

## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4102809/2016 Preliminary Hearing at Edinburgh on 1 August 2017

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Employment Judge: M A Macleod

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Ella Carrera

Claimant  
Represented by  
Mr L Moodie  
Solicitor

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OMI Facilities Limited

Respondent  
Represented by  
Mr M Carlin  
Solicitor

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

25 The Judgment of the Employment Tribunal is that the claimant's claim against the respondent succeeds; that the respondent's application to allow the ET3 to be received though late is refused; and that the claim should now be listed for a remedy hearing.

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### **REASONS**

- 35 1. This is a claim with a rather complicated history. The claimant submitted her claim to the Tribunal directed initially against three respondents. The second and third respondents were represented by an employment consultant, Mr Muirhead, and on their behalf he submitted an ET3 resisting the claimant's claims. No ET3 was submitted on behalf of OMI Facilities Ltd, who were at that point known as the first respondent.
- 40 2. On 29 March 2017, the claimant withdrew her claims against the second and third respondents. The claimant's representative then sought, on the

5 same date, a Judgment against the remaining respondent, OMI Facilities Ltd (to whom I shall refer as the respondent), and accordingly a hearing was fixed to take place on 1 June 2017 in order to determine whether the Judgment should be granted as sought, and if so, what remedy should be awarded to the claimant.

3. On 13 April 2017, a Notice of Hearing was issued to the parties, including the respondent, confirming that a “hearing to hear the claimant on his application for a default judgment against the 1<sup>st</sup> respondent in respect of remedy” would be held on that date.

10 4. On 26 May 2017, an email was received by the Tribunal from Mr Carlin, acting on behalf of the respondent, confirming that he had been instructed by them and asking for both the name of the claimant’s representative and a copy of the Tribunal’s decision restricting the hearing of 1 June to remedy only.

15 5. Mr Carlin then submitted an ET3 by letter dated 30 May 2017, received on 31 May, noting that it was late. He said that his client’s position was that they did not receive the ET1, and sought to invoke Rule 6 of the Employment Tribunals Rules of Procedure 2013 to invite the Tribunal to allow the ET3 to be received though late.

20 6. He also moved to postpone the hearing fixed for 1 June and asked that a hearing be fixed, though he did not specify what he saw as the purpose of that hearing.

25 7. The Tribunal granted the application to postpone the hearing of 1 June, and in due course this hearing was fixed. The Tribunal determined that the hearing should deal with the following issues: “The application for a default judgment by the claimant and the application by the 1<sup>st</sup> respondent to allow the ET3 to be received late.”

8. At the hearing on 1 August 2017, Mr Moodie appeared on behalf of the claimant, and Mr Carlin on behalf of the respondent.

30 9. The respondent called as a witness its company director, Rajinder Bains.

10. Documents were also produced to the Tribunal in order to assist its determination of the issue before it.

11. Based on the evidence led and the information available, the Tribunal was able to find the following facts admitted or proved.

5 **Findings in Fact**

12. The respondent is a company which provides cleaning services to customers on a contracted basis. Rajinder Bains is the company director. The respondent contracted with Cairn Hotel Group to clean the Royal British Legion Hotel, Princes Street, Edinburgh, (known herein as “the hotel”) by agreement made on 26 January 2016 and commencing on 1 March 2016 (R1). The duration of the contract was one year, to be automatically extended thereafter until terminated with one month’s notice by either party.

13. The claimant was working as a cleaner at the hotel at the time when the list of staff employed there was sent by Cairn Hotel Group to the respondent in advance of their assuming responsibility for the cleaning contract, in January 2016. At that time, the claimant was absent from work on long term sickness leave. The respondent was notified of the claimant’s name in the list provided to the respondent, and was also advised of this in a meeting with staff prior to the commencement of the new contract.

14. During the course of March, the respondent received correspondence from an Employment Co-ordinator working for Enable, confirming that the claimant had received her P45 and asking what her position was. Mr Bains replied (R4) to say that Kieran Turnbull of Cairn Group would contact her in response. Mr Turnbull replied to Mr Bains on 8 March to say that the claimant had been sent her P45 in error, and that this should have been sent to the respondent as she had effectively transferred with the other employees.

15. During the course of April 2016, ACAS contacted the respondent to advise that the claimant intended to raise Employment Tribunal proceedings in relation to her employment. Mr Bains told the ACAS conciliator that they

had taken over the contract on 1 March 2016, and that at that date they had received a list of employees and a set of P45s, but not for the claimant. He said that Cairn Group had sent the claimant her P45 directly, and he thought that that meant that they had dismissed her. He said that the respondent had not dismissed the claimant and that she still had her job with them. The only issue which ACAS raised with them was that of holiday pay, and Mr Bains said that he would be happy to resolve that outstanding matter but would need to see the claimant's contract before doing so. He made an offer of settlement to the claimant at the end of that conversation.

16. Mr Bains then awaited a response from ACAS to what he had said, but heard nothing further.

17. The respondent did not receive the ET1 which was issued to them by the Tribunal by letter dated 28 June 2016, at their address at 57/64 Tollcross Road, Glasgow, Greater Glasgow G31 4UG. That was, at the time and for some time thereafter, the respondent's registered address, which was amended in approximately June or July 2016 to 1 Eagle Street, Glasgow. Mr Bains maintained that this was as a result of an error by his accountants. The company had moved from the Tollcross Road address in 2013, though in evidence Mr Bains could not recall the exact date.

18. Mr Bains gave evidence to the effect that he had instructed his accountants to change the registered office of the company to 923 Sauchiehall Street, Glasgow, which was the address of the Lorne Hotel, and was the respondent's trading address. At C1, an email sent by the claimant to Kieran Turnbull dated 26 January 2016 gave Mr Bains' address, at the end of his message, as OMI Facilities Limited, 57/65 Tollcross Road, Glasgow, G31 4UG.

19. Mr Bains' position in evidence was that the first he knew of the claim was when a solicitor from England telephoned him to advise him that a claim was registered against the company in the Glasgow Employment Tribunal, and asking him if he wished to instruct the solicitor to draft a response. He contacted Mr Carlin at that point and asked him immediately to contact the

Tribunal, which Mr Carlin did. Mr Carlin also presented an ET3 within a matter of days thereafter.

20. Mr Bains insisted that he did not see the claim when it was sent to the Tollcross Road address, and that had he done so, he would have done as he did when he did receive it, namely contact Mr Carlin with a view to defending the claim. He continues to wish to defend the claim.

### **Submissions**

21. Mr Carlin, for the respondent, invited the Tribunal to accept Mr Bains' explanations for his late response.

22. He went on to submit that the matter must go to inquiry on whether there was a transfer of an undertaking, and whether there was in fact a termination of employment at all on the grounds of disability discrimination. Mr Bains' evidence gave no hint that the claimant's disability was in any way related to her dismissal. It is in the interests of justice that the case should go to inquiry.

23. Mr Moodie, for the claimant, submitted that courts all over the world would look at two matters when determining whether to allow the response in though late: the reasonableness of the explanation and whether a defence has been put forward.

24. He pointed out that the registered office should have been changed if the respondent moved from it. He wondered if what Mr Bains had said was correct or reliable. There was still reliance upon that address in January 2016. The claim was served by the normal methods. He found it hard to believe that the correspondence was not forwarded to Mr Bains up until April 2017. His attitude was that it was nothing to do with him.

25. Mr Moodie argued that there was no valid reason given for the late presentation of the ET3. Further, he submitted that no proper defence has been put forward by the respondent. He argued that it is obvious that there was a TUPE transfer, and so that matter does not require to go to inquiry,

and that in any event the issue of disability discrimination has never been central to the arguments about disability.

### **Discussion and Decision**

5 26. Neither Mr Carlin nor Mr Moodie referred me to any Rules of Procedure nor any case law to assist the Tribunal in its consideration of this matter.

10 27. The only issue before the Tribunal – which both seemed to misapprehend – was whether the response should be allowed to proceed notwithstanding that it was presented late. The submissions made by both parties, and the questions asked during the course of the hearing, about whether there was or was not a TUPE transfer, and whether there was any evidence of discrimination on the grounds of disability, are not properly for determination in this hearing, and I reach no conclusions about either point. The evidence would not, with respect, permit me to do so in any event.

15 28. In relation to the question of whether the respondent's response should be permitted to be received by the Tribunal, notwithstanding its lateness, Rule 20 of the Employment Tribunals Rules of Procedure 2013 provides that an application for an extension of time for presenting a response should "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."

25 29. It is a matter for the Tribunal to determine whether the explanation for the lateness of the presentation of the ET3 is sufficient to persuade it to allow the extension of time to be granted. Accordingly, it is necessary to consider carefully the explanation which was given by Mr Bains on behalf of the respondent.

30 30. I did not find Mr Bains to be a particularly impressive witness. He became very heated under cross examination, and his explanations of the changes in registered address were unusual and, by his own admission, not helpful

to the respondent's position, though he held his accountant responsible for the errors which had arisen.

5 31. The explanation given was simply that the respondent did not see the claim form, nor was aware of the claim having been presented, until late May 2017, when a solicitor, whose name he could not remember, contacted with a view, it appeared, to soliciting his business by offering to help him present a response to this case. Mr Bains said he was very surprised by this, and that he had not previously been aware of the claim. He acted immediately to contact Mr Carlin and instruct him to prepare a response and seek to ask  
10 the Tribunal to allow the response to be received, though late.

32. The claim was first sent by the Tribunal to the respondent at its registered address on 28 June 2016. 11 months passed before the respondent made any contact with the Tribunal about the claim.

15 33. The reason why they did not receive the claim was, according to Mr Bains, that the respondent was not at its registered address as at June 2016, and had not been at that address since 2013. He had put in place a forwarding arrangement for his mail, but that had expired by June 2016. The company's registered address remained Tollcross Road until well after June 2016.

20 34. The position was, however, confused by the fact that even in early 2016, well after the respondent maintained that it had moved its registered address from Tollcross Road, Mr Bains was sending emails which identified OMI Facilities Limited's address as Tollcross Road.

25 35. I was not satisfied that the evidence given by Mr Bains was accurate or entirely candid in all the circumstances. He sought to blame his accountant for the failure to move the registered address from Tollcross Road in 2013, though no evidence was led from his accountant to support this assertion. His accountant cannot be blamed, however, for the continued reference to Tollcross Road as the company's address in January 2016. His evidence  
30 was self-contradictory and as a result I found it difficult to accept what was, at all events, an unlikely explanation for such a late response.

36. I accept that Mr Bains acted quickly in May 2017 to instruct Mr Carlin to act on his behalf, and that Mr Carlin, who is blameless in all of this, acted promptly upon those instructions. However, what prompted him to act is much less clear. He says it is because an English solicitor, whose name is not known to the Tribunal, contacted him unsolicited to inform him that a claim had been made against his company and to offer help. Where an English solicitor obtained such information is entirely unclear, when the respondent itself claims to have been unaware of it. The evidence on this matter given by Mr Bains was quite unsatisfactory. It was he who was apparently contacted by this solicitor but the details he gave were very vague and unclear.

37. Mr Moodie suggested – though by way of speculation – that the real reason was that Mr Bains did not think that this claim was anything to do with his company and therefore ignored it. I am unable to give effect to that submission, in the absence of any evidence upon which to base it. However, the evidence of Mr Bains is so unclear that it is my judgment that I am unable to accept his explanation as being true, even in the absence of any contradictory witness. The contradictions in his own position were sufficient to undermine his credibility as a witness.

38. Accordingly, I am not satisfied that the explanation given by Mr Bains was either accurate or reasonable, and that in these circumstances it would not be in the interests of justice to allow the ET3 to be received approximately 10 months late. The claimant has waited a very considerable time for this matter to be dealt with, and the respondent's delays, which have not been supported by good reasons, have extended the process unreasonably.

39. It is therefore my judgment that the respondent's application to extend time to allow the ET3 to be received though late must be refused. It follows then that the claimant's application for a Judgment in her favour against the respondent must be granted.



40. In these circumstances, the case will now be listed for a remedy hearing.

5 Employment Judge: Murdo A MacLeod  
Date of Judgment: 06 September 2017  
Entered in Register: 06 September 2017  
and Copied to Parties