EMPLOYMENT TRIBUNALS

At an Open Attended Preliminary Hearing

Claimant: Miss T Smith

Respondent: Arnold Visionplus Ltd

Heard at: Nottingham

On: Monday 4 March 2019

Before: Employment Judge P Britton (sitting alone)

Representation
Claimant: Mr S McHugh of Counsel
Respondent: Mr S Liberadski of Counsel

JUDGMENT

1. The Respondent's application to extend time for the presentation of the Response is granted. Accordingly, the Response is permitted to stand as a defence to the Claim.

2. The Claimant's application for costs is refused.

3. Directions are hereinafter set out.

REASONS

Introduction

1. This is an application by the Respondent to extend time for file a Response (ET3). It is opposed by the Claimant.

Scenario

2. The claim (ET1) was presented to the tribunal on 4 October 2018. I will not rehearse the scenario in any detail. Suffice it to say that the claim had been

drafted for the Claimant by her solicitors (Premier Legal LLP). Set out was the period of employment, namely 26 May 2005 to 19 May 2018. The claim was based upon (i) constructive unfair dismissal pursuant to s95 (c) of the Employment Rights Act 1996, and (ii) disability discrimination pursuant to various cited provisions of the Equality Act 2010.

3. On the 29 November 2018, the Claim Form was issued out in the usual way to the Respondent. That is to say using what is known as a standard letter 2.8A. This was headed in bold **"NOTICE OF A CLAIM**" and thereunder **"NOTICE OF HEARING**", inter alia explained was that the claim had been issued and that it was attached. Then set out was that if it wished to defend, the Respondent would need to file a response in the prescribed form, a copy of which was enclosed. Guidance in that sense was given by reference to the website hyperlink. At the foot of the first page was set out, again in bold, that the claim would be heard by a full tribunal at Nottingham between 26-29 January 2020, and on the second page in what has been described to me by Claire Fletcher[1] as "the grid" was set out an explanatory timetable of specific directions to be complied with in the run up to the Hearing. The first of these was that the Claimant would supply a schedule of loss by 10 January 2019. Again, this was highlighted in bold.

4. The second document which was sent out at the same time was SL7.8, which set out in bold that there would be a telephone case management hearing and giving the date for the same, namely today.

5. The Respondent accepts it got both documents. There is an issue as to whether or not included was the document headed "Responding to a claim".

6. All that matters for my purposes is that no Response (ET3) was submitted by the deadline of 10 January 2019. On 14 January 2019, Eversheds sent in a completed Response and at the same time a letter of explanation. The crux was that the Respondent had "*never previously received an employment tribunal claim and whilst it diarised the dates of the case management orders within the tribunal's documentation, it failed to record the date for the Response to be filed. This was purely an administrative error for which the Respondent apologises.*" Thence invoked was that the tribunal has a discretion to extend time for filing a Response and thus if there had not been a default judgment already issued[2], then the solicitors invoked rule 20 of the Employment Tribunals Rules of Procedure 2013 (the Rules") thereby applying for an extension of time to lodge the said Response. In other words, that time be extended to 14 January 2019. It was submitted that in the circumstances it would be just and equitable, so to speak, to allow the Response.

7. When I use the words 'just and equitable', it is because rule 20 is silent on the premise upon which the Judge determines any such application. Therefore, what the Judge of course must do is to fall back on rule 2 and the overriding objective, which is to deal with cases fairly and justly.

[1] The witness called for the Respondent in support of its application.

[2] There had not been. The application in the alternative asked that the judgment be revoked and the respondent be allowed to defend.

8. The Claimant's solicitor was sent notice of the application and on 23 January made plain that it objected to the application. Summarised this was on the premise, that the Respondent could not escape the consequences of failing to file a response by minimising the failure with the label "administrative error".

9. At that stage, there had not been what is known as a default judgment issued in this matter. But the application and the objection thereto was put before my colleague, Employment Judge Heap. It is clear that she decided in terms of what she did not do to not issue a default judgment but instead to list the matter for a Judge to determine whether to extend time to accept the ET3 Response. Obviously if the application was refused, then a default judgement would assuredly follow. She converted today's TCMPH into an attended hearing to determine the application. She made directions. Firstly, that any documents to be relied upon by either party must be sent to the other not less than 14 days before the preliminary hearing.

