THE INDUSTRIAL TRIBUNALS

CASE REF: 17585/19

CLAIMANT: **Gary Smyth**

RESPONDENTS: **Glentoran Recreation Company Limited trading as Glentoran Football Club**

JUDGMENT

The decision of the tribunal is that the respondent's application for an extension of time to present its response to the claimant's claim is granted.

CONSTITUTION OF TRIBUNAL

President (Sitting Alone): **Eileen McBride CBE**

APPEARANCES:
The claimant was represented by Ms J Blair, Solicitor, of J Blair Employment Law Solicitors.

The respondent was represented by Ms R Best, Barrister at Law, instructed by Ms S Blair, Solicitor, of A & L Goodbody Solicitors.

1. The purpose of this Preliminary Hearing was to consider the respondent's application for an extension of time to present its response to the claimant's claim.

2. On 12 August 2019 the claimant presented a claim to the industrial tribunal in which he made complaints of unfair dismissal, breach of contract and unlawful deduction of wages against the respondent. A copy of the claim form, response pack and explanatory letter were sent, on behalf of the Secretary to the tribunals, to the respondent on 11 September 2019. In accordance with rule 4(1) of the Industrial Tribunal Rules of Procedure 2005 (hereinafter referred to as the 2005 Rules), which were in operation until 27 January 2020 when The Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020, (hereinafter referred to as the 2020 Rules) came into operation, the respondent had 28 days in which to present its response. The 28 days expired on 11 October 2019. The respondent presented its response on 11 November 2019 which was one month outside the time limit.

3. Under the 2005 Rules, where a response had been presented outside the 28 day time limit, a respondent could apply for an extension of the time limit in accordance with rules 4(1), (5) and (5B).

Rule 4(1) provided:-

> *If the respondent wishes to respond to the claim made against him, he must present his response to the Office of the Tribunals within 28 days of the date on which he was sent a copy of the claim. The response must include all the relevant required information. The time limit for the respondent to present his response may be extended in accordance with paragraphs (5) to (5C).*

Rule 4(5) provided:-

> *The respondent may apply for an extension of the time limit within which he is to present his response and he must, at the same time as the application is sent to the Office of the Tribunals, provide all other parties with details of the application and the reasons why it is made and confirm in writing to the Office of the Tribunals that he has done so.*

Rule 4(5B) provides:-

> *If the application under paragraph (5) is presented to the Office of the Tribunals more than 28 days after the date on which the respondent was sent a copy of the claim, it must explain why the respondent did not comply with the time limit and be accompanied by a completed response which includes all the required information specified in paragraph (4).*

4. Although the respondent presented its response on 11 November 2019 (one month after the time limit expired), it did not apply for an extension of the time limit within which to present its response until 15 January 2020. A Case Management Discussion was listed on 15 January 2020 to consider the respondent's application for its response to be accepted together with the claimant's objections thereto. At the outset of that Case Management Discussion, the parties made a joint application for it to be abandoned and for a pre Hearing Review to be listed at a later date as the respondent intended to adduce oral evidence in support of its application. The joint application was granted, and the parties notified the tribunal on 17 January 2020 that they had agreed that the pre Hearing Review should be listed for 24 February 2020.

5. The hearing proceeded on 24 February 2020. However by that date, as pointed out by Ms Best, the 2005 Rules had been revoked and replaced by the 2020 Rules which had come into operation on 27 January 2020. Insofar as this application was concerned, the pre Hearing Review was now called a Preliminary Hearing in accordance with the 2020 Rules. Rule 4(5C) of the 2005 Rules which provided:-

> *"The chairman shall only extend the time limit within which a response must be presented if he is satisfied that it is just and equitable to do so"*

had been revoked and replaced by rule 18(3) of the 2020 Rules which provides:-

> *"An employment judge may determine the application without a hearing".*

Ms J Blair submitted on behalf of the claimant, that the factors to be taken into account by the tribunal under rule 4(5C) were those set out by the Employment Appeal Tribunal in *Kwik Save Stores Ltd v Swain and Others (1997) ICR 49*. Ms Best accepted that the factors laid down by the Employment Appeal Tribunal in the Kwik Save Stores Ltd case should be followed. Ms Best also relied on the further judgement of the Employment Appeal Tribunal in *Moroak t/a Blake Envelopes v Cromie (2005) IRLR 535, (2005) ICR 1226* and *Hutchison v Westward Television Ltd (1977) IRLR 69, (1977) ICR 279 EAT*.

6. Although rule 18(3) of the 2020 Rules, which gives tribunals the power to extend the time limit to present a response, does not include the *"just and equitable*" test laid down in rule 4(5C) of the 2005 Rules, Rule 2 of the 2020 Rules requires tribunals to give effect to the overriding objective of dealing with cases fairly and justly when interpreting or exercising any power under the 2020 Rules. The tribunal is therefore satisfied that the principles set out in the *Kwik Save Stores Ltd, Moroak* and *Hutchison* cases above, are still applicable when determining an application under the 2020 Rules. In Volume 4 of Harvey on Industrial Relations and Employment Law, Section P1, paragraph 346, it is stated that the principles in the *Kwik Fit* and *Moroak* cases are the principles to be applied when considering an application for an extension of time for presenting a response in the equivalent rule in the 2013 Rules in Great Britain.

7. In relation to the EAT judgment in *Kwik Save Stores Ltd v Swain and Others (1997) ICR 49*, Ms J Blair referred the tribunal to page 55 of Mummery J's judgment at which he stated under the heading:-

> *"**The discretionary factors***
>
> *… The process of exercising a discretion involves taking 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**."***

With reference to Mummery J's judgment, Ms J Blair submitted that:-

> An employment judge should always consider:-
>
> (i) the explanation supporting an application for an extension of

time. The more serious the delay, the more important it is that the employment judge is satisfied that the explanation is honest and satisfactory;

(ii) the merits of the defence. Justice will often favour an extension being granted where the defence is shown to have some merit; and

(iii) the balance of prejudice. If the employer's request for an extension of time was refused, would it suffer greater prejudice than the employee would if the request was granted?

8. Ms Best agreed that that was an accurate summary of the principles set out by Mummery J. However she did not agree with Ms J Blair's oral submission that the tribunal was entitled to treat the respondent's delay in presenting its response, as starting from the 13 September 2019 the date on which the claimant's claim was sent by the tribunal office to the respondent, rather than the 11 October 2019, which was the date on which the time limit for presenting the response expired. In support of her contention, Ms Best referred the tribunal to the judgment of the EAT in the *Moroak* case and to Volume 4 of Harvey on Industrial Relations and Employment Law, Section P1, paragraph 346, at which it is stated:-

> "The investigation (by the tribunal) does not, however, require an explanation from the respondent as to why he did not present his response at an earlier stage in the 28 day period …"

Ms Blair did not present any authority to the contrary and the tribunal is satisfied that the period of delay commences on the date of the expiry of the time limit for presenting a response.

9. The tribunal considers that it would be helpful to set out the following additional dicta of Mummery J. in the *Kwik Save Stores Ltd* case.

Pages 53 and 54

> "***The importance of time limits***
>
> *We agree with the regional chairman that time limits are laid down as a matter of law, not by the tribunals themselves, and that "they are there for good reason because of the nature of industrial tribunal hearings". This is an important factor in the exercise of the discretion to grant an extension of time … as Sir Thomas Bingham M. R. said in Costellow v Somerset County Council (1993) 1 W.L.R. 256, 263:-*
>
> *"The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious despatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met."*

Those observations, made in the context of ordinary civil litigation, apply with even greater force in the case of the procedure in industrial tribunals, which were established to provide a quick, cheap and effective means of resolving employment disputes …"

Page 54

"Control of Procedure by industrial tribunals

Under their Rules of Procedure, industrial tribunals have many wide discretions.

…

The question of the weight to be given to the various factors and the balancing of them one against the other is for the industrial tribunal …"

Pages 55 - 56

"The discretionary factors

The explanation for the delay which has necessitated the application for an extension is always an important factor in the exercise of the discretion. An applicant for an extension of time should explain why he has not complied with the time limits. The tribunal is entitled to take into account the nature of the explanation and to form a view about it. The tribunal may form the view that it is a case of procedural abuse, questionable tactics, even, in some cases, intentional default. In other cases it may form the view that the delay is the result of a genuine misunderstanding or an accidental or understandable oversight. In each case it is for the tribunal to decide what weight to give to this factor in the exercise of the discretion. In general, the more serious the delay, the more important it is for an applicant for an extension of time to provide a satisfactory explanation which is full, as well as honest.

