EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4122256/2018

Held in Glasgow on 16 January 2019

Employment Judge: Ian McPherson

Miss Pauleen Harkins	**Claimant** **In Person**
Mrs Irene Duffy **T/a Caulfield Flowers**	**Respondent** **In Person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that: -

(1) Having heard oral submissions from the claimant, and the respondent, at this Hearing, the Tribunal, in terms of **Rule 48 of the Employment Tribunals Rules of Procedure 2013**, converted the listed Final Hearing into a Preliminary Hearing.

(2) Further, having heard both parties, and reserved judgment for private deliberation, the Tribunal **grants** the respondent's opposed application made at this Hearing , under **Rule 20 of the Employment Tribunals Rules of Procedure 2013**, for an extension of time for presenting her

ET3 response and, having done so, the Tribunal **allows** the ET3 response submitted late for the respondent at this Hearing to be accepted by the Tribunal, and the case to proceed as defended.

(3) Instructs the clerk to the Tribunal to serve a copy of the now accepted ET3 response on the claimant, and on ACAS, when issuing this Judgment to both parties.

(4) Further, the Tribunal **orders** the claim and response to be listed for a one day Final Hearing before Employment Judge Ian McPherson, sitting alone, at the Glasgow Employment Tribunal, on a date to be hereinafter fixed, following receipt of completed date listing stencils issued to both parties, in the listing period **April, May or June 2019**, listing the case for full disposal, including remedy if appropriate, including any preliminary issues that arise from the respondent's stated grounds of defence.

(5) Notes and records that as the claim is now defended by the respondent, and liability for redundancy pay, and notice pay claimed as owed to the claimant is denied by the respondent, who disputes that the claimant's employment was terminated by her, and who disputes there was any redundancy situation, and who further disputes the date from which she might be liable, if at all, the respondent asserting the claimant had less than 2 years' continuous service with her as a sole trader, the Tribunal **orders** that the claimant will be required to lead her evidence first, followed by evidence from the respondent, parties having confirmed that there will be no further witnesses led at that Final Hearing.

(6) In respect of the respondent's admission at this Hearing that she is liable to pay 2 weeks' outstanding holiday pay to the claimant, in the agreed amount of **Two hundred and twenty pounds (£220)**, the Tribunal has issued case management directions under separate cover.

REASONS

Introduction

1 This case called before me on the morning of Wednesday, 16 January 2019, at 10.00am, for a Final Hearing, further to Notice of Claim and Notice of Final Hearing issued by the Tribunal to both parties on 5 November 2018.

2 Following ACAS early conciliation between 30 September and 1 October 2018, the claimant, who is representing herself, presented an ET1 claim form to the Employment Tribunal, on 1 November 2018, complaining that the respondent owed her a redundancy payment, as well as notice pay and holiday pay, following the end of her employment with the respondent as a Florist on 31 August 2018.

3 In the event that her claim was to be successful, the claimant sought an award of compensation from the Tribunal. She did not, however, detail the amount of compensation that she was seeking, and, accordingly, there was no explanation for how she had calculated any sum being sought from the respondent.

4 The claim was accepted by the Tribunal on 5 November 2018, and a copy of the claim was served on the respondent, on that date, requiring her to lodge a ET3 response at the Glasgow Tribunal office by 3 December 2018. In that Notice of Claim, it was explained to the respondent that if her response was not received by 3 December 2018, and no extension of time had been agreed by an Employment Judge before that date, then she would not be entitled to defend the claim.

5 It was further explained that, where no response was received or accepted, an Employment Judge might issue a Judgment against her without a Hearing and she would only be allowed to participate in any Hearing to the extent permitted by an Employment Judge.

6 Further, the Notice of Claim and Notice of Final Hearing, sent to both parties by the Tribunal on 5 November 2018, stating that the claim would be heard by an Employment Judge sitting alone, and that one hour had been allocated to hear the evidence and decide the claim, including any preliminary issues.

7 As the figures for compensation being sought in the claim were not set out in the claim, the letter from the Tribunal further directed that the claimant must send to the respondent within 14 days details of the amount claimed and how it was calculated, and a copy of that calculation should be brought to this Hearing.

Additional Information from the Claimant

8 No ET3 response was lodged by, or on behalf of, the respondent, by the due date of 3 December 2018. On 11 December 2018, Employment Judge Laura Doherty, having noted that no response to the claim had been received, and while it may therefore have been possible to issue a Judgment without the need for a Hearing, she considered that there was insufficient information to issue a Judgment at that stage, and therefore she required the claimant to provide additional information within 14 days to allow a Judgment to be issued against the respondent.

9 On 11 December 2018, the claimant e-mailed the Tribunal office, stating that her wages were £110 per week, and she was looking for "***7 weeks' pay for the 7 years Irene Duffy took over the business and 2 weeks' holiday pay. I was owed £990 in total."*** Thereafter, on 17 December 2018, Employment Judge Jane Garvie instructed that the claimant be asked to clarify whether the respondent was a limited company, and if so, what was its name.

10 In reply, on 18 December 2018, the claimant again e-mailed the Tribunal office, and without identifying the name of the company involved, stated that she had worked for the company for 20 plus years when it was a William Bell who owned it, when the respondent, Irene Duffy and her husband took over that company 7 years ago, they kept her on, which she was happy about, and when Irene Duffy and her husband split up the respondent continued the running of the shop, and to employ the claimant.

11 In response to the claimant's e-mail of 18 December 2018, on referral to Employment Judge Lucy Wiseman, on 28 December 2018, she confirmed that the Final Hearing set for 16 January 2019 would go ahead, and that the

claimant should attend this Hearing and bring with her any paperwork she had in relation to her case, for example letters, e-mails, contract, payslips, and P60. By return, on 28 December 2018, the claimant advised the Tribunal office that she was looking for her previous year's P60, but she did have a P45, and that she would bring that to the Hearing.

Correspondence from the Respondent seeking Extension of Time

12 While the respondent, Irene Duffy, had not lodged an ET3 response, by 3 December 2018, nor sought any extension of time to do so, she e-mailed the Glasgow Tribunal office on 17 December 2018 apologising for being late, getting back to the Tribunal, and explaining that this was due to:

> "***me taking my stuff to Citizen Advice Centre Alexandria, who took my paperwork from yourselves along with some other stuff I need help with, they in turn sent the paperwork to another Citizens Advice Centre, to look at then I had been waiting on them getting back to me which they did eventually to tell me there was nothing they can do to help me as there is a conflict of interest which I presume is Pauleen is also using them. So I would like to ask for an extension firstly, then because I still don't have paperwork back from Citizens Advice, I would like to extend to the Tribunal my side of things."***

13 Following referral of the respondent's e-mail of 17 December 2018 to Employment Judge Jane Garvie, on 18 December 2018, she directed that the respondent should submit a draft ET3 response form, by no later than 21 December 2018, and a blank copy of an ET3 response form was e-mailed to the respondent by the Tribunal staff for that purpose.

14 A copy of her e-mail of 17 December 2018, being her application for an extension of time, and a copy of the Tribunal's letter to the respondent, were sent to the claimant to enable her to provide her comments on the respondent's application for an extension of time.

Claimant's Reply

15 Having received the Tribunal's letter of 18 December 2018, the claimant replied to the Tribunal, stating that "***I would like the case to go ahead on the date issued as it is causing so much stress and upset to myself."***

16 Further, on 28 December 2018, the claimant again e-mailed the Tribunal office, seeking an update on her case, and reiterating her preference for the case to go ahead as scheduled as it was causing her a lot of stress, and she disputed the truth of what the respondent had stated in her e-mail of 17 December 2018 to the Tribunal, and that she had had plenty of time to get any paperwork she claims the Citizens Advice might have had back from then.

