EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101094/2022

Preliminary Hearing held by Cloud Video Platform on 20 May 2022

Employment Judge A Kemp

Mr B Deans	**Claimant** **Represented by:** **Mr R Russell,** **Solicitor**
Mr F Shewan	**Respondent** **Represented by:** **Mr B Duncan,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent's application under Rule 20 to extend the period for receipt of his Response Form is granted.

REASONS

Introduction

1. This was a Preliminary Hearing held remotely to address an opposed application for receipt of a Response Form under Rule 20 of the Tribunal's Rules of Procedure, it being out of time. If not accepted the merits of the claim would have remained determined against the respondent, as the case is otherwise undefended with a Preliminary Hearing referred to below having been held which arranged a Final Hearing on remedy only, and I

consider that for that reason this matter requires to be addressed as a Judgment rather than a Note.

Background

2. No evidence was led, and parties made submissions.

3. The Claim Form was prepared by the claimant who at that stage was a party litigant. He did not tick the box in the form for a claim of "unfair dismissal including constructive dismissal", but in the grounds of his claim and in relation to compensation set out averments of fact that in my opinion amounted to a claim that there had been a dismissal under section 95(1)(c) of the Employment Rights Act 1996, and that it was unfair under section 98(4) such as to amount to what is generally referred to as a constructive dismissal.

4. The claimant emailed the Tribunal on 2 March 2022 to request an amendment with regard to the identity of the respondent.

5. The Response Form was due to be presented by 22 March 2022 (the solicitors appearing were not aware of that date as it was before each of them had been instructed, but it was confirmed by the clerk after the hearing). The respondent did not do so.

6. A Preliminary Hearing was held on 20 April 2022. The respondent had not sent in a Response Form, and did not attend the hearing although Notice of the hearing had been sent to him. The claimant by that stage had instructed a solicitor, who attended for him. The proposed amendment to the respondent's identity was not moved, as it was unnecessary.

7. A Note of the Preliminary Hearing was sent to parties afterwards. It referred to the claims made being for constructive dismissal, as it is generally known, and for unpaid holiday pay. It referred to arrangements for a Final Hearing on remedy only.

8. The respondent wrote to the Tribunal by letter dated 21 April 2022. In it he stated "I am extremely disappointed that I was not given the opportunity on Wednesday 20 April 2022 to attend my case against Brian Deans. I was unaware that my forms had not arrived at your office, as I had posted

them in good time." He made an offer to meet to discuss the case, and set out why he did not agree with the claim. The Tribunal sent a reply to his email. His solicitor explained that the respondent did not suggest that he had sent a Response Form, and that the respondent had been somewhat confused when writing that letter.

9. On 27 April 2022 the claimant sent further and better particulars of the claims, including the basis on which the claim of a constructive dismissal was made.

10. On 29 April 2022 solicitors instructed by the respondent made the present application, and attached their proposed Response Form. In that it was accepted that holiday pay was due, and it was stated that that would be paid. It was denied that there had been a dismissal, or that that was unfair.

11. The claimant's solicitors wrote to object to the application by email dated 6 May 2022.

Respondent's submission

12. The following is a brief summary of the submission by Mr Duncan. The respondent apologised for not providing a Response Form timeously. There was confusion on his part. He understood that the claim was for holiday pay. The box for unfair dismissal (including constructive dismissal) was not ticked, and the box as to holiday pay was. He is 82 years of age and a sole trader. He denies that there was a dismissal, but accepts that some holiday pay is due. Reference was made to the terms of Rules 20 and 2, and to the case of ***Swain*** cited below. The reason to request the extension was not fully apprehending the claim made, the defence had merit, and the balance of prejudice favoured the respondent. It was accepted that there would be delay but there would be a fair hearing without which the consequences for the respondent were serious.

Claimant's submission

13. The following is a brief summary of the submission made by Mr Lawson. The respondent had been well aware of the claim. The claim had not changed in nature, it was easily identified as one of constructive dismissal from the Claim Form. The respondent had chosen not to defend the Claim

or to take legal advice. If the respondent suffered prejudice he was the cause of that. The claimant would suffer prejudice if the application were to be granted. He suffers badly from mental health issues which would be made worse by a defended claim. There would be additional delay and cost. If the claimant had presented the claim late he would have been treated differently, and it would set a dangerous precedent to allow a respondent to present a Response Form late in circumstances such as the present.

The law

14. The terms of Rule 20 are as follows:

> "**20 Applications for extension of time for presenting response**
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> (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.
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> (2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.
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> (3) An Employment Judge may determine the application without a hearing.
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> (4) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside."

15. The terms of Rule 2 are as follows:

> "2 **Overriding objective**
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> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
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> (a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

16. The test to apply to such an application was considered in respect of the predecessor provisions of the rules in ***Kwik Save Stores Ltd v Swain [1997] ICR 49***. I consider that whilst the terms of the Rules considered in that case and those that apply currently are not the same, the principles set out in that authority remain valid. That was also the position adopted by the EAT in ***Polygon Corporation v Tregunna EAT/1194/00***, and ***Moroak (t/a Blake Envelopes) v Cromie [2005] IRLR 535*** on Rules which were again not the same as those introduced in 2013.

17. In ***Swain*** the respondent had submitted its Notice of Appearance late, with a covering letter setting out the reasons, and the EAT said the following:

> "They were required to show cause under rule 3(5) of the Industrial Tribunals Rules of Procedure 1993 in Schedule 1 to the Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993 as to why an extension should be granted……"

18. The term of the Rule relevant to the application were as follows

> "*3*(1) A respondent shall, within 14 days of receiving the copy of the originating application, enter an appearance to the proceedings by presenting … a written notice of appearance … (3) A notice of appearance which is presented … after the time appointed by this rule for entering appearances shall be deemed to include an

application under rule 15(1) (by the respondent who presented the notice) for an extension of the time so appointed …. (5) A chairman shall not refuse such an application unless he has sent notice to the person wishing to enter an appearance giving that person an opportunity to show cause why an extension should be granted.

15(1) A chairman may on the application of a party or of his own motion extend the time for doing any act appointed by or under these rules (including this rule) and may do so whether or not the time so appointed has expired.".

19. The EAT in ***Swain*** commented on how such matters should be addressed, and I consider is worth quoting at length:

"The explanation for the delay which has necessitated 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 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. 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 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. 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 his case.

> Mr. Hand cited the decision in ***Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc. [1986] 2 Lloyd's Rep. 221*** as illustrating the importance of considering the merits factor. That was a case of an application to set aside a default judgment. The Court of Appeal held that, when defendants, who had initially made a deliberate decision not to defend the plaintiff's claim, later applied to set aside the judgment obtained in default, it was necessary for the court, in the exercise of its discretion, to consider whether the defendants had merits, whether they had a real prospect of success in defending the case. It was for the court to form a provisional view about the possible outcome of the case. That was a necessary exercise because one of the 'justice' factors in the exercise of a discretion is that there should normally be a proper adjudication, i.e. a decision after hearing evidence and argument from *both sides*.
>
> In our view, similar considerations apply if an industrial tribunal is minded to refuse an extension of time which will have the effect of denying a respondent a hearing on the merits. In that case the Court of Appeal decided that the defendants had not shown that they had a reasonable prospect of success. The court was therefore entitled to refuse the exercise of discretion, taking account of the defendant's earlier decision to let the judgment go by default."

20. The position in relation to the practice of the civil courts in Scotland is similar to that which appears to be the case from the English authorities cited in ***Swain***. If there is an application to receive a Notice of Intention to Defend late, or if decree has been granted and followed by a Reponing Note, the practice is to consider firstly the reason for the delay in entering appearance, secondly the extent of delay, and thirdly the prejudice if the defender is not permitted to contest the case which includes a provisional assessment of the merits or otherwise of the proposed defence. If there is no reasonable prospect of success in that defence the prejudice is little, if any. If there is, if only on the amount of any award, that is taken into account. It is an exercise of discretion.

Discussion

21. There are arguments both ways, and I do have sympathy for the claimant given the fact that the respondent did not defend the Claim timeously, but I have decided that it is in accordance with the overriding objective to grant the application to extend the time for presenting the Response Form to the date on which it was tendered. I do so for the following reasons:

(i) When the claim was commenced both parties acted for themselves. The Claim Form did not include a tick in the box for unfair dismissal (including constructive dismissal). Whilst the narrative did make it reasonably apparent to those legally qualified that such a claim was being made, the claim was not set out in express terms that a layman will always appreciate. In so far as the pleading of a constructive dismissal claim is concerned the very recent EAT case of ***Holmes v Telemachus Ltd [2022] EAT 71*** confirmed that, particularly where the claimant was a party litigant, it was not necessary to plead the test specifically under sections 95 and 98 of the Employment Rights Act 1996, but that more general language from which that claim could be inferred was sufficient. The EAT said:

> "Employment judges occasionally fail to appreciate that a litigant in person is asserting that they resigned from their employment because of their treatment by the employer, which was so bad as to breach the implied term of mutual trust and confidence, which in lawyer's terms would be constructive dismissal."

In my view it is to be expected that a party litigant did not appreciate the nature of the claim in such a situation that if some Employment Judges also on occasion fail to do so. In addition, however the Claim Form indicated that payment of holiday pay might be sufficient as a remedy as it referred to that "as a minimum". In short, it was not as clear as it might be what exactly the claimant sought until the Further and Better Particulars were provided.