10. Stopping there, there are no documents and for reasons that I shall come to, I cannot see that they would be of any relevance apart from the e-mail to which I refer below and which Ms Fletcher was able to retrieve before us.

11. The second limb of what she directed was that "*Any witness statements (must be served) not less than 7 days before the hearing*". That deadline of course would be Monday 25 February.

11. When I started this hearing this morning, it was made plain as part of a first application by Mr McHugh that this direction was not complied with by the Respondent. The statement which is relied upon of Claire Fletcher was only emailed to the Claimant's solicitors on 28 February 2019 at 12:15. So, the first application that I had to deal with today is to whether or not I permit that statement to be allowed and thus entertain the evidence of Ms Fletcher. Obviously without it, the Respondent would be in great difficulty in pursuing its application.

Determination of the first issue

12. I have heard discussion on this point and encapsulated I proceed, on the basis that there was some fault by the solicitor at Eversheds (Mr Pipkin) in dealing with what I now go to. He is not here because he is on other business for Eversheds and had not been requested to attend. But I do have the evidence of Claire Fletcher. The parties have not really stood in my way in proceeding today although Mr McHugh did at one stage seek to suggest I should not. His opponent was clear that I ought to proceed in terms of proportionality rather than adjourn. I decided that proportionality weighed in favour of my proceeding.

13. So, I am going to deal with the issue of the late service of the statement first. From the evidence of Ms Fletcher (who I found an honourable witness, consistent and of integrity), the following on this point can be established and inter alia because she read out to us all the email exchange that she had on 12 February with Mr Pipkin. Quite properly, he told her that Employment Judge Heap had made the orders and directions to which I have referred. He therefore

properly told her that she would need to have to give evidence on 4 March. She promptly replied and insofar as if she was needed to assist in preparing a witness statement, that she would be contactable on 13 February, albeit it was her day off.

14. There was not any contact on that day. I work on the premise that Mr Pipkin or someone else from Eversheds should have contacted her. If they had, given the statement of Ms Fletcher is so straightforward, it would not have taken any time at all to have prepared the same. I can safely say that because of what happened on 25 February when contact was made and to which I shall return.

15. Thereafter, there was very limited window of opportunity to prepare the statement before the deadline as imposed by Employment Judge Heap. That is for the following reasons and it goes to the evidence of Ms Fletcher and which I believe. So, she was in Coventry and on all day conference in terms of the business on 14 February. On Friday the 15th, she had already pre-planned a holiday because she was pregnant and did not want to put her pregnancy at risk and thus had factored in breaks to her very busy schedule. She worked on the Saturday and Sunday at the store, which is in Arnold; but I would not expect Eversheds to be in contact with her on those days. To my knowledge law firms, such as Eversheds do not usually work on weekends.

16. On Monday/Tuesday of the following week, she was on business in Birmingham and stayed over. For the same reason as the previous break, she had already planned to take off the Wednesday. She was back in the store on Thursday the 21st. So that is the second window of opportunity. She was off again with pre-booked leave, again pregnancy related, on the Friday. She then worked the weekend, but then again that does not provide a window of opportunity given by observation as to weekend working by Eversheds.

17. Cross-referencing to the standard directions, she was aware that there was a first deadline by 10 January in terms of what she thought the Claimant was supposed to have done. That is the schedule of loss. She was then aware that of course the hearing on the 5th March was now imminent. So on the Monday 25th February, she contacted Eversheds to find out what was going on. She spoke to Emily, who I take it would be a PA, who informed her that Mr Pipkin was attending an employment tribunal but would be back in the office on the Wednesday, which of course was the 27th.

18. Mr Pipkin on that day contacted Ms Fletcher in the afternoon. It was her day off but rather like the previous window of opportunity she had explained she could be contactable and had left her contact number. Basically, he asked her the questions that one would need to ask in order to prepare a statement to deal with why the delay in submitting the ET3. Later that day he sent her a draft statement to consider.

19. But Ms Fletcher could not deal with in particular the dates of her dealing with the matter prior to the presentation of the ET3 because she was not in the office. Therefore, they agreed she would get back to him the following day when she would be in the office and could check the dates. This she did and the same

day the witness statement was completed and that explains why very promptly on that day, the statement got sent to Premier.

