EMPLOYMENT TRIBUNALS

Claimant: **Carole Scott**

Respondents: **(1) Fisher Jones Greenwood LLP**
(2) Paula Cameron
(3) Anthony Edwards
(4) Anthony Fisher

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **12 April 2020**

Before: **Employment Judge Housego**

Representation

Claimant: Suhayla Bewley, of Counsel, instructed by Julie Stewart of Stuart Law Solicitors

Respondent: Rupert Myers, of Counsel, instructed by the Respondents

JUDGMENT

1. **The application for an extension of time to file a Response to the Claim is refused.**

2. **Judgment in default of appearance is entered for the Claimant in respect of her claims for unfair dismissal, age discrimination, disability discrimination, notice pay and holiday pay.**

3. **The Respondents are permitted to engage in the remedy hearing.**

4. **The Respondents are jointly and severally ordered to pay the costs of the Claimant of opposing the application for an extension of time, the amount to be assessed at the remedy hearing (unless previously agreed).**

5. **The claim is to be listed for a 1 day remedy hearing. If the parties require directions they are to make application for a case management hearing.**

REASONS

1. I gave a short ex tempore judgment at the close of the hearing. Full reasons are required in such a case, and so this judgment is prepared.

2. The parties provided very detailed submissions in correspondence. These should be read in conjunction with this judgment. I agree with many (but not all) of the submissions of the Claimant's solicitor, and do not repeat them here. I also made a full note of the submissions of Ms Bewley, which amplified them and made further points with which I also accepted. I also took a careful note of the submissions of Mr Myers.

3. I have taken full account of the fact that to refuse the application condemns the Respondents to a default judgment, and that the judgment is that the Respondents are guilty of both age and disability discrimination, and that as they are a firm of solicitors, its senior partner and 2 other senior people in the firm this may have more effect on them than if they (two of them) were not officers of the Court.

4. I was careful (and said so in the hearing several times) to do no more than evaluate the Claimant's argument that there was not a strong refutation of the claim in the response, and nothing in this judgment is a finding of fact about the circumstances leading to the claim.

5. During the hearing, Mr Myers said that the 4th Respondent was available to give evidence if I required it. It is not for me to require anything. It is for the parties to make or oppose the application as they wish. I said as much in the hearing. No application was made for the 4th Respondent to give evidence in the hearing.

6. The facts leading to the application are as follows:

    6.1. The Claimant was dismissed on 31 July 2020 having been given 4 weeks' notice.

    6.2. The Acas notification and certificates were all on 22 September 2020.

    6.3. The Claim was received by the Tribunal on 30 October 2020.

    6.4. It was not sent to the Respondents until 14 December 2020.

    6.5. They received it on 18 December 2020.

    6.6. The last date for filing the ET3 was 11 January 2021.

    6.7. The ET3 was submitted online by the 4th Respondent at 16:41 on 13 January 2021, and copied to the Claimant's solicitor.

6.8. At 19:30 on 13 January 2021 the Claimant's solicitor emailed the Tribunal, and copied the 4th Respondent, pointing out that it had to be rejected as it was out of time.

6.9. At 20:45 on 13 January 2021 the 4th Respondent emailed the Tribunal and the Claimant's solicitor. It is headed *"Application for extension of time to present ET3"*.

6.10. In a lengthy letter of 20 January 2021 the Claimant's solicitor opposed this.

6.11. On 22 January 2021 the 4th Respondent submitted a witness statement dated 21 January 2021 on behalf of all the Respondents.

6.12. On 03 March 2021 the ET3 was rejected by the Tribunal.

6.13. This hearing was set when the ET3 was received, as a case management hearing. It has been utilised for the hearing of the Respondents' application for an extension of time.

7. The Respondents' case is that:

7.1. The delay was very short – less than 2 days.

7.2. It was the result of putting the wrong date in the diary of the expiration of time.

7.3. Because it was not appreciated that it was out of time, there was no application to extend time submitted with the ET3, but it was done later that same day, immediately the 4th Respondent became aware that it was submitted out of time.

7.4. The form was received only on 18 December, and the firm was closed over Christmas, and the 4th Respondent returned to work only on 11 January 2021 which was (at the time unknown to him) the last date for filing the ET3, so there was little time to deal with the form, which he dealt with quickly, within 2 days.

7.5. The Covid-19 pandemic had caused problems, which had taken the attention of the 4th Respondent.

7.6. The email the 4th Respondent sent on 13 January 2021 was a *"knee-jerk reaction"* not properly researched, and it should not be taken as intentionally misleading.

7.7. It was a simple mistake, which while regrettable, is also not so bad as to lead to the deprivation of the ability to defend.

7.8. To be deprived of the opportunity to defend is draconian.

7.9. The only prejudice to the Claimant is to be deprived of the windfall of a default judgment.

8. The Claimant's opposition to the application is that:

8.1. It was perfectly possible to apply for an extension when the claim form arrived, but this was not done.

8.2. The ET3 was sent in with no application to extend time.

8.3. It was the Claimant who pointed out that the ET3 was out of time, and the swift application to extend time reflected no credit on the Respondents.

8.4. The application did not contain a draft ET3 as the Rules require.

8.5. The email of 13 January 2021 gave specific reasons why the form was submitted late. These were that it was so short as not really to matter; that they *were "unable"* to comply with the 28 day limit because the claim was received only 3 working days before the firm closed for Christmas and the 4th Respondent did not return to work before the day on which the ET3 had to be filed. These were no reason at all.

8.6. The reason given in the email of 13 January 2021 was not the reason at all – which was later given that the date had been entered in a dairy on the wrong date. The first response read that the ET3 had been filed late as a deliberate act.

8.7. The lateness is then described as a *"miscalculation"* in the witness statement of the 4th Respondent, and that then he recalculated it. There is no calculation that can lead to 13 January 2021 from the dates in this case. It is simply not a true explanation. The witness statement (at paragraph 7) expressly admits that *"I did not at that stage disclose my own error in calculating the date on which service was due."* Candour is essential in such a matter, and this was not candid. He did not say in his witness statement that he had not realised it was out of time when he filed the ET3.

8.8. The notice of claim clearly states that the last date is ***11 January 2021***, that part of the notice is all is in bold type, and the date is also italicised and underlined, as above. It could not be made any clearer. The notice states that the ET3 *"must"* be returned by that date and that if it is not, *"judgment may be entered against you"*.

8.9. Not only this, but the ET3 form itself states as the very first thing it says, in bold type **"This requires your immediate attention"** and *"If the form does not reach us by 11/01/2021 you will only be entitled to participate in any hearing to the extent permitted by the Employment Judge and a judgment may be entered against you…"*

8.10. The form was sent by post, so it was not overlooked as an email at a busy time (not that that this would be an excuse).

8.11. The form was sent to the firm and to each of the 3 individuals named as individual respondents. This was a failure by not one person, but by 3.

8.12. If the 4th Respondent was too busy or away, he was head of the firm's employment department with resources at his disposal (or he could have instructed Counsel).

8.13. The 4th Respondent had access to his work remotely. He could not have been going anywhere at the time (save perhaps for the period of a few days Christmas relaxation of restrictions) and he could have prepared it when at home.

8.14. The 4th Respondent is the senior partner of a firm which has multiple offices and over 140 employees, and he is head of the firm's employment department. He is to be expected to be able to deal with an ET3 in good time.

8.15. The Claimant's position as to the merits of the claim is very fully set out in the correspondence. The deficiencies of the Grounds of Resistance is very fully set out in that correspondence. Yet the Respondents had not addressed any of those points. Kwiksave Stores Ltd v Swain & Ors [1997] ICR 49 makes it abundantly clear that:

"It was incumbent on a respondent applying for an extension of time for serving a notice of appearance before a full hearing on the merits has taken place to ***put before the industrial tribunal all relevant documents*** *and other factual material* ***in order to explain*** *both the non-compliance with Rule 3 of the Industrial Tribunal's Rules of Procedure 1993 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 the one against the other, and to reach a conclusion which was objectively justified on the grounds of reason and justice; that it was important when doing so to balance the possible prejudice to each party;… [and in the instant case the chairman had failed] to take into account the merits of the employer's defence or to balance the prejudice it would suffer if he withheld the extensions as against the prejudice which the applicants would suffer if the extensions of time were granted."* [Emphasis added.]

8.16. Not only had they failed to deal with the merits (or otherwise of their defence) but they had failed to provide any documents to show that it had any weight – all the documents had come from the Claimant.

8.17. The deficiencies in the defence were set out, and the letter setting out the issues also stated that the pleading was generic and lacking in detail, and this had not been addressed.

8.18. The Claimant had been furloughed and there was no reason to dismiss her, as she was (almost) cost free while furloughed (and was accepting the capped amount of £2,500 a month, much less than her net pay of £3,434 a month). There was no genuine reason why she should be dismissed so swiftly if there were not an ulterior motive.