(ii) The reason for the delay appears therefore to be largely due to the respondent not appreciating the extent of the claim or claims he faced. Whilst he has a degree of fault for that, he should have defended the claim timeously if there was any doubt, and in any event disputes the quantum of the claim for holiday pay, his lack of appreciation that he was facing a constructive dismissal claim, as it is generally known, being one under the combined terms of sections 95 and 98 of the Employment Rights Act 1996, is I consider forgivable. It was not a deliberate tactical decision or reckless disregard for the claim being made for example.

(iii) The claimant provided Further and Better Particulars of the Claim once his own solicitors were instructed. They make more clear precisely what is sought, and why. That places the claim in a somewhat different context to that facing the respondent from the Claim Form itself.

(iv) When the Note of the first Preliminary Hearing was sent to the respondent he responded almost immediately, indicating that he had intended to defend the claim. He then contacted his solicitors. There was no delay once his solicitors were instructed. They required to obtain the Claim Form to respond to it, and had to seek that from the Tribunal itself. The overall period of the delay is not particularly lengthy, at very roughly five weeks.

(v) The respondent may have a defence to the claim as to constructive dismissal. He has referred to the terms of the resignation letter, which on one reading of it may be evidence that the reason for resignation was not the material breach of contract by the respondent. It is far from conclusive evidence, but it is an adminicle of evidence. The respondent also disputes that there was a material breach by him. It is not yet clear whether he disputes all or some of the comments allegedly made by him. There are liable to be several disputed issues of fact, and one cannot say at this stage how the Tribunal would determine such a dispute. It is possible that the defence has merit. If the hearing proceeds in absence, the respondent may be found liable for something that, if he were able

to defend the claim, he may (it can be put no higher) not have done. At this stage one cannot know whether the claimant or respondent would succeed on the issue of whether or not there was a constructive dismissal, but the onus of proof falls on the claimant.

(vi) There may also be issues of the proper quantification of the award, given that the claimant seeks past and future losses. The Schedule of Loss seeks £21,401.44. Of that £2,230.40 is for holiday pay, the balance as a basic and compensatory award for unfair dismissal. The total sought is a material sum. The respondent accepts that £860.99 for holiday pay is due, but disputes the balance of that claim. He has failed to make payment of the sum he accepts. On that basis a finding against him for holiday pay admittedly due is inevitable, but the amount of it is not certain.

(vii) I do not consider that allowing the application sets the dangerous precedent Mr Lawson argued that it would be. As he noted the test applied to the presentation of a Claim Form for claims such as the present is different to that applied under Rules 20 and 2. The test for a claimant is a matter of jurisdiction. The test for a respondent under Rule 20 is one of discretion. Whilst therefore I can understand why it may be argued that that is unequal and unfair, the law in relation to the two tests is I consider clear. I must apply the law set out above, not that as to reasonable practicability.

(viii) Whilst the respondent has I consider acted unreasonably in not defending the claim when he had the opportunity to do so, I understand that he is a sole trader and 82 years of age. He did not need to seek legal advice, but he could have done so, and in any event should have provided a Response Form timeously if he wished to defend the claim even on the basis of what he understood it to be. But that does not need to be marked only by rejecting the present application. The claimant has not made an application for an order for expenses, which is likely to be as he sought to oppose the application under Rule 20, but in all the circumstances if such an application were made for the expenses which have effectively been lost by the late receipt of the Response Form, including for

preparing for and attending the first Preliminary Hearing and to address the present application and the present hearing, there would appear to be reasonable grounds to grant such an order unless the respondent made sufficient representations to the contrary. I would suggest that the claimant send a draft note of such expenses and that the respondent consider the same carefully with a view to resolving the issue, but if terms are not agreed an application can be made formally, and if opposed a further Preliminary Hearing can be held by telephone.

(ix) I accept that there will be prejudice to the claimant. The need for a disputed hearing on the merits and remedy may add to levels of stress at the least. It will cause delay. It may also cause additional expense, although if the claim is unreasonably defended on its merits an application for an award of expenses under the same rule as above may be made. It may or may not be granted, but it is a matter that can be weighed in the balance. I consider that the prejudice to the claimant including by delay and expense, as well as having to pursue a defended claim which at present is not, is outweighed by the prejudice to the respondent given all the circumstances referred to above.

Conclusion

22. The application under Rule 20 is therefore allowed. Case management in consequence of that decision is addressed separately.

Employment Judgment: **A Kemp**
Date of Judgment: **24 May 2022**
Date sent to parties: **25 May 2022**