EMPLOYMENT TRIBUNAL

Case N° 39 of 2022

ALBERTO MUÑOZ MARTIN

Claimant

–and–

1974 LIMITED

Respondent

BEFORE:- Joseph Nuñez

COUNSEL:-

Mr Suresh Mahtani of Wilkinson Law for the Claimant
Ms Claire Pizzarello of Hassans for the Respondent

DECISION on the Respondents Application under Rule 20

BACKGROUND

On the 12th August 2022, the Claimant filed with the secretary to the Tribunal a claim form in which he claimed unfair dismissal, breach of contract, arrears of pay and arrears of holiday pay. The total of the claim made is said to amount to £62,604.80. The Claim Form was accepted by the Tribunal as filed and in consequence thereof, on the 12th August 2022, it e-mailed to the Respondent a letter informing the Respondent that a claim had been filed and that it had 21 days in which to file a Response, and attaching a copy of the Claim Form filed. No reply or response from the Respondent was received by the Tribunal.

On the 14th September 2022, the Tribunal e-mailed to the Respondent a letter pointing out that the time limit for filing a response had expired and that a chairman would now be appointed to hear the case.

On the 18th September 2022, the Tribunal received by e-mail:-

(a) an application for extension of time in which to file a response on the grounds that:-

> *"The Claim e-mail was received into the Respondent's junk email folder and therefore not seen until the 15th September 2022, at which point the Respondent also became aware of the e-mail of the 14th September 2022 in respect of non-presentation of the Response form".*

(b) documentation submitted by the Respondent's solicitors showing correspondence exchanged between both parties; namely:-

(i) a letter before claim dated the 25th July 2022 sent by Wilkinson Law to the Respondent in which it is stated that:-

> *'The Company is put on notice that court action, before the Employment Tribunal and the Supreme Court of Gibraltar, may be necessary to provide a remedy to the above-mentioned matters, as set out below";*

(ii) a letter from 1974 Limited dated the 8th August 2022 addressed (presumably because it is not stated) to Wilkinson Law in full reply to the afore-said letter of the 25th July 2022. The letter ends with the statement:-

"1974 Limited does not want to enter any negotiation".

(iii) an e-mail dated the 15th September 2022 sent by Ms Pizzarello to Mr Mahtani in which a request is made for consent to an extension of time in which to file the response;

(iv) an e-mail dated the 15th September 2022 sent by Mr Mahtani to Ms Pizzarello in which the following is stated:-

"Under ordinary circumstances Claire, such requests for extensions are readily granted. In the circumstances however, and acting strictly on instructions from my client, your client's request for an extension is not granted.

My client is particularly aggrieved by the actions of your client, the manner in which your client chose to dismiss him and the stance your client had adopted throughout".

(v) a draft order for approval.

On the 7th October 2022, the Respondent filed with the Tribunal a Response.

On the 7th October 2022, the Claimant's solicitors wrote to the Tribunal setting out the following as being the Claimant's reasons for objecting to the extension sought by the Respondent:-

(a) Counsel for the Respondent was on notice of a claim;

(b) the Respondent had not provided any evidence that supports its reasons for late filing;

(c) extensions were usually allowed in very narrow circumstances; and

(d) the Claimant had been unemployed for over three months and would suffer unnecessary further hardship on account of the Respondent's delay in providing a Response to the Claim.

On the 10th October 2022, the Respondent's solicitors wrote to the Tribunal pointing out that the Claimant's e-mail of the 7th October 2022, was filed outside the time prescribed by Rule 20(2) of the Employment Tribunal (Constitution and Procedure) Rules and that in any event the Respondent would respond as follows to the points made:-

(1) Hassans was aware of the letter of claim but had no notice of the claim being filed or sent to their client. A letter of claim did not automatically mean a claim would be filed and their client had responded to the letter of claim setting out the defence.

(2) The Rules required an application in writing setting out the reasons the extension was sought, which had been provided. The reasons being the e-mail serving the claim form having been received into the junk folder and not coming to the Respondent's attention until 15th September as set out in the body of the application and that it was difficult to provide any other evidence in this regard.

(3) In circumstances where delay was short, there is good reason and particularly where there is no prejudice, an extension should be favourably considered in the interests of justice. Further the Claimant was aware of the intention to

defend, and importantly the reasons for this, through the response to the letter of claim.