8.19. One of the reasons given was conduct, which was because she had asked questions about the lack of fairness in her dismissal.

8.20. She was given 4 weeks' notice expiring 31 July 2021 (so given at the end of June 2020) but a video podcast/vlog on the 1st Respondent's website on 21 May 2021, presented by the 4th Respondent himself, was all about what he described as the *"big and unexpected bang"* of the stamp duty land tax holiday. There was not a reduction in residential conveyancing, but a boom in it at the time of the notice of redundancy and dismissal. Judicial knowledge could be taken of this fact, and there was in the bundle press coverage of it at the relevant time.

9. The issues about the stated lack of merit in the defence were identified:

9.1. The Claimant had a mobility clause in her contract requiring her to move to anywhere within a 29 mile radius of Colchester (clauses 8.2 and 8.3). That encompassed the Billericay and Chelmsford offices. No attempt had been made to relocate her.

9.2. A salaried partner, Paul Tawn, had twice been retrained, the last time being from criminal work to immigration. These were vastly different fields of work, and not all immigration work involved hearings. Yet they had not considered the modest amount of retraining required to bring the Claimant up to speed with private client work – wills and probate – which she had carried out in the past.

9.3. People were being recruited for the firm, and within a few months even qualified solicitors to undertake conveyancing at Chelmsford (and the evidence was in the bundle of documents).

9.4. There was no attempt to justify the pool of one, when there were many conveyancing solicitors in the firm. That there was only one in Colchester and that the 1st Respondent's position was that they would cease to do residential conveyancing there was no answer to the relocation and retraining points.

9.5. The 1st Respondent said that the Claimant had not met her financial targets. The Claimant had comprehensively shown this to be wrong, in her solicitor's letters, but the Respondents had provided nothing to support this assertion.

9.6. The Respondents relied on a claimed attendance record, but provided no evidence of it, nor any reason why reasonable adjustments were not possible.

9.7. There could be no doubt about the fact of disability, given the pages of GP notes provided in the bundle of documents provided by the Claimant (on which the Respondents had not commented).

9.8. Nor was it any secret, for the Claimant had sought counselling help (to the knowledge of the Respondents) through a workplace scheme for precisely this reason.

10. I do not consider the reasons given by the 4th Respondent to be good reason to extend time. (But even so, I would have allowed the application if the assessment of balance of prejudice and merits of defence had so indicated.)

11. This is for a variety of reasons:

11.1. A solicitor faced with a claim of unfair dismissal, and even more so with a claim for unlawful discrimination, is to be expected to give that claim the utmost attention (if for no other reason than that so to discriminate is professional misconduct).

11.2. The 4th Respondent is head of the firm's employment department. He really should have known better than to miss the limitation date in a claim against himself.

11.3. There was no *"miscalculation".* He would have been better being candid and owning up immediately to a simple diary mistake. The various explanations offered lack candour. It is not acceptable to say, as in effect he said on 13 January 2021 that he had not thought it worth applying because the delay was so short, and he was busy (when he was on 3 weeks holiday, and with remote access to his firm's computer systems).

11.4. The Covid related excuse is without merit. In essence it is that the pandemic has caused much work to adapt practice. The 4th Respondent was able to take a 3 week break over the Christmas / New Year period, which makes that reason risible.

11.5. The original email of 13 January 2021 was not candid. The reasons were set out by the Claimant's solicitor and Counsel.

11.6. The witness statement is similarly flawed. It states that he did not originally state the reason the date was missed, but not why. It repeats the *"miscalculation"* excuse.

11.7. The 2nd and 3rd Respondents could have salvaged the position had either of them taken the trouble to check with the 4th Respondent that he was going to submit the response in time. As they are respondents in person one might think that they would want to have some input to the document, or at least approve it, but it is not said that they did either.

12. The merits of the claim are apparent from reading it. The criticisms of the deficiencies in the merits of the defence are detailed above, and they are all

weighty. It is incumbent on a respondent seeking an extension of time (after the time has expired) to show that the defence they wish to advance has merit. None of the criticisms made by the Claimant were addressed by the Respondents. No documents were produced by them. This is not to require the production of a full document bundle, but some documentary evidence supportive of their defence. They had 3 months to do so. The matters that I find the most troubling about the defence are the absence of evidence that the 1st Respondent considered relocation or retraining the Claimant (but did for others), and the web blog of 21 May 2021 which is all about the "big and unexpected bang" (in the words of the 4th Respondent in that broadcast of the stamp duty land tax holiday) in the reopening of the housing market. The absence of any evidence or pleading to show that there is anything in the claimed failure to reach performance targets is also important: the Claimant set out her position in some detail as to why this was not so. Claiming that the conduct of the Claimant was relevant in the decision to dismiss her (para 17) was not detailed, but Mr Myers accepted that this was the Claimant's objection to the process being followed. This does not seem a sound reason to justify dismissal for redundancy: any employee facing redundancy is fully entitled to put her case robustly.

13. *Kwiksave* clearly sets out (the paragraphs are unnumbered) in the section headed *"The discretionary factors"* that the decision on an application such as this *"will involve some consideration of the merits of his* [the Respondents'] *case".* For the reasons given in this judgment there a series of reasons (and absence of documentation) why the Respondents have not met the obligation set out in Kwiksave: *"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."* The Respondents *must show* that the defence has merit. The Respondents have not done so, even though the points of criticism were spelled out in detail and with clarity by the Claimant's solicitor well in advance of this hearing.

14. The medical records clearly show that the Claimant is very likely to succeed in showing that she has the disability as set out in the claim form. Her contention set out in her particulars of claim, that she told the 3rd Respondent (human resources manager of the 1st Respondent) is not addressed in the Grounds of Resistance (para 12 is limited to asserting that in a pre employment questionnaire the box *"No"* was ticked in answer to the question *"Do you consider yourself to have a disability?"* Someone not seeking reasonable adjustments may have any number of reasons not to tick *"Yes"* before starting employment and then once in post disclose this to the human resources manager. There is a lack of engagement in the defence with the Claim that the Respondents knew of her disability, despite the 3 month opportunity to amend or expand on the defence before this hearing. Indeed at 21(d) it is accepted that in January 2020 the Claimant had sought assistance from the firm in relation to the disability.

15. The holiday pay and notice pay claims are modest, and are technical cases based on how they are to be calculated. There is no great prejudice to the Respondent in refusing the application to extend time to defend them.

16. I have evaluated the balance of prejudice. The Claimant succeeds and saves the time and cost of a case without risk, and the inevitable delay of 12 months or so until a full hearing. Given her disability that would inevitably be a great strain. This is a considerable advantage to her. The Respondent loses the opportunity to defend. Discrimination cases can result in very large awards of compensation. In this case the Claimant was able to get a new job in residential conveyancing quickly, and at a similar salary (which is also supportive of the submission that the conveyancing market was buoyant at the time the Claimant was dismissed). This is not a case which will result in a huge award. The 1st Respondent is a substantial firm of solicitors, and it is not suggested that the financial repercussions of this decision will be overly harmful to the firm. In so far as this decision results in reputational damage to the Respondents they have brought this on themselves, and it is no reason to permit them to defend the case. I conclude that the balance of prejudice argument is not one that should lead to the application succeeding. I note also that the Claimant does not suggest that the Respondent be restricted in any way in dealing with the remedy hearing. While stopping Respondents from defending is terminal to a defence, a Claimant who fails to meet the time limit in filing a claim is subject to the same outcome if not able to show good reason why time should be extended. There is little if any difference in principle.

17. Time limits are not aspirational but are deadlines, and parties are expected to meet them, the more so for respondents who are solicitors. This is even more so for an employment law solicitor who is also the senior partner of the firm, and a personal respondent. It is seldom wise to leave the filing of a pleading until the last minute, which is what the 4th Respondent thought he was doing. I repeat that whatever the failings of the Respondents the application would have been allowed had the Respondents met the *Kwiksave* test (and I note that the successful respondent in *Kwiksave* had behaved appallingly).

18. I do not consider the technical criticism of the application to be correct. The email of 13 January 2021 is clearly headed as an application to extend time. There was no point in sending a draft ET3 with it, as it had already been submitted. The point of that rule is to make sure that someone wanting to defend sets out exactly what that defence is, and that was set out in the ET3 sent in earlier that day.

19. I record that I have considered all the other case law cited to me by both sides, who agreed that there was no unusual point of law in this application.

20. The Claimant sought costs of £8,101.80, including vat. A schedule of costs had been provided, but only minutes before the start of the hearing. While costs do not follow the event in Employment Tribunals, I consider that the way this application has been dealt with by the Respondents falls within Rule 76(1)(a) as “otherwise unreasonably”. A substantial firm of solicitors which has an employment team headed by one of the Respondents can reasonably be expected to deal with matters such as this competently and timeously, and this has not been the case in this application.

21. I decided to award the Claimant the costs incurred in defending this application, the amount to be decided at the remedy hearing.

Employment Judge Housego
Date: 13 April 2021