20. So, do I visit upon the Respondent what is a somewhat limited degree of blameworthiness by Mr Pipkin[3] given the limited windows of opportunity which I have now rehearsed, so as to deny it the justice seat. For reasons which I shall come to, I bear in mind that it has a clear, viable defence in this matter. Well, in that respect, although of course it is not on all fours in terms of the scenario with what I am dealing with here, I draw comfort from the judgment of the Court of Appeal in ***Steeds v Peverel Management Services Ltd [2001] EWCA, Civ 419***. In terms of its relevance, the parties are directed to the IDS Handbook – Employment Tribunals Practice and Procedure latest edition at paragraph 5.106. Although it is dealing with the issue of just and equitable extensions to presenting claims, it is to be noted that bearing in mind my discretion in terms of whether I allow a Response in this case is based in effect on the justice and equitable principle, that therefore it is relevant; the significant point being that a claimant (for which in this case read Respondent) should not be disadvantaged because of the fault of the advisers for otherwise the defendant (for which read Claimant) would be in receipt of a windfall.

21. Well, given the scenario which I have now rehearsed, I have reached a similar conclusion. Bearing in mind there is a viable defence, I am not prepared to exclude the statement and thus in reality stop the Respondent from being meaningfully able to continue with its application for an extension of time to file a Response.

The application to permit the late response

22. What I now move to is whether or not I grant the extension of time pursuant to rule 20. In dealing with this matter, I have been guided by page 394, paragraph 6.17 in particular of the aforesaid IDS Handbook. In that context, I have read in its entirety the judgment of their Lordships in ***Kwik Save Stores Ltd v Swain & others ICR 1997 p49 CA*** and in particular the judgment of Mr Justice Mummery, as he then was.

23. So, on the evidence as I will now deal with it, I have to weigh on the scales of justice act the relevant factors including the explanation, or lack of explanation, for the delay and the merits of the defence. Weighing and balancing them one against the other and so as to reach a conclusion which is objectively justified on the grounds of reason and justice; and that it is important when doing so to balance the possible prejudice to each party. In that sense, obviously if there is a meritorious defence, it is really coming back to the point of should a respondent be denied the justice seat if that therefore means that a claimant might get a windfall which on the pleadings might otherwise be undeserved. Of course, I look at the explanation for the delay first, and obviously the longer the delay in presenting the ET3, then the higher the burden upon the respondent. Also, is to consider whether there are other aggravating features. A good example might be a serial respondent to employment tribunal proceedings who had shown on other occasions a contempt for the process.

[3] I repeat taken at its highest with the leave of Mr Liberadski only for the purposes of today.

That is not dissimilar to the scenario in ***Kwik Save***. For reasons I shall now come to, this case could not be more opposite.

24. I come back to the evidence of Ms Fletcher, I repeat that I found her an honest and compelling witness albeit I will address Mr McHugh's at first blush understandable scepticism on the "naivety" point.

25. The basic scenario here is that the Respondent has a franchise from Specsavers as a consequence of which it operates a store in Arnold. First, it does the optician aspect of Specsavers' business (which I do not need to rehearse), second linking thereto is its contact lenses operation, third it also has a hearing centre. The Claimant is one of two Directors/shareholders. The other is Mr Vineet Nehra. In terms of the management team, the third person is Emma Coveney who runs the hearing side. It is a lean management team. It is backed by two administrators who I heard about, one of whom is Glenys Hughes. The business has been operating about 30 years; Ms Fletcher has been involved for about 16 years. They have never received an employment tribunal claim before as a business and I will accept that they are totally unaware of the procedures.

26. Not in dispute is that Ms Fletcher first saw the Claim Form via Glenys with the documents to which I have already referred on either 10 or 11 December. Given the Claimant date stamped its copy as received on 30th November, I will accept that it actually would have been in the Respondent business for some days before the 10th. But the administrators deal with quite a lot of paperwork, and it may simply have not been opened before then. Ms Fletcher looked at it somewhat briefly. She had things to do as she had a pre-planned 1½ week holiday in Lanzarote in the run up to Christmas. She quickly read the document and her mind principally focussed on the "grid" on the second page. She thought that the first deadline was 10 January, which was to do with the service of a schedule of loss, although it would be the Claimant who of course would have to do that.

