EMPLOYMENT TRIBUNALS

Claimant: Ms E Szimul

Respondent: Malrat Foods Ltd t/a Fengate Bazaar (R1)
Mr I Koca (R2)

HEARD AT: Cambridge **ON:** 3rd March 2017

BEFORE: **Employment Judge G P Sigsworth**

REPRESENTATION

For the Claimant: Mr T Gracka (Consultant)

For the Respondent: Mr J Buckle (Counsel)

JUDGMENT

1. The Judgment of the Tribunal is that the response forms, having being confirmed by the Respondents as being submitted on behalf of both Respondents and having been accepted on that basis by the Tribunal, are held to be valid responses to the claim.

REASONS

1. At a closed preliminary hearing on 9th December 2016, the Employment Judge at his own instigation, and not on the application of either party, listed an open preliminary hearing today to determine whether the Respondents have submitted valid response forms and, if not, whether to strike them out.

2. The chronology is important. The claim form was presented on 8th July 2016, making various complaints of discrimination and for unpaid wages. The claim was accepted by the Tribunal on 21st July 2016, and was served in the usual way on the Respondents. On 10th August 2016, the response form ET3 was

completed on behalf of the first Respondent and sent to the Tribunal. The response did not give particulars of the response, but said that the first Respondent would respond in detail to the allegations on return of their representative. On 12th August, the Tribunal wrote to the Respondents and confirmed that the response from both the first and second Respondents had been accepted. On 18th August, a detailed statement from the second Respondent, headed “Full Response of the Second Respondent further to Response Pack”, was received by the Tribunal. On 9th September, the Tribunal wrote to the parties, on the Employment Judge’s instruction, asking the Claimant’s representative to comment on the application to amend the Response, and asking the Respondents’ representative to confirm whether the response was filed on behalf of both the Respondents or only on behalf of the second Respondent. On 12th September the Respondents’ solicitors confirmed that the response (the original ET3 form) and the full response (in other words the document provided by the second Respondent) were filed on behalf of both the first and second Respondents. The Claimant’s representative did not thereafter comment on the Respondent’s application despite being invited to do so by the Employment Judge, either by 16th September or at all. No further communication on the subject was made by the Tribunal or by the parties between then and 9th December at the preliminary hearing, when the Judge at the PH raised the issue of the validity of the responses, seemingly for the first time.

3. The Employment Tribunal today read the written submissions of the parties on the issue and heard their oral submissions. The Respondents’ counsel pointed to the fact that the issue had not been raised by the Claimant until the Employment Judge had raised it at the last hearing, and said that the Claimant’s pursuit of the application to strike out the responses as being invalid was being opportunistic. In any event, says the Respondents’ counsel, the responses were accepted as joint responses and presented in time. Therefore, rules 16 to 20 of the Rules of Procedure did not apply. There had been no rejection of the responses presented in time and therefore no need to reconsider that and apply for an extension of time etc. As accepted by the Tribunal, the response is both the prescribed ET3 form and the response from the second Respondent, and should be treated as the responses of both Respondents. The responses now contain the defence (subject to what is said below) of both Respondents, should the case proceed to a merits Hearing. It would be highly prejudicial to the Respondents to declare their responses invalid, as they would not then be able to defend these serious allegations, says counsel. The merits are evenly balanced, and the outcome would depend on the oral evidence and which party is believed. It is argued that there would be massive prejudice to the Respondents to strike out the responses and no prejudice to the Claimant by reason of the matter, save in respect of the delay this may cause to the listing of the Hearing. The case has not got very far as there has been no compliance with the standard orders made at the outset.

4. The Claimant’s representative emphasised rule 6 of the Rules of Procedure, pointing out that the second Respondent had failed to put in a response on a prescribed form and that was not something under rule 6 that could be overlooked. It was also stressed that, although the first Respondent had put in an ET3 form in time, there were no particulars of the first Respondent’s case, save insofar as it was parallel with the second Respondent’s case. In particular,

there was no case set out on the failure to investigate the Claimant's grievance or the dismissal of the Claimant. No regard had been given as to whether there was a conflict between the two Respondents, and whether they should be separately represented, as it is likely that the first Respondent will wish to rely on a statutory defence as against the alleged activities of the second Respondent. Such a defence is not pleaded at the present time. The Claimant's representative stressed that both Respondents have always been represented by a solicitor, and that solicitor should have known what to do in terms of following the Rules, and any loss of defence to the Claimant's claim would be less prejudicial to the Respondents as they would have an action of negligence against their solicitor. Even now there is no particularised defence from the first Respondent.

5. I was referred to one case, that of *Thornton v Jones*, an unreported decision of the EAT, dated 21st June 2011. That case refers to all the well known authorities in this area – *Moroak (trading as Blakes Envelopes) v Cromie* [2005] ICR 1226, *Kwik Save Stores Ltd v Swain* [1977] ICR 49, *Pendragon Plc v Copus* [2005] ICR 1671, and *D&H Travel Ltd v Foster* [2006] ICR 1537. In *Thornton v Jones*, the EAT said that the correct approach was to exercise a broad general discretion in the interests of justice and not to assume that these are restrictive rules that have to be applied. The Respondent's explanation for lateness would always be relevant. If there was a genuine misunderstanding or accidental understanding or oversight, the Tribunal might be much more willing to allow late lodging. Length of delay, prejudice to other parties and the merits of the defence should be considered.

6. I conclude that the responses of both Respondents are valid. They were not rejected by the Tribunal, they were presented in time and they were accepted by the Tribunal as being responses being presented on behalf of both Respondents. The Claimant's representative did not take issue with the matter at the time, presumably accepting that we were where we were, in the light of the response to the Tribunal and the Employment Judge's directions. It is difficult now to overturn that state of affairs without causing massive prejudice to the Respondents. I must have regard to the broad interests of justice, as set out in the case law. Although there has been really no explanation from the Respondents as to why the process went as it did, I have in mind that there is no prejudice to the Claimant, save by reason of the delay, and anyway not all the delay that has occurred between the lodging of the claim form and today can be laid at the door of the Respondents. Some of it is down to the Tribunal's postponement of a hearing, and also because the Claimant could not travel to Bury St Edmunds and asked for the original Hearing to be postponed also. The parties have not made any preparation for the Hearing and so have not been prejudiced in that respect.

7. The real issue in this case as it is today is whether or not the first Respondent should be allowed to amend its response, currently joint with the second Respondent, to deal specifically with the matters that it has failed to deal with – namely, the allegations of direct discrimination in respect of failing to investigate and deal with the Claimant's grievance, dismissal of the Claimant and whether it wishes to raise any defence against the alleged actions of the second Respondent. They will also have to set out a case on the wages claim, which has not been particularised, but which will appear in more detail in the schedule

of loss. The Respondent will have an opportunity to respond to that. It is understood that it may involve an allegation that the Claimant was paid less than the national minimum wage. I deal with the matter further in the case management orders that follow.

Employment Judge G P Sigsworth, Cambridge

Date: 16 March 2017

ORDER SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS