

When time may/may not be extended for submitting a Response to an Employment Tribunal Claim

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[**Costco Wholesale UK Ltd v Mr Jaiden Nash \[2026\] EAT 85**](#)

Overview

In this case, HHJ Tayler was required to consider the Employment Tribunal's refusal to grant the Respondent an extension of time in which to submit their response.

While the judgment turns on peculiar facts (and the usual warning that no two cases are the same applies at this juncture), nevertheless the judgment of HHJ Tayler provides a useful analysis of the principles to be considered in extension decisions which are not simply determined by identifying the balance of prejudice between the parties.

Background

The Employment Tribunal

The response was submitted 10 months out of time on 22 December 2023 and was accompanied by a written application to extend time which, amongst other things, stated that the Respondent was unaware of the claim until 19 December 2023 when the Respondent's head office received a record of a preliminary hearing.

The Employment Tribunal made the following findings of fact:

- (1) The Claimant had supplied a valid address for service of the claim on the Defendant – the address of the warehouse at which he worked which was agreed to be capable of accepting post.
- (2) Four items of correspondence had been received at the warehouse and had been ignored prior to 19 December 2023.

- (3) Six emails had been sent to the General Manager which the General Manager had seen and had actively deleted and ignored.

In firmly rejecting the oral testimony of the General Manager, the Employment Tribunal found that the Respondent's explanation for its failure to submit a response in time, and delay before it applied for an extension of time, was untrue.

None of the above coruscating findings of fact made by the Employment Tribunal were challenged in the appeal.

HHJ Tayler in the EAT

HHJ Tayler (from paragraph 15 of his judgment) set out the law on extensions of time to present a Response beginning with the then procedural rule at the relevant time (which is now Rule 21 of the Employment Tribunal Rules 2024). After observing that the procedural rule was to be interpreted in accordance with the overriding objective, HHJ Tayler then considered the leading authority on extensions of time to present a Response - *Kwik Save Stores Ltd v Swain* [1997] ICR 49 EAT (Kwik Save).

HHJ Tayler described Sir John Mummery's judgment in *Kwik Save* as a 'paradigm of clarity and concision' – an epithet that is equally applicable to the many recent judgments of HHJ Tayler himself (this case included).

Before turning to the principles in *Kwik Save*, HHJ Tayler identifies a principle that is implicit but not expressed by Sir John Mummery (at paragraph 18 of the *Costco* judgment):

... a more generous approach is generally taken when considering an extension of time in which to submit a response to a claim than to an extension of time for the submission of the claim itself. The time limit for the submission of a claim is jurisdictional whereas the time limit for a response is essentially procedural. A respondent does not initiate litigation and should not ordinarily be shut out from advancing an arguable defence as a result of honestly admitted and explained procedural default, unless that default has caused significant prejudice to the other party or demonstrates wilful disobedience in compliance with the ET Rules or directions of the Employment Tribunal.

However, HHJ Tayler also emphasised a more cautionary note from *Kwik Save* for all parties seeking to appeal a decision of an Employment Tribunal on an application to extend time to enter a Response, quoting from the *Kwik Save* judgment:

Under their Rules of Procedure, industrial tribunals have many wide discretions. When they exercise them, the result should, in general, be accepted by the unsuccessful party and appeals to this appeal tribunal ought only to be brought when it is clear (or at the very least clearly arguable) that the industrial tribunal has exercised the discretion contrary to well established legal principles, such as failing to take any account of relevant factors or taking into account irrelevant factors. The question of the weight to be given to the various factors and of the balancing of them one against the other is for the industrial tribunal, not for the appeal tribunal.

Turning to the three discretionary factors identified in *Kwik Save*, HHJ Tayler observed:

(1) The explanation for the delay

It is for the Employment Tribunal to decide what weight to give to the explanation for the delay and the longer the delay the greater the importance of a full, honest and satisfactory explanation. ... Mummery J considered that the lack of a satisfactory explanation may be the decisive factor when balancing the other matters that should be considered.

(2) The balance of prejudice

The balance of prejudice is important, but not necessarily decisive. If the likely prejudice to the respondent by refusing the extension outweighs the likely prejudice to the claimant of granting an extension that “is a factor in favour in granting the extension” but “it is not always decisive”. Were it otherwise granting the extension would be close to being the norm because generally the prejudice to the respondent of refusing an extension will be greater than that to the claimant of granting it because the respondent will be prevented from defending the claim if the extension is refused whereas the claimant will be able to pursue the claim if the extension is granted and the claim will succeed if meritorious. That said there may be cases in which the claimant would suffer prejudice should the extension be granted that cannot be remedied by appropriate procedural action, possibly including an order for costs, such as where an important witness may no longer be available.

(3) The merits of the defence

While the fact that a defence appears to have some merit will often favour the granting of an extension of time to enter a response, a defaulting respondent can have no expectation that an extension will be granted but only has a right to expect that there will be “some consideration of the merits of his case”.

In *Kwik Save* the EAT allowed the appeal on the basis that the Employment Tribunal had given no consideration to the prejudice to the respondent of refusing the extension, the prejudice to the claimant of granting the extension, or the merits of the defence.

