



EMPLOYMENT TRIBUNALS

BETWEEN

MS ZHUOFANG WEI

Claimant

- and -

CANADIAN IMPERIAL BANK OF COMMERCE

Respondent

Heard at: OPH, held London Central, by CVP

On: 9 September, 2021

Before: Employment Judge O Segal QC

Representations

For the Claimant: Ms M Tutin, counsel

For the Respondent: Ms A Mayhew, counsel

JUDGMENT

Time is extended until 16 October 2020 for the Respondent to present its ET3 and Grounds of Resistance, pursuant to Rule 20(1) of the Employment Tribunals Rules of Procedure.

CASE MANAGEMENT DIRECTIONS

Full Merits Hearing

1. A FMH is listed to deal with these claims for 8 days **11 to 20 May 2022** inclusive.
 - 1) The hearing is listed in person, subject to further communication from the tribunal.
 - 2) Subject to the views of the tribunal dealing with the FMH:-
 - 1.2.1. The intention is that the tribunal will first deal with evidence and submissions on liability and the principles applicable to any remedy (by analogy with Polkey), though not the amount of any loss; to be followed by a determination of loss at a subsequent hearing, as listed below, if applicable.
 - 1.2.2. The tribunal will read for at least the first morning, and the parties are not required to attend the tribunal on the first day until 1.30 pm.
 - 1.2.3. The Claimant's evidence is expected to conclude at or before the morning of day 3.
 - 1.2.4. The Respondents' evidence is expected to conclude at or before the end of day 5.
 - 1.2.5. Submissions are expected to conclude at or before the end of day 6.
 - 1.2.6. The remainder of the time listed is for the tribunal's deliberations.

Remedy hearing

2. A remedy hearing is listed if required for 2 days **30 June and 1 July 2022** inclusive.
3. The tribunal will give directions as appropriate when promulgating its decision on liability.

Other Directions

4. The Claimant will send the Respondent a draft List of Issues by **4pm 16 September 2021**.
5. The Respondent will send the Claimant any proposed amendments to the draft List of Issues by **4pm 23 September 2021**.
6. The parties will agree and file with the tribunal a Final List of Issues (subject to amendment before/at the FMH) by **4pm 30 September 2021**.
7. The parties must **by 4pm 15 November 2021** provide disclosure by list to the other party, with copies of documents (electronically or hard copy) being provided on request within 7 days of such request(s).
8. The Respondent must **by 4pm 6 December 2022** provide to the Claimant a draft index for the hearing bundle.
9. The Claimant must **by 4pm 10 December 2022** provide to the Respondent a list of any additional documents relevant to these proceedings which she wants included in the hearing bundle.
10. The Respondent must **by 4pm 17 December 2022** produce a paginated trial bundle and provide a copy (electronic) to the Claimant.
11. The parties must **by 4pm 28 January 2022** exchange written statements of any witness who is to give oral evidence at the hearing of these claims. Exchange may be by electronic copy.
12. The Claimant must **by 4pm 28 January 2022** provide to the Respondent an updated Schedule of Loss.
13. The Respondent is to serve a Counter-Schedule of Loss **by 4pm 11 February 2022**.
14. The parties are to agree a neutral Chronology, no more than two sides A4, showing dates, key events, page refs; and a Cast List, no more than one side A4, by **4 May 2022**.

15. The parties are to agree an essential reading list (which can be simply the witness statements and such documents referred to in the statements as the tribunal members consider they need to read before the hearing begins) by **4pm 9 May 2022**.
16. The Respondent must provide four hard copy bundles (including the Agreed Chronology and Cast List) and the parties' witness statements, and three copies of the essential reading list, for the use of the tribunal by 9.30 am on the first day of the hearing.
17. All hard copies (bundles, witness statements, etc.) are to printed double-sided.

REASONS, DISCUSSION

1. This Preliminary Hearing was ordered to determine whether time should be extended for presentation of the ET3, which was filed 23 days out of time.
2. There has been a very long delay in resolving that issue, for which, notwithstanding the background of the pandemic, the tribunal apologises to the parties.
3. I thank both counsel and their respective solicitors for their assistance with today's hearing and the preparation of the bundle.

Facts

4. The Claimant (C), by an ET1 presented on 19/6/20, brings claims of direct discrimination related to sex and/or race, nationality, ethnic or national origins, harassment and/or victimisation against the Respondent (R).
5. For the purposes of today's hearing, I had an agreed bundle and a written witness statement from Gillian Miles for R explaining the circumstances in which there was a delay in providing the ET3, which evidence was accepted as reliable by C.
6. In summary, by reason of an imperfect system for dealing with correspondence put in place by R during lockdown and/or human error by the security guard who opened the correspondence from the tribunal, the claim in this matter, which was delivered to R's correct address on 28/8/20, did not come to the attention of any relevant employee of R until 13/10/20.
7. At that time the FMH in this case was listed to take place starting 6/9/21.
8. On 16/10/20 R made the present application, providing detailed draft grounds of resistance.
9. On 22/10/20, C objected to the application to extend time for presentation of the ET3.
10. On about 11/8/21, the tribunal decided that this application could not be determined on the papers and listed it for determination at an OPH today, to be followed by giving case management directions if appropriate.

The law

11. The relevant law was not in dispute and is well-established.

11. Rule 20(1) of the ET Rules provides:

“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.”

12. Rule 20 does not specify the grounds on which the Tribunal may grant an application to extend time for presentation of a response. However, under Rule 4(4) of the 2004 ET Rules, the Tribunal could extend time for presentation of a response if it was satisfied that it was just and equitable to do so; and that test has been established by the case law as applicable.

13. *Kwik Save Stores Limited v Swain and others* [1997] ICR 49, EAT, per Mummery J and *Moroak (t/a Blake Envelopes) v Cromie* [2005] ICR 1226, EAT, at [30], per Burton J, identify the most material factors in the exercise of the tribunal’s (wide) discretion as being:

- (1) The explanation for the delay – the range being between deliberate and/or abusive conduct, to an innocent oversight;
- (2) The possible prejudice to each party; and
- (3) The merits of the defence (without seeking to conduct a ‘mini-trial’).

Decision

14. It is clear to me that time should be extended in this case.

15. It is common ground that the reason for the delay was, as characterized fairly by Ms Tutin, an ‘oversight’ or an ‘unfortunate error’.

16. There was, at the time of the application, no prejudice to C at all in granting the extension sought since the listing in September of this year would not have been prejudiced; whereas the prejudice to R in not being able to contest this case on its merits where serious allegations of discrimination and harassment are made and where C values her claim at some £800,000, would be considerable.
17. It is common ground, and I find, that the grounds of resistance raise a proper arguable defence in response to nearly all or all of the claims made.
18. In the circumstances, it would not be just and equitable for me to refuse to extend time for this claim to be adjudicated on its merits at a full hearing; and I therefore extend time as requested.

Costs application

19. After I gave the above decision, R applied for some of its costs of today's hearing on the basis, it argued, that C had acted unreasonably in persisting with its objection to R's application to extend time once it knew the reason for the delay and the grounds of resistance.
20. That application for costs is not entirely without merit. However, I reject it for these reasons:-
 - a. Although it was likely to fail, C's initial objection was put on a basis which was not absurd (the culpability of R in not putting in place appropriate systems to deal with important correspondence, etc).
 - b. C had the right to expect that R's application would be dealt with expeditiously by the tribunal and very likely on the papers. It was not C's fault that this did not happen.
 - c. As Mr Mayhew fairly accepted, a PH to deal with case management would in any event have been required.

- d. In so far as R expended costs on the provision of a witness statement and skeleton argument in support of its application to extend time, it is to be inferred that R took the view that the issue was not so clear-cut that it could safely be resolved ‘on the papers’.

Oliver Segal QC
Employment Judge

Date: 9 September, 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

09/09/2021.

FOR THE TRIBUNAL OFFICE