In some cases, the explanation, or lack of it, may be a decisive factor in the exercise of the discretion, but it is important to note that it is not the only factor to be considered. The process of exercising a discretion involves taking 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. An important part of exercising this discretion is to ask these questions: what prejudice will the applicant for an extension of time suffer if the extension is refused? What prejudices will the other parties suffer if the extension is granted? If the likely prejudice to the applicant for an extension outweighs the likely prejudice to the other party, then that is a factor in favour of granting the extension of time, but it is not always decisive. There may be countervailing factors. It is this process of judgement that often renders the exercise of discretion more difficult

than the process of finding facts in dispute and applying to them a rule of law not tempered by discretion.

It is well established that another factor to be taken into account in deciding whether to grant an extension of time is what may be called the merits factors identified by Sir Thomas Bingham M.R. in Costellow v Somerset County Council (1993) 1 W.L.R. 256, 263:-

> *"a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate."*

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. If no extension of time is granted for entering a notice of appearance, the industrial tribunal will only hear one side of the case. It will decide it without hearing the other side. The result may be that an applicant wins a case and obtains remedies to which he would not be entitled if the other side had been heard. The respondent may be held liable for a wrong which he has not committed. This does not mean that a party has a right to an extension of time on the basis that, if he is not granted one, he will be unjustly denied a hearing. The applicant for an extension has only a reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner. That will involve some consideration of the merits of his case.

Mr. Hand cited the decision in Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc. [1986] 2 Lloyds Rep. 221 as illustrating the importance of considering the merits factor. That was a case of an application to set aside a default judgement. The Court of Appeal held that, when defendants, who had initially made a deliberate decision not to defend the plaintiff's claim, later applied to set aside the judgment obtained in default, it was necessary for the court, in the exercise of its discretion, to consider whether the defendants had merits, whether they had a real prospect of success in defending the case. It was for the court to form a provisional view about the possible outcome of the case. That was a necessary exercise because one of the 'justice' factors in the exercise of a discretion is that there should normally be a proper adjudication, i.e. a decision after hearing evidence and arguments from both sides.

In our view, similar considerations apply if an industrial tribunal is minded to refuse an extension of time which will have the effect of denying a respondent a hearing on the merits…"

10. The tribunal proceeded to consider the discretionary factors, namely:-

A. Explanation

B. Merit

C. Prejudice

A. Explanation

10.1 The respondent's explanation for not presenting its response within the time limit which expired on 11 October 2019 was that:-

(a) it did not receive the claim form which had been sent by the tribunal office;

(b) the claim form only came to its attention by a third party (the Labour Relations Agency) after the time limit for presenting a response had passed; and

(c) there were a number of unfortunate administrative errors which left correspondence unanswered by the tribunal office.

10.2 The claimant contended that the first two parts of the respondent's explanation were not credible and that the third part was not relevant to the respondent's delays in presenting its response and in making its application for an extension of the time limit for doing so.

10.3 The tribunal heard evidence from Mr Jess and Mr Rea in support of the first two parts of its explanation. Mr Jess is a volunteer director of the respondent and does not attend the club on a daily basis. Mr Rea is the respondent's administrative secretary. He has held that position on a full time basis since 1 August 2019 and as a volunteer for over five years before that. The tribunal considered their evidence together with the correspondence to which it was referred by Ms Best and Ms J Blair during the hearing and their written and oral submissions. Having considered those matters the tribunal found the following relevant facts.

10.3.1 On 7 June 2019, Ms J Blair, the claimant's solicitor, sent a pre claim letter to Mr Henderson who is the chairman of the respondent on a volunteer basis. In the final paragraph of her letter, Ms Blair stated:-

> "Unless we receive within 7 days of the date hereof an acceptable proposal to compensate our client, we are instructed to issue proceedings against the club."

10.3.2 Mr Henderson replied to Ms J Blair, by letter dated 14 June 2019 in which he stated:-

> "We wish to acknowledge receipt of your letter dated

7th June 2019, posted 8th June 2019 and will respond to you when we have considered its contents. Due to the office not being accessed at this time of year, your letter was only collected yesterday.

We will seek to revert to you in due course."

10.3.3 Mr Henderson had not reverted to Ms J Blair by 12 August 2019 and on that date she presented a claim to the industrial tribunal on behalf of the claimant. The claim contained complaints of unfair dismissal, breach of contract and unlawful deductions of wages against the respondent.

10.3.4 On 13 September 2019, the tribunal office sent a copy of the claimant's claim form, a response pack and a letter from the acting Secretary to the respondent. The acting Secretary's letter informed the respondent, inter alia, that if its response was not received by 11 October 2019 and an extension of time had not been agreed by an Employment Judge, it would not be entitled to resist the claimant's claim and a default judgment could be issued against it.

10.3.5 As set out in paragraph 10.3 above, Mr Rea has been a full time administrative secretary to the respondent since 1 August 2019. He was at work throughout September and October 2019. One of Mr Rea's duties involves collecting the mail from the respondent's post box, bringing it to his office, sorting it and distributing it to the relevant persons so that it can be dealt with. The post box is situated on the back of the main front door into the stadium. There is an opening on the front door through which letters can be deposited. The post box is locked at all times. There are two sets of keys to the post box both of which are held by Mr Rea.

10.3.6 Another one of Mr Rea's duties is to open all mail that has been addressed to the respondent club rather than to a named individual. If Mr Rea considers it to be important, he is required to contact Mr Henderson, who is the chairman on a volunteer basis, immediately by telephone or to text to let him know it is there or to give it to Mr McDermott, the club manager, if he is in his office. Neither Mr Henderson whose other work requires him to travel or Mr McDermott attend the club on a daily basis.

10.3.7 At some time between Tuesday 8 October 2019 and Friday 11 October 2019, Mr Rea collected a letter dated 7 October 2019 from the Labour Relations Agency from the post box. Mr Rea could not remember the precise date on which he collected the letter from the post box because he did not write or stamp the date on which he collected mail from the

post box at the relevant time and because he had only been informed a few weeks before this hearing that he would be called as a witness. Mr Rea opened the letter because it was not addressed to a named individual. He considered it to be important because it referred to a claim having been made by the claimant against the respondent to an employment tribunal and he contacted Mr Henderson, the chairman, to inform him of it.

10.3.8 Mr Henderson and Mr Jess, a volunteer director, both attended the club on Saturday 12 October 2019 because the respondent had a match that day. Mr Rea gave the letter from the Labour Relations Agency to Mr Henderson. The letter was from the Agency's Conciliation Officer who had been assigned to the case. It indicated that the Labour Relations Agency had received a copy of a claim by the claimant against the respondent to an employment tribunal and that they had a legal duty to help the parties in tribunal cases to settle their differences without the need for a tribunal hearing. As the letter was not from the tribunal office, it did not contain any information about the requirement for the respondent to present a response or to the fact that the time limit for doing so would expire on 11 October 2019. Mr Henderson gave the letter to Mr Jess and asked him to look into it.

10.3.9 Mr Jess emailed a copy of the letter from the Labour Relations Agency to the respondent's previous solicitors on the following day (Sunday 13 October 2019) and sought advice from them in relation to it.

10.3.10 Following receipt of advice from the respondent's previous solicitors, sometime between Monday 14 and Friday 18 October 2019, Mr Jess contacted the Labour Relations Agency on 18 October 2019 and informed them that the respondent was not aware of any claim having been made by the claimant against the respondent. The Labour Relations Agency advised Mr Jess to contact the industrial tribunal office. The Labour Relations Agency also tried to send Mr Jess a copy of the claimant's claim form but due to computer difficulties the full copy did not get through to Mr Jess.

