



## EMPLOYMENT TRIBUNALS

### Claimant

Ms Y Luwoye

### Respondent

DMT Solutions UK Limited t/as Bluecrest

## JUDGMENT ON RECONSIDERATION OF LEGAL OFFICERS DECISION

The decision of Legal Officer Faisal Khan has been considered afresh and is confirmed as the correct decision in the circumstances.

### REASONS

1. This is the application of the claimant to have the decision of the Legal Officer given on the 15 November 2022 considered by a Judge. It was not seen by the judge until the 10 March 2023.
2. The claim form was received on the 27 June 2022. The claimant brings claims of unfair dismissal, age and race discrimination and that she was subjected to a detriment for raising a protected disclosure and automatically dismissed contrary to section 103A Employment Rights Act 1996.
3. The claim was served on the respondent at the correct address on the 25 July 2022 giving the date by which the ET3 response was required as the 22 August 2022.
4. By letter of the 15 September 2022 (just over 3 weeks late) the respondent made application under Rule 20 for an extension of time to submit the response and submitted a draft response with that application as required by the Rules.

5. The respondent explained that it operates from premises occupied by other businesses. The post is delivered to the building and left in a bundle by the mailboxes. An employee of the facilities team sorts the mail out and delivers it to the respondent. The respondent's office is unmanned, and it operates with most employees working from home or only attending one day a week at the office. The employee who opens the post attended the office on 6 September 2022 and the claim form was not there. When the employee attended on the 13 September 2022 the claim form was there and was immediately passed to the HR Business Partner who instructed Make UK who submitted the application on its behalf.

## **6. Relevant Rules and law**

### *Overriding objective*

2. 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—

- (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.

### *Applications for extension of time for presenting response*

**20.—** (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.

(2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.

(3) An Employment Judge may determine the application without a hearing.

(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.

7. In Kwik Save Stores Ltd v Swain and ors 1997 ICR 49, EAT, (the case applied by the Legal Officer) the EAT made clear that the process of exercising a discretion involves taking into account all relevant factors, weighing and balancing them and reaching a conclusion which is objectively justified on the grounds of reason and justice'. In particular, the EAT held that, when exercising a discretion in respect of the time limit, a judge should always consider the following:

The employer's explanation as to why an extension of time is required - the more serious the delay, the more important it is that the employer provide a satisfactory and honest explanation. A judge is entitled to form a view as to the merits of such an explanation.

The balance of prejudice - would the employer, if its request for an extension of time were to be refused, suffer greater prejudice than the complainant would suffer if the extension of time were to be granted?

The merits of the defence - if the employer's defence is shown to have some merit in it, justice will often favour the granting of an extension of time — otherwise the employer might be held liable for a wrong which it had not committed.

## **Conclusions**

8. The tribunal must have regard to the overriding objective when making case management decisions and in relation to the granting of an extension in these circumstances the guidance in the Kwik Save case.
9. The claimant submits that the rules for whether a claim is submitted in time are strictly applied and the same considerations should be applied to delay in entering the Response. However that is not the legal test which is as set out in the *Kwik Save* case. Parliament has laid down time limits within which proceedings have to be issued and in considering whether to allow a claim to proceed that has been submitted outside of those time limits the tribunal will apply the statutory provisions relating to the particular claim for example in the Employment Rights Act 1996 or Equality Act 2010.
10. The respondent has provided a valid explanation for the delay in this case. It is not a long delay and the case management hearing has not yet taken place.
11. Greater prejudice will be caused to the respondent than to the claimant if it is not allowed to defend the proceedings having advanced a defence to it. The claimant will still have the opportunity to have the proceedings heard.

12. The decision of the Legal Officer was the correct one in all the circumstances and is upheld. The case management hearing will continue as listed for the 23 March 2023 and the respondent is entitled to participate in it

Employment Judge Laidler

10 March 2023

Sent to the parties on:

13 March 2023

For the Tribunal Office: