



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4102696/2023**

**Preliminary Hearing held remotely by CVP on 11 August 2023**

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**Employment Judge P O'Donnell**

**Mr F Mitchell**

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**Claimant  
In person**

**RGS Forfar**

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**Respondent  
Represented by:  
Ms Harvie,  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that the respondent's application under Rule 20 is granted and the date for presenting the ET3 is extended to 24 July 2023.

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### **REASONS**

#### **Introduction**

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1. The claimant lodged his ET1 on 7 April 2023 raising a claim of unfair dismissal. The ET1 was served on the respondent by letter dated 12 April 2023 and the ET3 was due to be lodged by no later than 10 May 2023.
2. The ET3 was not received by this date. A final hearing of the claim was listed for 11 August 2023 with the Notice of Hearing being issued to parties by correspondence dated 30 May 2023.

E.T. Z4 (WR)

3. By email dated 24 July 2023, an application was made by the respondent under Rule 20 for an extension of time to lodge the ET3 (enclosing a draft ET3 setting out the defence).
4. This application was opposed by the claimant and the final hearing was converted to the present preliminary hearing to determine the Rule 20 application.

### **Evidence**

5. The Tribunal heard evidence from the following witnesses:-
  - a. Gordon Skea (GS) – part-owner and sole director of the respondent.
  - b. William Skea (WS) – previously the manager of the business in Scotland but who now runs a depot in Suffolk.
  - c. Graham Kinghorn (GK) – a consultant who assists the business with financial management.
6. There was a bundle of documents prepared by the respondent's agent.
7. The Tribunal made it clear that it should only hear evidence relevant to the Rule 20 application. In particular, it was made clear that no findings of fact would be made regarding the events giving rise to the claim; the case will be proceeding to a final hearing in due course and it is for the Tribunal dealing with that final hearing to make such findings in fact.

### **Findings in fact**

8. The Tribunal made the following relevant findings in fact.
9. The claimant was dismissed on 25 November 2022.
10. He commenced ACAS Early Conciliation on 8 February 2023 and the certificate was issued on 22 March 2023 (p22). There was contact between the ACAS conciliation officer and GK around this time.
11. The claimant lodged his ET1 on 7 April 2023. The Tribunal served the ET1 on the respondent by letter dated 12 April 2023 and this was date stamped by the respondent as having been received on 13 April 2023 (p5). The

letter explained that the respondent had until 10 May 2023 to submit their ET3 in response.

12. The normal process in the respondent's office for dealing with mail is that it would be opened, date stamped and passed on to the appropriate manager to deal with it. There was previously three administrative staff dealing with these matters but two of them had been made redundant late in 2022 leaving only one person in the office.
13. Neither GS, WS or GK could recall seeing the notice of claim from the Tribunal in April 2023.
14. The period from April to June each year is the respondent's busiest time of year; it manufactures, sell and services machinery for the agricultural sector across the globe, primarily in relation to the preparation of the ground for planting. The period when such work is undertaken in the sector is, therefore, the peak business period with two-thirds of its profits being made in that period.
15. The respondent presently has 35 members of staff. GS is the sole director and oversees the business. There is a general manager who runs the manufacturing and servicing. WS deals with sales and servicing in England. GK was brought in as a consultant on the recommendation of the respondent's bank to assist with financial matters after the respondent got into financial difficulties in 2022.
16. The ET3 was not submitted by the deadline of 10 May 2023.
17. By letter dated 30 May 2023, the Tribunal sent parties a Notice of a Final Hearing for this case. This was received and date stamped by the respondent on 1 June 2023.
18. This correspondence was shown to GK on 9 June 2023. He was given an envelope containing papers relating to the Tribunal proceedings. This was the first time that anyone involved in the management of the respondent had seen such correspondence. He could not recall who passed the envelope to him.

19. On reading the contents of the envelope, GK realised that action needed to be taken as soon as possible. On 12 June 2023, he emailed a solicitor whom he had dealt with before to ask them to take action to respond to the claim. There was a short delay in this being progressed as his email went  
5 into a “Junk” folder but he chased this up by phone and spoke to the solicitor.
20. The application under Rule 20 was lodged by email dated 24 July 2023.

### **Respondent’s submissions**

21. The respondent’s agent made the following submissions.
- 10 22. Reference was made to the *Kwik Save* case (below) and the principles to be applied by the Tribunal in considering a Rule 20 application.
23. It was submitted that there was an explanation presented for the delay in the ET3; the respondent had a small management team with chaotic administration processes; the claim was received at a time of high seasonal  
15 demand; it was not denied that the notice of claim had been received but it was not seen by those who would take action about such matters; it has not been possible to identify why it was not brought to the attention of the relevant people at the time; it was not a deliberate failure to follow the rules.
24. The ET3 was said to set out a statable defence that the claimant was fairly  
20 dismissed, either by reason of redundancy or “some other substantial reason”. Further, it was submitted that there were grounds for the respondent to challenge the sums sought by the claimant.
25. In terms of the balance of prejudice, it was submitted that the respondent would face significant prejudice if they were prevented from being able to  
25 defend the claim. On the other hand, there would be little prejudice to the claimant who has only faced a short delay in proceeding to a final hearing.

### **Claimant’s submissions**

26. The claimant made the following submissions.
27. It was said that the respondent had had ample time to lodge their ET3 and  
30 there was no reasonable explanation for the delay. There had been contact

from ACAS and so it was submitted that they must have known that the letters from the Tribunal were on their way.

28. It was submitted that the claimant did not believe the respondent's explanation.

5 **Relevant Law**

29. Section Rule 20 of the Employment Tribunal Rules of Procedure deals with an application for an extension of time to lodge an ET3. It provides as follows:-

10 (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.*

15 (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.*

20 (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.*

25 30. In considering an application under Rule 20, the Tribunal is exercising a discretion to extend the time limit for complying with one of its Rules of Procedure (that is, Rule 16). In doing so, the Tribunal should bear in mind the principles set out in *Kwik Save Stores Ltd v Swain* [1997] ICR 49. Although that decision was made under a previous version of the rules, those principles continue to be the matters which the Tribunal should take into account (*Moroak (t/a Blake Envelopes) v Cromie* [2005] IRLR 535).

30 31. The position is summarised in the head note of *Swain* as follows:-

5 *'... it was incumbent on a respondent applying for an extension of time for serving a notice of appearance ... to put before the industrial tribunal all relevant documents and other factual material in order to explain ... both the non-compliance and ... the basis on which it was sought to defend the case on its merits; that an industrial tribunal chairman in exercising the discretion to grant an extension of time to enter a notice of appearance had to take account of all 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 to reach a conclusion which was objectively justified on the grounds of reason and justice; that it was it was important when doing so to balance the possible prejudice to each party ...'*

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### **Decision**

- 15 32. The Tribunal is satisfied that the reason presented by the respondent to explain the delay in lodging the ET3 is the genuine explanation for this. It may well be an explanation which does not reflect well on the respondent (showing a somewhat chaotic approach to the handling of mail) but there is no evidence to suggest that the genuine reason for the delay is anything
- 20 other than that the notice of claim sent by the Tribunal never made its way into the hands of the relevant officers of the company until after the deadline for the ET3 had passed.
- 25 33. The Tribunal is satisfied that the first time that someone, with the requisite authority to deal with the claim, had sight of the correspondence from the Tribunal was 9 June 2023 when GK was handed an envelope containing the correspondence regarding the final hearing.
- 30 34. The Tribunal does take account of the fact that no-one can explain why the April correspondence did not make its way to an appropriate person until June. It notes that the respondent was in their peak business period at the time but there is no evidence to suggest that GS, WS or GK had received the correspondence and put it to one side because of how busy they were. Rather, the correspondence simply goes missing for a period until the receipt of the notice of hearing.

35. The comments by the claimant about the contact with ACAS is noted but the Tribunal does not think this particularly assists him. Whilst early conciliation is a necessary precursor to a claim to the Tribunal, it is not the case that every early conciliation process will lead to Tribunal proceedings.
- 5 36. Turning to the merits of the proposed defence, the Tribunal should be clear that it has not come to any view as to whether the defence will ultimately succeed. Rather, it is concerned with whether there is a storable defence being presented. The ultimate success or failure of the defence (or the claim) will be a matter for another Tribunal at the final hearing having heard  
10 all the relevant evidence and submissions.
37. Having reviewed the ET3, the Tribunal does consider that it sets out a storable defence to the claim of unfair dismissal. The respondent is offering to prove that there is a potentially fair reason for dismissal (that is, redundancy or "some other substantial reason") and have set out why they  
15 say they followed a fair process in dismissing the claimant. If the evidence supports their assertions then there is, on the face of it, a defence to the unfair dismissal claim being presented.
38. In terms of the prejudice to both parties, it is quite clear that there will be a significant prejudice to the respondent if the application is refused. They  
20 will be denied the opportunity of defending the claim in circumstances where they have a storable defence. This could potentially lead to a significant financial liability for them.
39. On the other hand, there is very little prejudice to the claimant in allowing the application. He is not prevented from pursuing his claim in any way.  
25 The only difference is that he would be facing a defended claim but, in this regard, he would be in the very same position he would have been in had the ET3 been lodged in time.
40. The only other prejudice to the claimant is a very short delay in listing a final hearing caused by the need to list the present hearing and determine the  
30 Rule 20 application. This prejudice does not outweigh the prejudice to the respondent identified above.

41. In these circumstances, the Tribunal considers that the balance of prejudice falls in favour of the respondent and the granting of the application.

42. Taking account of all of these matters, the Tribunal grants the respondent's application under Rule 20 and extends the period of time for lodging the ET1 to 24 July 2023 (that is, the date on which the Rule 20 application and draft ET3 was presented to the Tribunal).

**Employment Judge : P O'Donnell**  
**Date of Judgment : 15/08/2023**  
**Date sent to parties : 22 August 2023**

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