



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr D Benton

v The CGM Group (East Anglia) Limited

RECORD of a PRELIMINARY HEARING

Heard at: Cambridge (by CVP)

On: 10 June 2022

Before: Employment Judge Bloom

Appearances

For the Claimants: Miss S Bewley, Counsel

For the Respondent: Mr D Frame, Solicitor

JUDGMENT on PRELIMINARY ISSUE

1. The Respondent's application to extend time for presenting its Response fails and is therefore refused.
2. The Claimant was engaged as a "worker" by the Respondent pursuant to the provisions of Section 230(3) Employment Rights Act 1996.
3. The issue of whether or not the Claimant was "employed" by the Respondent shall be determined at the Substantive Hearing.
4. The Substantive Hearing shall take place at the Cambridge Employment Tribunal, over the course of two consecutive days on dates to be fixed.
5. The Respondent is only permitted to take any further part in these proceedings in order to make any representations concerning the issue of Remedy and to respond to any application for costs against the Respondent and / or any application for Wasted Costs against the Respondent's Solicitors.

REASONS

1. At this open Preliminary Hearing the Claimant was represented by Miss Bewley of Counsel. The Respondents were represented by their Solicitor, Mr Frame.
2. I had before me the pleadings in the case, i.e. the ET1 and the ET3. I also had a Bundle of Documents relevant to the issues to be determined at the Preliminary Hearing consisting of 131 pages. There was also a small 8 page Supplemental Bundle. The proceedings were conducted using the CVP (Cloud Video Platform) method. All parties therefore attended remotely. In addition to their representatives the Claimant attended in person and Mr Graham Masters an employee of the Respondent also attended. Neither gave nor were they required to give evidence. I did hear evidence on affirmation from Mr Frame.
3. The two issues to be determined at the open Preliminary Hearing were the following:-
 - 1) The Respondent's application to extend time to submit its Response; and
 - 2) To determine the Claimant's employment / worker status.
4. It was agreed that the first issue to be determined would be the Respondent's application to extend time to submit its Response to the Claim.
5. The Claimant's Claim was presented to the Employment Tribunal on 29 September 2020. The last day for the submission of any Response to the Claim was 23 December 2020. Prior to the presentation of the Claim the Claimant through his solicitors had engaged in correspondence with the Respondent regarding issues surrounding and following the Respondent's decision to terminate its "engagement" with the Claimant on or around 2 July 2020. I purposely do not make any reference here to "termination of employment" because the issue of the Claimant's "employment" still has to be determined.
6. On 17 September 2020 the Respondent submitted an email to the Claimant's Solicitor confirming that they had instructed Fosters Solicitors of Norwich to act on their behalf. Mr Frame is a Senior Associate with that firm. He is a Solicitor. He joined the firm in 2018. He qualified as a Solicitor in 2011. Mr Frame gave frank and honest evidence to the Tribunal. He accepts he specialises in employment law and has done so since he qualified. He accepted that his firm knew about the potential of litigation around the 17 September 2020 (page 106 of the Bundle). He received instructions from the Respondent to submit its Response to the Claim on 5 December 2020. He knew about the background before doing

so. He prepared various drafts of the Response of which the final version was sent to his client on 12 December 2020. Mr Frame recognises before me and recognised at the time that he was aware of the deadline to submit the Response on or before 23 December 2020.

7. Mr Frame informed me that he attended before an Employment Tribunal on 15 December 2020 conducting another case on behalf of a client. That case was adjourned and continued on 18 December 2020 and concluded at about 3:00 p.m. that afternoon.
8. On 18 December 2020 (a Friday) Mr Frame received final instructions from the Respondent. The final draft of the content of the Response was agreed. Mr Frame's firm closed for business at lunchtime on Wednesday 23 December 2020 for the Christmas/New Year break and returned to business on 4 January 2021.
9. Mr Frame told me that he did not recall seeing the Respondent's e-mail dated 18 December 2020 confirming the final version of the Response and did not check his e-mails on Saturday 19 or Sunday 20 December 2020. He was on leave on Monday 21 December 2020.
10. He accepts that he saw the e-mail from his client before 10:00 a.m. on Tuesday 22 December 2020. The final draft of the Response was prepared by himself by the conclusion of that day, i.e. Tuesday 22 December 2020.
11. Mr Frame did not submit the Response to the Employment Tribunal that afternoon. He fully conceded it was his fault for not doing so. He told me that he overlooked submitting the Response due to pressure of other work. He accepts he was in his office the morning of Wednesday 23 December 2020 and again failed to submit the Response to the Employment Tribunal.
12. Mr Frame has a computer diary which would send automatic reminders to him of time limits to e.g. submit documents to Tribunals.
13. He returned to his office on 4 January 2021. On either 6 or 7 January 2021 he checked the file. He then realised that the Response had not been submitted by 23 December 2020. He e-mailed the Tribunal on 7 January 2021 (pages 46 – 47 of the Bundle). The e-mail contained an application to the Tribunal under Rule 20 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 requesting an extension of time to submit the Response. The e-mail contained an admission by Mr Frame that he had failed to submit the Response on time as a result of his own error. Mr Frame's omissions were further compounded by the fact that he did not copy that e-mail, i.e. the application to extend time to the Claimant's solicitors. This omission was a breach of Rule 92 of the 2013 Regulations. Mr Frame again accepted that omission was due to his own error. In the meantime, the Claimant's Solicitors had been chasing the Employment Tribunal to obtain an update regarding progress of the Claimant's Claim. They subsequently became

aware of the 7 January 2021 application. They quite properly pointed out to the Employment Tribunal and to Mr Frame that they had not received that application. To rectify his error, Mr Frame renewed his application on 11 February 2021 and on this occasion he copied in the Claimant's solicitors (pages 48 – 50 of the Bundle). Mr Frame informed me that it did not occur to him at the time he first presented his application on 7 January 2021 to copy in the Claimant's solicitors and again failed to check his file to ensure that he had done so.

14. On or around 11 February 2021 Mr Frame informed me that he advised his supervising partner of his errors. He was unaware when giving evidence before me as to whether or not his firm of Solicitors had reported the issue to their insurers. Mr Frame concluded his evidence to me by saying – *“it was completely my fault. I can only apologise”*.
15. Mr Frame was cross-examined by Miss Bewley and Miss Bewley and Mr Frame subsequently made closing submissions to me. Miss Bewley submitted that if I granted the application in these circumstances the Claimant would suffer more prejudice than the Respondent. The case had been going on now for almost two years. She further submitted that the content of the draft Response failed to deal with the merits of the Respondent's case with regard to the Claimant's submission that he was an “employee”; a “worker” and had made a protected disclosure, i.e. that he was “a whistle-blower”. The application provided no valid reason for the delay in presenting the Response. In his final submission to me Mr Frame said that he *“held his hands up”*. He did not try to hide behind his negligence. He had had a bad year and was overworked. He submitted that by granting the application the Claimant would suffer no prejudice but his client would do so.
16. In reaching my Judgment I have considered fully the provisions of Rule 20 and Rule 21 Schedule 1 of the 2013 Regulations. I have a discretion as to whether or not to grant the application. Rule 20 is silent as to the test I should apply when considering the application. However, I take note of Rule 2, i.e. the overriding objective to deal with cases fairly and justly. I have also considered the Employment Appeal Tribunal's Judgment in Kwik Save Stores Limited v Swain (1997) ICR 49. That Judgment reminds me of the importance of when exercising a discretion to take into account all relevant factors, weighing and balancing them one against the other and reaching a conclusion which is objectively justified on the grounds of reason and justice. I have considered the Respondent's explanation as to why the application is required. I have considered the issue of prejudice to either party depending on whether or not the application is granted or refused and finally I have considered the merits of the defence.
17. As far as merits of the defence are concerned, as I have already noted, the Respondent's draft Response makes no reference to any admission or otherwise that the Claimant was engaged as a “worker” with the Respondent for the purposes of Section 230 (3) Employment Rights Act 1996. It deals solely with the issue of the Claimant's alleged employment