10.3.11 Following his contact with the Labour Relations Agency, Mr Jess sent an email to the tribunal office at 10.41 am on Friday 18 October 2019 in which he stated:

> "Good morning
>
> Refer the above case

> We received a letter dated 7 October from Labour Relations Agency regarding the above case. I have asked LRA for copy of full claim form however due to computer issues they have a problem in providing a full copy
>
> Can I request that you reply to this email address with the fill (sic) claim form submitted?
>
> Thanks for your help in this matter to allow us to progress
>
> Regards
>
> Colin Jess"

10.3.12 Mr Jess received an automated acknowledgement of receipt from the tribunal office at 2.05 pm on that same day but no claim form. Mr Jess therefore sent a further email to the tribunal Office at 2.56 pm on that same day, in which he stated:

> "Thank you for confirming receipt. Can you forward to me as soon as possible so we can consider our action?
>
> Thanks
>
> Colin"

Mr Jess received an automated acknowledgement of receipt from the tribunal office at 2.58 pm and, at 3.16 pm on that same day, i.e. Friday 18 October 2019, he received a copy of the claimant's claim form which he sent to the respondent's previous solicitors later that same day.

11. Having considered the above facts together with the written and oral submissions of Ms Best and Ms J Blair and the agreed legal principles, the tribunal concluded that the respondent's explanation that:-

(a) it did not receive the claim form which had been issued by the tribunal office on 13 September 2019; and

(b) the claim form only come to its attention when it read the letter dated 7 October 2019 from the Labour Relations Agency;

was genuine. The tribunal also concluded that the respondent's explanation satisfactorily explained why its response was not presented within the 28 day time limit. In reaching those conclusions the tribunal considered that in light of:-

(a) the fact that, although Mr Henderson did not revert to Ms J Blair about the substance of her pre claim letter, he did acknowledge receipt of it promptly (see paragraph 10.3.2 above); and

(b) the prompt way in which Mr Henderson and Mr Jess reacted when they read the letter dated 7 October 2019 from the Labour Relations Agency (see paragraph 10.3.8 - 12 above) even though the said letter did not contain information about the time limit for presenting a response;

it is unlikely that the respondent would not have presented a response to the claimant's claim within the time limit if it had received the claim form which had been issued by the tribunal.

12. The third part of the respondent's explanation was that there were a number of unfortunate administrative errors which left correspondence unanswered by the tribunal office. The claimant submitted that this part of the respondent's explanation was not relevant to the respondent's delays in presenting its response and in making its application for an extension of the time limit in which to do so. The tribunal considered the evidence of Mr Jess together with the relevant correspondence and the written and oral submissions of Ms Best and Ms J Blair. Having considered those matters the tribunal found the following additional relevant facts.

12.1 On Tuesday 22 October 2019, following receipt of the claimant's claim form on the afternoon of Friday 18 October 2019 from Mr Jess (see paragraph 10.3.12 above), the respondent's previous solicitors sent emails, which had been typed on 21 October 2019, to the tribunal office and to Ms J Blair. The emails informed them that they had been instructed on behalf of the respondent and that they intended to lodge a response to the claimant's claim form. The respondent's previous solicitors also asked the tribunal office to "please confirm if a Default Judgment has been entered in the matter as yet?"

12.2 The case file was referred to an Employment Judge on 22 October 2019 for a direction in relation to Mr Jess' two emails, dated 18 October 2019, seeking a copy of the claimant's claim form. That was because, although the tribunal office had already replied to Mr Jess by email, dated 18 October 2019, and had attached a copy of the claim form, the response pack and the acting Secretary's letter to it, the tribunal office's email dated 18 October 2019 had not been placed on the case file. Nor had the respondent's previous solicitors' email, dated 22 October 2019 (see paragraph 12.1 above), been added to the file before the Employment Judge issued a direction on the 23 October 2019.

12.3 The result of that was that the tribunal office sent Mr Jess a further copy of the claim form, the response pack and the acting Secretary's letter on 24 October 2019. The tribunal office also sent Mr Jess a copy of rule 4(5) and informed him that it explained what is required when a

response is late. However, as the respondent's previous solicitors' email, dated 22 October 2019, had not been referred to the Employment Judge, the respondent's previous solicitors did not receive a response to their query as to whether or not a default judgment had been made.

12.4 On 25 October 2019, Ms J Blair acknowledged receipt of the respondent's previous solicitors' email dated 22 October 2019 (to which their email, dated 21 October 2019, was attached) and stated:-

> "We would be obliged if you would confirm by what date the ET3 is to be lodged or if the deadline has passed, whether you intend to apply for an extension to lodge same.
>
> If the latter, please set out the grounds upon which the extension is sought.
>
> We look forward to hearing to hearing from you."

12.5 On Friday 8 November 2019 the respondent's previous solicitors sent the tribunal office a reminder in relation to their query, dated 22 October 2019, about whether a default judgment had already been made. Apart from an automated response, the tribunal office did not respond to the reminder. On that same date, the respondent's previous solicitors also sent Ms J Blair a further email in which they thanked her for her email dated 25 October 2019 and stated:-

> "We can confirm that papers are presently with Counsel for the purposes of drafting a response to your ET1 claim form. We have been informed that the deadline for lodging same has passed however our clients were only recently notified by Labour Relations that a claim had been lodged by your client. Our client did not receive a copy of the claim form from the Tribunal. We have advised the Tribunal of the position and put the Tribunal on notice we intend to lodge a late response.
>
> We trust this clarifies."

12.6 On Monday 11 November 2019, the respondent's previous solicitors presented a response to the claimant's claim on line. They also sent a copy to Ms J Blair which she received approximately one week later. However they did not make an application for an extension of time in which to present the response.

12.7 On 14 November 2019, the respondent's previous solicitors sent the tribunal office a further reminder in relation to their query as to whether a default judgment had been made but, apart from a further automated response, received no reply.

12.8 On 21 November 2019, Ms J Blair sent an email to the tribunal office,

which she copied to the respondent's previous solicitors, in which she stated, inter alia, that she had received an email from the respondent's previous solicitors on 22 October 2019 to inform her that they were instructed on behalf of the respondent. She also stated that she had replied on 25 October 2019 (see paragraph 12.4 above) to ask if the deadline for the ET3 had passed and, if so, what the date of the deadline was and the grounds for seeking an extension. In addition, she stated:-

> "We received a reply on 8th November 2019, in which the Respondent's representative confirmed they intended to make an application for an extension to lodge the Respondent's ET3. The email did not state the date on which the ET3 should have been lodged. Nor by this date (2.5 weeks after the original email) the application had still not been made".

12.9 On 22 November 2019 the respondent's previous solicitors sent a further email to the tribunal office in the following terms:-

> "We refer to the above and to our previous correspondence of 22 October and 8 November and note we have not heard from you. We ask you to note that a response was lodged on Monday 11 November.
>
> We confirm that our clients were first made aware of this claim when they received a copy letter from the Labour Relations Conciliation Officer. Upon contacting Labour Relations it became apparent that a claim form had been submitted by the claimant. However, when they were provided with a copy of the claim form and a covering letter from the Tribunal, which they had not received, it was clear they had missed the date for submission of a response. We notified you at the earliest possible stage advising of our involvement and advising of our intention to bring a late response. To date we have not received any correspondence from the Tribunal and therefore in order to avoid any further delay in the matter, we lodge (sic) a response via the Employment Tribunal website on 11 November 2019. We confirm a copy of the claim form has been forwarded to the claimant's representative."

12.10 On that same date i.e. 22 November 2019, the tribunal office was notified by the respondent's current solicitors that they had been instructed on behalf of the respondent.

12.11 On 27 November 2019, the respondent's previous solicitors sent a further email to the tribunal office in which they stated that they had not received a response to their previous correspondence and that the respondent's current solicitors had taken over conduct of the case on behalf of the respondent.

12.12 On 19 December 2019 the acting Secretary to the tribunal wrote to the respondent's previous solicitors, the respondent's current solicitors and to Ms J Blair, the claimant's solicitor. She informed them that a number of administrative errors had taken place in respect of which she apologised. She also sent the respondent's current solicitors a copy of her letter to the respondent's previous solicitors, in which she had informed them that a default judgement had not been made and that although, a response was presented on 11 November 2019 via the tribunal's on-line form, an application for an extension of time had not been received.

12.13 On 23 December 2019 Ms J Blair acknowledged receipt of the acting Secretary's email dated 19 December 2019 and stated:-

> "We note that there were administrative errors within the Tribunal office, nevertheless the primary fault appears to lie with the Respondent in that no application has been made to lodge the ET3 late. Rather it appears that it simply has been lodged late.
>
> The Claimant would contend that there are sufficient grounds for the ET3 to be rejected and a default judgement made against the Respondent.
>
> We would be grateful if this could be drawn to the Employment Judge's attention before he or she makes any directions in the matter."

12.14 Following receipt of that email from Ms J Blair, a Case Management Discussion was listed for 15 January 2020. The respondent's application for an extension of time for presenting its response was received from the respondent's current solicitors on that same date. As set out at paragraph 4 above, the Case Management Discussion was abandoned following the joint application of the parties for a Pre hearing Review to be arranged instead. That was because the respondent intended to adduce oral evidence in support of its application. At the request of the parties the Pre Hearing Review was arranged for and took place on 24 February 2020.

13. Having considered the above facts together with the written and oral submissions of Ms Best and Ms J Blair and the relevant legal principles of law, the tribunal concluded that the respondent's explanation for not making an application for an extension of time until 15 January 2020, just over three months after the time limit had expired, was unsatisfactory. In reaching that conclusion the tribunal took into account:-

(a) the importance of time limits as explained by Mummery J. in the *Kwik Save Stores Ltd* case;

(b) that, although the respondent and its previous solicitors acted promptly

after they received the Labour Relations Agency letter:

(i) in obtaining a copy of the claim form;

(ii) in notifying the tribunal office and Ms J Blair that they had not received the claim form which had been sent by the tribunal office and that they intended to lodge a response; and

(iii) in presenting the response on 11 November 2019;

and although they did not get a response to their query, dated 22 October 2019, as to whether a default judgment had been made until 19 December 2019, despite three reminders dated 8, 14 and 22 November 2019, it should have been reasonably clear to them that they ought to have lodged a precautionary application for an extension of time when presenting the response on 11 November 2019, as no default judgment had been issued to them by the tribunal office at that stage; and

(c) that, although the respondent's current solicitors were made aware on 19 December 2019, that a default judgment had not been made and that the respondent's previous solicitors had not made an application for an extension of time, they did not make an application for an extension of time until 15 January 2020.

B. Merit

Ms Best submitted that there was merit in the respondent's response and set out her reasons for doing so. The Tribunal does not consider it necessary to go into those reasons. That is because, although Ms J Blair made it clear that the claimant would be strenuously disputing the respondent's defence, she accepted that there was merit in it. The tribunal, having considered the claim form and the response form is satisfied that, although the claimant does strenuously dispute the respondent's defence, there is merit in it.

C. Prejudice

Ms Best submitted that the respondent would suffer much greater prejudice, if its application for an extension of time to present its response was not granted, than the claimant would suffer if the application was granted. Ms J Blair accepted that and the tribunal is satisfied that that would be the case.

Conclusion

17. The tribunal considered and balanced, on the one hand:

(a) the importance of time limits as explained by Mummery J in the *Kwik Save Stores Ltd* case; and

(b) that the respondent's explanation for not making an application for an extension of time until 15 January 2020 was unsatisfactory;

and on the other hand that:

(a) the respondent had provided a genuine and satisfactory explanation for failing to present its response within the time limit;

(b) the respondent had acted promptly after they received the Labour Relations Agency letter:-

(i) in obtaining a copy of the claim form;

(ii) in notifying the tribunal office and Ms J Blair that they had not received the claim form, which had been sent by the tribunal office, and that they intended to lodge a response; and

(c) in presenting the response on 11 November 2019:

(i) there is merit in the respondent's defence; and

(ii) the respondent would suffer much greater prejudice, if its application for an extension of time to present its response was not granted, than the claimant would suffer if the application was granted.

Having considered and balanced those matters, the tribunal concluded that it would be fair and just to grant the respondent's application for an extension of time to present its response to the claim having regard to the respondent's explanation, the merits of its defence and the prejudice it would suffer if its application was refused, and the application is therefore granted.

President:

Date and place of Hearing: - 24 February 2020, Belfast

Date the decision was issued and entered in the register: