



EMPLOYMENT TRIBUNALS
London Central Region

Claimant: EDUARDO ALEXANDRE GRAZIOLI

Respondent: CHARLES GREGORY SOLICITORS LTD

By: Employment Judge Mr J S Burns

Judgment

1. The Respondent is granted an extension for the filing of its ET3 and GOR until 5/10/20 (when it was received by the Tribunal)
2. The Claimant's application/s for an order striking out the Response is/are dismissed.

Reasons

1. The hearing was convened primarily to consider the Respondent's application for an extension of time to serve its ET3 and GOR until 5/10/2020, which application was made on the same date; and applications made by the Claimant on 14/9/20 for a Rule 21 judgment and or to strike out the Respondent's defence;
2. The hearing was by CVP. I heard evidence on oath from Ms R Hussain, and was referred to documents in an OPH bundle, and to two skeleton arguments.
3. The Claimant resigned from his employment as solicitor with the Respondent on 11/12/2019. On 25/3/2020 he presented an ET1 with particulars of claims of unfair constructive dismissal, detriment from whistleblowing during employment under section 47B ERA 1996, unlawful deduction of wages (salary for October to December 2019, holiday pay and unpaid employer pension contributions), failure by the Respondent to provide a statement of employment particulars, failure to provide itemised pay slips and failure to consult as required by section 13 TUPE Regs 2006.
4. The ET1 with a notice that the Respondent's response to the claim was required by 4/9/2020, was sent by the tribunal on 10/8/2020 and received by the Respondent on 11/8/2020. In fact the final date on which the ET3 was due was 8/9/2020.
5. The Respondent is the corporate embodiment of a small legal practice owned and run by Ms R Hussain, who is a solicitor specialising in personal injury claims and litigation in the civil courts. She had no knowledge of or experience of employment law or the practice of the Employment tribunal and her firm does not practice in Employment law.
6. It is accepted by the Respondent that it received the ET1 by 11/8/20.
7. Ms Hussain initially took the view that the ET claim must be out of time, given the time which had elapsed between the Claimant resigning in December 2019 and the Respondent's receipt of the claim. She planned to make an application to strike out the claim on this basis. In fact the ET1 had not been presented out of time, and Ms Hussain was mistaken.

8. Ms Hussain was extremely busy in August and September 2020. She had taken on hundreds of new cases from the Claimant in late 2019 and was still struggling to manage them. She had been unable to get a suitable replacement solicitor for the Claimant as his clients had all been Portuguese-speaking. Many of the cases had pending limitation dates or procedural requirements of their own that needed her urgent attention. She was working 12 hour days “juggling and fire-fighting” to use her own phrase.
9. On 11/9/20 Ms Hussain was told by a colleague Kiran Dodega that the ET1 had been presented in time.
10. Further confusion was caused by the fact that the Tribunal had scheduled a case management hearing on 11/9/2020 which did not in fact take place.
11. Ms Hussain made attempts to call the Tribunal and ended up travelling to Victory House by taxi during the pandemic to try to resolve matters but was unable to gain access to the building.
12. Ms Hussain suggested in her evidence that another reason for the delay was that she had relied on a friend who had let her down. As that friend has not been given an opportunity to give evidence to rebut these suggestions, on reconsideration I make no finding about this suggestion either way and do not rely on it.
13. Ms Hussain instructed Ms A Sidossis of Counsel in early October 2020 and she produced a draft ET3 and GOR which were then sent to the Tribunal on 5/10/20 with a request for an extension.
14. I must look at all the circumstances. As Ms Hussain’s references to her friend have not been explored, the full reasons for the delay are unclear, but nevertheless and independently of this, I am satisfied that Ms Hussain on behalf of the Respondent took the matter seriously and was anxious to respond correctly at a time when her professional situation as an overstretched solicitor, as well as the wider national circumstances, were difficult.
15. In the end the ET3 and GOR were lodged about one month after the due date.
16. The draft Grounds of Resistance are detailed and drafted by Counsel. They raise numerous issues and disputes of fact. One of the arguments raised in defence is that there was no TUPE transfer of the Claimant to the Respondent on or about 1/10/2019. I regard that as a weak aspect of the defence but many other arguments which perhaps are not so weak are also raised. Taken as a whole the document raises a reasonable arguable defence on the merits.
17. The late filing of the ET3 has caused some delay in this case getting to trial, and a possible trial slot in January 21 may have been missed as a consequence. However, the value of the claim if it succeeds in all its aspects will probably exceed £50,000. I regard the potential prejudice to the Respondent (is a company representing Ms Hussain’s modest legal practice), - which would arise from its being deprived of its opportunity to contest these high value claims, - as greatly exceeding the prejudice caused to the Claimant in having the trial delayed.
18. The leading authority on extensions of time for presenting a response, albeit under a previous version of the Rules, 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: “The explanation for the delay which has necessitated the application for an extension is always an important factor in the exercise of the discretion ... The tribunal is entitled to take into account the nature of the explanation and to form a view about it ... 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 an 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”. ... “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 prejudice to the applicant for an extension outweighs the 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. If a defence is shown to have some merit in it, justice will often favour the granting of an extension of time ... That 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”.

19. Whether an extension should be granted is essentially a discretionary matter for the Tribunal considering the case, weighing up the various relevant factors as above. Also, I must have regard to the overriding objective to deal with cases fairly and justly, including, so far as practicable, ensuring the parties are on an equal footing, but also avoiding delay, so far as compatible with proper consideration of the issues and saving expense.
20. Taking these factors, and all other matters submitted to me on behalf of the parties, into account, in the light of my findings above, and having reconsidered the matter, I find that the interests of justice are best served in this case by extending time so that the Respondent can defend and I accordingly allow the Respondent’s application.
21. The Claimant then applied to strike out because he claimed that the Respondent had failed to respond to requests for disclosure, and because there had been a delay in the Respondent finalising a bundle prior to a previous case management hearing. I have made an unless order to deal with the disclosure, but apart from that, the matters complained of do not justify a strike out, which is a draconian measure which should be reserved for flagrant or very serious and persistent cases.

J S Burns Employment Judge
London Central
13 July 2021
For Secretary of the Tribunals
Date sent to parties:14/07/2021