27. She left the document and went on her holiday. The business was not being run in the administrative sense over the Christmas break, but Ms Fletcher popped in from time to see that front of house so to speak was working ok. Her first day back at work was on 2 January. She looked at the documentation again and still thought that she did not need to anything before 10 January or thereabouts. She diarised the deadlines in the "grid". She missed the deadline on the first page for filing a response. It was an oversight. She clearly should have read more closely the documentation because if she had she would have realised that they had to put in a Response by the deadline clearly set out of 10 January, in fact being the same day as the first of the directions timetable. But she did not. She says that as to the oversight she was "naïve". Do I put that down to something that is unbelievable as Mr McHugh says to me?

28. The answer is I do not. I have to take witnesses as I see them, including when cross-examined, and form a view. I bear in mind the Respondent's lack of knowledge of employment matters. And then the following in particular is important to me because when she got to the deadline of 10 January, if Ms Fletcher (and for that read the Respondent) had been cavalier and indifferent

to the claim, which is often the scenario when errant respondents try to get back in having let matters go and even ignored things until the bailiff arrives with the default judgment, then that is an entirely different scenario from this because on 10 January (ie the date of the first deadline) she called ACAS because she wanted to know what she should do. When she did not get a response having been put on hold for a considerable time, and bearing in mind that at this stage she did not have solicitors retained for the Respondent, the following day she contacted the HR team at Specsavers HQ. She was aware from past experience that they could assist in employment matters, but she had not realised up to then that she should engage their services. She had used them in the past for things like managing attendance. She never had to go, as I repeat, to the extent of needing their help to deal with an employment situation where there was a dismissal or a claim arising therefrom.

29. Straightaway she was informed of Eversheds and she immediately got in touch with them, hence the Response being presented on 14 January. Yes, there are shortcomings in that she ought to have looked more closely at the documentation for reasons that I have addressed, but I do not find that this was contemptuous of the claim or the tribunal process. I put it down to her not appraising the complete contents of the documentation and thus appreciating what she was obliged to do. I repeat the significance of what she did on 10 January.

30. So, I accept the explanation. As to the length of the delay, it is of course only for 4 days, two of which was a weekend.

31. That leads me to the merits of the defence. It brings me back to the claim. The claim rehearses that concerns were raised about the Claimant's performance in what is known as the call centre within the Respondent business, albeit it only consists of 3 or 4 people and who deal with customer queries and matters of that nature. Even the Claimant rehearses an extensive involvement on the front of performance management over the months from February 2018 up to her resignation on 19 May. She cites that Ms Fletcher was bullying and harassing her but on the face of the pleaded claim is this more discomfort at being criticised over her performance? There appear at present to be no aggravating features. In this respect I provide for further particularisation in the orders that I hereinafter make. I will come to that later.

32. She pleads that she therefore resigned by way of constructive dismissal. She needs to spell out much more clearly what exactly is the express term or whether it is a breach of the implied term of trust and confidence which the Respondent fundamentally breached bearing in mind management's right to manage employees viz performance issues unless it is perverse. Also pleaded were various conditions of the Claimant which rendered her a disabled person for the purposes of the Equality Act 2010 and thus was pleaded in the context direct discrimination pursuant to section 13, unfavourable treatment because of something arising pursuant to section 15, failure to make reasonable adjustment pursuant to sections 20 – 22 and finally harassment pursuant to section 26[4].

[4] All being references to the Equality Act 2010.

33. It is to be noted that in terms of the current state of that pleading that there is no clear pleaded causal link between the disability conditions, or any of them, and the performance management of the Claimant by the Respondent.

34. When I turn to the Response, it sets out a clear defence. Fully rehearsed is the raising of the performance issues, prima facie for legitimate reasons, starting with an informal meeting with the Claimant. Thence escalating the matter through what on the face of it is an ACAS CP compliant procedure. Inter alia pleaded is that the Respondent was not ignoring any potential possible underlying health reason why the Claimant might be underperforming hence the citing that on 18 May Ms Fletcher flagged up whether anything was troubling the Claimant that might for instance warrant an occupational health intervention. The pleading is to the effect that the Claimant declined the offer and proffered no health related explanation for the performance failings.

35. So it pleads that when the Claimant resigned, it had been legitimately managing clear performance concerns, and therefore it had not fundamentally breached without reasonable and proper cause[5] the implied term of trust and confidence, or otherwise, when the Claimant resigned. It accepts that one of her disabling conditions, ie the skin cancer, would of course be a disability but does not currently accept that the other conditions pleaded are. It queries as to why she is pleaded as having Downs Syndrome given the work she did. Mr McHugh has confirmed that she does not have Downs Syndrome and that it was pleaded in error. In any event as is by now self evident the Respondent denies that it discriminated against the Claimant by reason of disability.

36. To put it at its simplest, there is a clear meritorious defence in this matter. Given my other findings and thus applying ***Kwik Fit***, I have decided that the balance of justice falls in favour of the Respondent. Accordingly, I do grant the extension of time and therefore the Response is permitted to stand as the defence in this matter.

Costs

37. Mr McHugh is instructed to apply for the costs of today occasioned by the need for this hearing. First engaged is rule 76(1) of "the Rules" because I cannot make a costs order unless first the Respondent comes within one of the criteria set out in that section. The only ones that engage are (a) and (b) - (a) reads: "*A party or that party's representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way the proceedings (or part) have been conducted….*"

38. The only way that could engage is if by his conduct Mr Pipkin had acted "*otherwise unreasonably*" construed ejusdem generis in terms of the preceding words. Give the scenario as I have found it to be, his conduct does not come remotely near that threshold.

[5] This is my summarisation and by reference to the seminal authority on the topic namely Malik v BCCI (1997) IRLR 462 HL which follows the line of authority starting in particular with Woods v WM Car Services (Peterborough) (1981) IRLR 347 EAT.

39. The other limb is (c): "*A hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.*" Well, the Respondent did not apply to adjourn out today's listed telephone case management discussion. It applied for a Judge to exercise his or her discretion to permit a late Response. Post the objection of the Claimant, that of course could have been dealt with by way of a telephone hearing. As it is, for reasons which I totally understand, a highly experienced Judge decided it should be dealt with by way of a live hearing, it is obvious because inter alia her directions envisaged sworn evidence and thus implicitly cross examination. However, it means that today's hearing was not postponed or adjourned but it was instead converted to an attended hearing. In that sense, the attended hearing was of course required because the Claimant opposed the application to permit the late Response.

40. Accordingly I refuse the application for costs.

Case management orders

1. For reasons which I have already gone it, I observe the following:

1.1 The Claimant's solicitors need to carefully consider and advise their client as to whether or not this is a case that can be run using section 13 of the EQA given ***London Borough of Lewisham v Malcom 2008 IRLR 700, HL.*** Also, they need to consider whether bullying and harassment pursuant to section 26 is engaged, given the context and thus ***Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT.*** Then focussing on section 15, unfavourable treatment, and failure to make reasonable adjustments pursuant to section 20-22 particularisation of what was the unfavourable treatment because of something arising in consequence of the disability and was the PCP and the failure to make reasonable adjustments needs to be made clearer. Finally, in any event, the claim of constructive unfair dismissal requires particularisation in terms of what were the breaches of the contract of employment by the Respondent and what is the "last straw".

1.2 I think that the way forward is for the Respondent to then have an opportunity to reply to the same and thence we can move on to a further case management discussion.

1.3 Thus, I make the following orders for directions

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The Respondent will serve upon the Claimant's solicitors a request for further and better particulars along the lines I have set out by **25 March 2019**.

2. The Claimant will then reply fully to the same by **3 May 2019**. The Respondent then has liberty to reply to the further and better particulars by way of an

amended Response by **21 June 2019**, together with any applications it wishes to make in terms of the case as it is crystallised by then.

3. I will then direct that there will be a further, at this stage telephone, case management discussion to take current directions further forward on **Monday 22 July 2019** at **10 am**. For the purposes of that case management discussion, the parties are expected to have agreed an agenda to be submitted to the tribunal for the use of the Judge not later than **48 hours before the TCMPH**. The time currently for the TCMPH is one hour.
To take part you should telephone **0333 300 1440** on time and, when prompted, enter the access code **512292#**

[Please note that if you intend to dial into the telephone hearing from a mobile phone, higher rates apply and you may wish to check the call rate with your service provider first.]

4. For the time being, I am staying all directions other than if not already done so, the Claimant must supply her schedule of loss by **Friday 15 March 2019**.

Judicial Mediation

5. I have explained to the parties what that entails. Obviously, the parties will let the tribunal know sooner rather than later if they are prepared to engage in the process. If they are, then there will be listed an urgent TCMPH, time estimate 15 minutes, to simply give directions for a Judicial Mediation and list the same.

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Employment Judge P Britton
Date: 6 March 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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