(4) It was understood the Claimant was carrying out some work. In any event the delay was minimal and in the current circumstances would not cause any substantial impact on the time frame of proceedings or any real prejudice to the Claimant.

I have been appointed as chairman for the purposes solely of making a decision with regard to the application for an extension to file the response made by the Respondent.

Applicable Law

Rule 15(1) of the Employment Tribunal (Constitution and Procedure) Rules 2016 ("the Rules") provides that-

> *"The response to a claim, if any, shall be on a prescribed form and presented to the Tribunal within 21 days of the date that the copy of the claim form was sent by the Tribunal".*

Bearing in mind that the Claim form was filed by the Claimant on the 12th August 2022, and the e-mailed letter of the Secretary sent to the Respondent was of the same date, the Response should have been filed by the Respondent by the 2nd September 2022. It was not, and indeed, a Response was not presented by the Respondent to the Tribunal until the 7th October 2022.

As stated above, on the 18th September 2022, Ms Pizzarello of Hassans acting on behalf of the Respondent, sent an e-mail to the secretary of this Tribunal to which there was a letter attached ("the Letter") applying for an extension of time in which to file the Response.

Rule 20(1) of the Rules deals with applications for extension of time in which to file a response and provides as follows:-

> *"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 reasons 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".*

The Letter states that:-

(i) the reason for a response not being filed was that the letter of the secretary dated the 12th August 2022, informing the Respondent of the Claim filed and forwarding a copy of the same, which had been sent by e-mail only to the Respondent, had gone into the Respondent's junk mail box and had not come to light until the 15th September 2022, by which time the period for filing a Response had expired; and

(ii) no response was being filed with the application since Hassans required further time in which to prepare the response.

The application for the extension was made some sixteen days after the date on which the period for filing a response expired, and some three days after the Claimant had refused to agree to an extension. It is not what one could consider to be a long time in the circumstances of the case.

No application was made by the Respondent for the application for the extension to be heard before the Tribunal, and therefore the application is being dealt with on the papers.

Rule 20(2) of the Rules provides that the Claimant may within 7 days of receipt of the Respondent's application for an extension of time file reasons in writing explaining why the Claimant opposes the application. The Claimant's solicitors, Wilkinson Law, did not state the reasons for the Claimant's opposition until after the seven day period prescribed had elapsed.

Rule 71(1) of the Rules provide that:-

> *"Documents may be delivered to a party (whether by the Tribunal or by another party):-*
>
> *(a) by post;*
>
> *(b) by direct delivery (including personal delivery and delivery by hand or same day courier or messenger service); or*
>
> *(c) by electronic communication".*

No authorities or cases have been cited to me by either of the parties.

The leading authority on extensions of time for presenting a response is the decision of the Employment Appeal Tribunal in Kwik Save Stores Ltd v Swain and others [1997] ICR 49. Mummery J pointed out that time limits are laid down as a matter of law and are therefore requirements to be met, particularly in employment tribunal litigation which is intended to provide a quick, cheap and effective means of resolving employment disputes ("*failure to comply with the rules causes inconvenience, resulting in delay and increased costs*"). He then outlined the essential principles to consider in deciding whether to permit a response to be presented late:-

> *"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 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 application 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. It is this process of judgment that often renders the exercise of a discretion more difficult than the process of finding facts in dispute and applying to them a rule of law not tempered by discretion".*

It is well established that another factor to be taken into account in deciding whether to grant an extension of time is what may be called the merits factor identified by Sir Thomas Bingham M.R. in Costellow v. Somerset County Council [1993] 1 W.L.R. 256, 263:-

> *"a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate".*
>
> *'Thus, if a defence is shown to have some merit in it, justice will often favour the granting of an extension of time, since 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 this case".

'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".

The authorities therefore essentially establish that I need to consider the following factors when deciding on the application for an extension:-

(a) the explanation supporting an application for the extension of time – the more serious the delay the more important it is that I am satisfied that the explanation is honest and satisfactory;

(b) the merits of the defence – justice will often favour an extension being granted where the defence is shown to have some merit; and

(c) the balance of prejudice – if the Respondent's request for an extension is refused would it suffer greater prejudice than the Claimant would if the request was granted?

Whether an extension of time should be granted is essentially a discretionary matter for the Tribunal, weighing up the various factors established by the authorities but also having regard to the overriding objective of the Tribunal to deal with cases fairly and justly, including so far as practicable, ensuring that the parties are on an equal footing, but also avoiding delay, so far as compatible with proper consideration of the issues and saving expense (Bournemouth Borough Council v Leadbeater UK EAT/0010/11/SM).

Relevant Findings of Fact

The following findings of fact were reached by the Tribunal taking into account the documentation presented to the Tribunal and that contained in the Tribunal's files with reference this case.

The letter of the 12th August 202, addressed to 1974 Limited by the Secretary to the Tribunal, was sent by the Tribunal by e-mail only to the address of said company. The Respondent does not deny that said letter was sent and/or that the e-mail address to which it was sent was correct and/or that the letter was received at the correct e-mail address. Proper delivery of the Notice in accordance with the Rules was made. This is not a case in which the notice went astray before service but rather a case in which the notice was served on the correct recipient but became akin to lost/mishandled upon receipt by the Respondent, ie placed automatically in the junk folder.

I initially was intrigued as how it come to be that on the 15th September 2022, the Respondent suddenly became aware of the Tribunal's letters of the 12th August 2022 and the 14th September 2022. I have come to the conclusion that on a balance of probabilities the answer lies with the statement made by Mr Mahtani in his e-mail of the 15th September; namely:-

"I did for a moment even suspect that your client had de-instructed you and I even placed a call to him yesterday to find out what was going on ....." .

This telephone call obviously put the Respondent on notice and would have led to the checking of whether any documentation from the Tribunal had been received. I do not see the delay as being the result of an attempt at procedural abuse or questionable tactics or intentional default. I am also of the view that the Respondent and its solicitors acted quickly upon becoming aware that the Claimant had filed a claim with the Tribunal by immediately requesting the Claimant's consent to an extension of time for the filing of a response, and on this being denied, formally making the application to the Tribunal within three days. I am also of the opinion that the passing of some sixteen days (ie between the 2nd and 18th September) between the date when the response should have been filed and the date when the application for an extension was made is not an

inordinate length of time in all the circumstances of the case. Moreover, bearing in mind that the Claimant only filed his claim with the Tribunal a day before the expiration of the three month time limit in which to do so, I do not believe that it is reasonable for the Claimant to complain that the delay is causing him further unnecessary hardship.

The Respondent did receive the letter before action dated the 25th July 2022, and therefore was perfectly well aware that at the very least the Claimant was contemplating issuing proceedings with reference his termination of employment. Whilst it is true to say that contemplation of proceedings is not the same thing as issuing proceedings it is my view that the Respondent, after serving its letter of the 8th August 2022, in which it ends up by saying that it does not want any negotiation on the matter, should have been alive to the probability that proceedings would issue and therefore should have made enquiries with the Tribunal after the 12th August 2022 to see whether this had indeed been the case. To this extent the Respondent is at fault.

Conclusion

I am satisfied that the explanation given as to why the Response was not filed in time is honest and true and that the delay before the application for an extension was made is not a serious one that in any way will materially affect any proposed or projected timeline for the hearing and determination of the claim, or, in any way affect or impede a fair and just hearing of the claim.

Having read the Respondent's letter of the 8th August 2022, and the Response filed, I am of the opinion that the Respondent has prima facie an arguable defence and that there are triable issues, which will require oral testimony to be given by both parties in due course in order to fairly and justly determine the claim filed.

With reference to prejudice, it is my opinion that there would be a far greater comparative prejudice to the Respondent if the application for an extension is refused. There is a claim for just over £62,000 which is a significant amount. The prejudice to the Claimant is that the issues need to be litigated and some six weeks have been lost pending the resolution of whether a valid response is before the Tribunal; but that is a far less comparative prejudice. There is some force in the argument that the Respondent should have made enquiries sooner to see if there was a claim in the system but viewed holistically this does not alter the balance referred to.

I am also of the opinion that the overriding objective prescribed for in Rule 3 of the Rules requires me in this particular case to grant the application for the extension of time in which to file the response.

DECISION

The Respondent's application under Rule 20(1) of the Rules succeeds. The Response filed by the Respondent with the Tribunal on the 7th October 2022 is therefore deemed to have been filed in time.

Dated this 26th day of October 2022

Joseph Nuñez
Chairman