As if to emphasise the discretion that is available to the Employment Tribunal (and to caution against appealing in circumstances where this discretion has been validly deployed) HHJ Tayler added with valuable perspicuity:

33. Notwithstanding the clarity of the reasoning in Kwik Save, it is not a statute and should not be treated as if it were, or that it set out hard and fast rules as to how the discretion to grant an extension of time in which to submit a response should be exercised. All relevant factors are to be taken into account.

34. The three discretionary factors to which Mummery J referred need not necessarily be considered in the order in which he dealt with them. The mere fact that the prejudice to the respondent of refusing the extension of time outweighs that to the claimant of allowing it, does not necessarily mean that an extension will be granted. It is not a threshold question to which there must be a binary answer that the balance of prejudice favours one or other party, so that the prejudice to the party that suffers more is taken into account but the prejudice to the party that suffers less is ignored. The Employment Tribunal may take account of the prejudice to both parties as components of its overall assessment.

35. In some cases the lack of an explanation, or the presentation of a false explanation, for the delay may be the decisive factor. Conversely, where the explanation for the delay advanced by the respondent is rejected that does not inevitably mean that an extension will be refused.

36. If the respondent shows that it has an arguable defence that does not mean that an extension must be granted. The existence of an arguable defence is not a threshold to which a yes or no answer must be given. The Employment Tribunal can consider the apparent strength or weakness of the defence more generally.

37. Where one or more factors weighs heavily against the granting of an extension of time, the Employment Tribunal is likely to require that any countervailing factors more strongly support the grant of an extension. It is not sufficient for the respondent to have the better of the argument in respect of one of the factors, an overall assessment must be made. And this has to be assessed by application of the overriding objective, including that the time of the Employment Tribunal is not wasted, with the consequences that will have on other parties who are awaiting the hearing of their claims.

Finally, and before reaching his judgment, at paragraphs 39-40 in *Costco*, HHJ Tayler considered the cases of *Brent London Borough Council v Fuller* [2011] ICR 806 and *Anya v University of Oxford* [2001] ICR 847 and their observations on the level of scrutiny to which the judgment of the Employment Tribunal should be subjected.

In *Costco*, three overlapping grounds of appeal were advanced: the Employment Tribunal erred in law in its assessment of the balance of prejudice; in considering the merits of the defence; and in the overall conclusion not to grant an extension of time.

HHJ Tayler dismissed all three grounds applying the *Kwik Save* principles as he had identified them earlier in his judgment. Of particular interest are the following conclusions:

At para 44: The Employment Tribunal was not required to declare on which side the balance of prejudice fell. HHJ Tayler observed:

I do not accept that it was an error of law for the Employment Tribunal not to do so. The task of the Employment Tribunal was to assess all relevant factors in determining whether to grant an extension. It was not required to reach an interim conclusion that the prejudice to the respondent of refusing the extension outweighed that to the claimant of allowing it. It was permissible for the Employment Tribunal to assess the prejudice to each and take it into account as part of the final overall assessment. If an Employment Tribunal merely decided that one party would suffer greater prejudice than the other and then fed that binary determination into its overall conclusion, it would ignore the prejudice suffered by the other party completely.

At para 50: On the application of the merits test, *Kwik Save* did not set a threshold which, if surpassed, has the consequence that the merits factor is in favour of the Respondent:

The Employment Tribunal is entitled to consider the merits in more detail. On a fair reading of the judgment, the Employment Tribunal accepted that the defence had

some merit. If it thought that the defence had no merit the Employment Judge would have said so. The Employment Tribunal clearly thought that the defence was not so strong that it countervailed the very serious default of the respondent in failing to respond to postal correspondence and by the General Manager deliberately deleting and ignoring emails.

And at paragraph 53:

In Kwik Save Mummery J stated that an “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” which “will involve some consideration of the merits of his case”.

Finally on the overall justice assessment and the reasons at paragraph 54:

I do not accept that the Employment Tribunal gave insufficient reasons for the overall assessment of the interests of justice in deciding to refuse the extension of time. The Employment Judge considered the very extensive delay, the prejudice it caused to the claimant and the more general interests of the administration of justice. The Employment Tribunal took account of its finding that the respondent had given a false explanation for the failure to submit the response in time and the delay in seeking an extension of time. The Employment Tribunal appreciated the significant prejudice that the respondent would suffer by not being able to defend a race discrimination complaint. The Employment Tribunal had regard to the merits of the defence. The reasons are more than adequate for the respondent to understand why the application was refused.

Concluding Remarks

A salutary lesson for employers to ‘come clean’ when things have gone awry, and not to endeavour to cover up mistakes. Further, a very useful reminder of the *Kwik Save* principles with HHJ Tayler’s characteristic lucidity and exposition which, when properly heeded, gives assistance on how to create the best chance of succeeding in an extension application, crucially at first instance: valuable, because the EAT will not readily interfere with the Employment Tribunal’s discretion unless errors of law are obvious.

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