following the authority of **Office Equipment Systems** to make representations about the award at remedy (if the claimant establishes her claims). The respondent may have a claim against its advisers for failing to lodge the response in time and does have redress against a claim in this respect. Other relevant circumstances the

- Tribunal takes into account is that this is the first time the case has come before the Tribunal for case management.
15. Against these factors the Tribunal weighs the prejudice to the claimant. To disallow the respondent's application means that the claimant has removed the respondent's opportunity to challenge her case at the liability stage; the claimant does not have a windfall, she still has to prove her claims (detriment, whistleblowing and discrimination) but she can seek to establish these matters in the absence of a respondent challenging her about her claims in a liability hearing. She has also been prejudiced by the three month delay of a lack of knowledge of the respondent's position in respect of her claims and how she is to prepare for the preliminary hearing today and the substantive hearing. Discrimination claims are fact sensitive and should be considered and heard in a timely fashion.
 16. The matter is finely balanced. The Tribunal concludes that the long period of delay means that the respondent's explanation should be satisfactory; it is not. Further, if, the application is not granted the respondent is prejudiced by not being able to contest liability but this is not outweighed by the claimant's right to have her liability case unchallenged by the respondent; the respondent has redress against its advisers and can make representations against any award at the remedy hearing. The Tribunal concludes that the respondent's application is not in the interests of justice and is refused.

Employment Judge Wedderspoon
23 November 2021

Note - Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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