status. Determination of whether or not the Claimant was a “worker” is central to the Claim and the Response fails to deal with that important issue. As far as prejudice is concerned, in my Judgment the Respondent suffers no prejudice if the application is refused. Mr Frame has frankly admitted that the reason the Response was not presented on time was solely as a result of his negligence. That negligence was compounded by the fact that the application dated 7 January 2021 had to be renewed again on 11 February 2021. Any loss that may or may not be suffered by the Respondent in these proceedings will clearly be recoverable by pursuing a Claim against Mr Frame’s firm/their professional indemnity insurers. The Claimant will be prejudiced if the application is granted. He will continue to expend further costs on issues such as his worker status/employee status and the merits of his Claim having to be determined at future Hearings. The delay in the presentation of the Respondent’s Response is a serious one and is solely down to Mr Frame’s negligence.

18. Exercising my discretion therefore and taking into account all the above factors, the application made by the Respondent to extend the period of time in which to present its Response is refused.
19. Having given Judgment on the above matter, Mr Frame took further instructions from his client. Having done so, he informed me that the Respondent now conceded that the Claimant was “a worker” pursuant to the provisions of Section 230 (3) Employment Rights Act 1996. They do not concede that the Claimant was “an employee” and that issue must now be determined at a further Hearing. There was insufficient time at the conclusion of this Preliminary Hearing to deal with the whole of that matter.
20. I informed Mr Frame and therefore the Respondent that their ability to continue to participate in these proceedings shall be limited only to making appropriate representations if and when the issue of Remedy becomes relevant and/or to respond to any future application that the Claimant may make in respect of either a costs application against the Respondent themselves or a wasted Costs Order against Mr Frame’s firm. For the avoidance of any doubt, they are not permitted to participate in any further way.
21. The Claimant’s Claim shall proceed to a Substantive Hearing. At the commencement of the Substantive Hearing the issue of whether or not the Claimant was “an employee” shall be determined and thereafter the merits of his Claim. I make below appropriate Case Management Orders.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. List of Issues

1.1 The Claimant's representative shall submit to the Employment Tribunal and to the Respondent's representative a full List of Issues to be determined at the Substantive Hearing and they shall do so on or before **29 July 2022**.

2. Schedule of Loss

2.1 The Claimant shall submit a Schedule of Loss together with all supporting documents to the Employment Tribunal and to the Respondent's representative, on or before **29 July 2022**.

3. Bundle of Documents

3.1 The Claimant's representative shall prepare a Joint Bundle of Documents to be used at the Substantive Hearing. They shall ensure that four copies are brought to that Hearing. The Bundle shall be prepared and copied to the Respondent's representative, on or before **16 September 2022**.

4. Witness Statement

4.1 The Claimant shall provide a Witness Statement, a copy of which shall be submitted to the Employment Tribunal and to the Respondent's representative, on or before **7 October 2022**.

5. Final Hearing

5.1 The case shall be listed to be heard at the **Cambridge Employment Tribunal, Cambridge County Court, 197 East Road, Cambridge, CB1 1BA**. It shall be conducted in person. The Hearing will take place before an Employment Judge sitting with two Members. It is a detriment Claim as well as a Claim relevant to solely a dismissal. The Hearing shall take place on dates to be notified to the parties by the Employment Tribunal.

5.2 The parties shall have **14 days** in which to submit any dates to avoid to the Employment Tribunal.

6. Costs Application

6.1 Any application for costs arising from this Preliminary Hearing is reserved to the Substantive Hearing.

7. Other Matters

- 7.1 The above orders were made and explained to the parties at the Preliminary Hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.
- 7.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
- 7.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the Tribunal's permission except that no variation may be agreed where that might affect the Hearing date. The Tribunal must be told about any agreed variation before it comes into effect.
- 7.4 **Public access to Employment Tribunal decisions**
All Judgments and Reasons for the Judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.
- 7.5 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**
- 7.6 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and / or (d) awarding costs in accordance with rule 74-84.**

9 August 2022

Employment Judge Bloom

Sent to the parties on:

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For the Tribunal Office.