Final Hearing before this Tribunal

17 When the case called, shortly after 10.00am, the claimant was in attendance, unrepresented, and without any witnesses. The respondent was in attendance, also unrepresented, and without any witnesses, although she was accompanied by a Mr Gavin Brand, for moral support. I was advised that Mr Brand was there in that observer capacity only, and that he was not a witness for the respondent.

18 Mrs Duffy, the respondent, not having entered a response, and so not being entitled to participate in the Final Hearing, except to the extent that might be allowed by me as the Employment Judge, had handed to the Tribunal clerk, prior to the start of this Hearing, a handwritten, completed ET3 response form, defending the claim, and she sought to invite me to allow an extension of time so that she might now defend the claim brought against her by Miss Harkins.

19 Miss Harkins had attended, and provided to the Tribunal, with copy to the respondent, a small bundle of productions, to be referred to in her evidence to the Tribunal. No productions, or any documentation whatsoever, were provided by the respondent, Mrs Duffy, who stated that her paperwork had been handed to the Citizens Advice Bureau, and she did not have a copy of the claim form, or any correspondence from the Tribunal.

20 Initially, Mrs Duffy insisted that she had, in reply to the Tribunal's e-mail of 18 December 2018, including a blank ET3 response for completion and return,

completed an ET3, having opened it on Adobe, and then saved it, and e-mailed that back to the Tribunal.

21 When I indicated that that ET3 response, if returned by her, was not on the case file, the respondent, Mrs Duffy, insisted that she had e-mailed it, and, accessing her mobile phone, she identified that she had done so by an e-mail on 18 December 2018, for which she had received an acknowledgement of receipt from the Tribunal's system.

22 Following an adjournment, for the clerk to the Tribunal to enquire of the Glasgow Tribunal inbox, when proceedings resumed, after that short adjournment, the respondent accepted that while she thought she had submitted a completed, ET3 response, defending the claim, it was clear from her e-mail of 18 December 2018 to the Tribunal, at 16:49, that there was no attachment, and that her only response on that occasion was to advise the Clerk to the Tribunal: "***thank you for your time".***

23 As such, it was agreed, that she would refer to the handwritten, completed ET3 response that she had completed at the Tribunal office, prior to the start of this Hearing, and invite me to allow her an extension of time based on that ET3 response form, a copy of which was provided to the claimant, in order that she could consider its terms, and advise the Tribunal as to whether or not she opposed Mrs Duffy's application for an extension of time.

24 By this stage, having heard from both the claimant, and the respondent, I advised them of the terms of the Tribunal's overriding objective, under **Rule 2 of the Employment Tribunal Rules of Procedure 2013**, which provides that the Tribunal is to deal with cases fairly and justly, and that dealing with a case fairly and justly includes, so far as practicable (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of issues; (c) avoiding unnecessary formality and seeking flexibility of the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.

25 Further, **Rule 2** also provides that the Tribunal shall seek to give effect to the overriding objective when exercising any power given to it by the Rules, and parties shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and the Tribunal.

Relevant Law

26 As neither party was represented, and both advised me that they had no knowledge of Tribunal practice or procedure, or the relevant law, I advised both of them that, consistent with my **Rule 2** duty to deal with the case fairly and justly, I could inform them, in general paraphrased terms, of the applicable legal test for a **Rule 20** application, and then invite their comments, by way of addressing the factors identified in the EAT case law.

27 I explained to them both that this would include me seeking the explanation or lack of explanation for the delay in presenting a response to the claim, the merits of the respondent's defence, the balance of prejudice each party would suffer should an extension be granted or refused, and so why they invited me to grant or, as the case may be, refuse the respondent's application.

28 Specifically, I read to them from paragraphs 16, 17, and 18 of the judgment of Mrs Justice Simler DBE, then President of the Employment Appeal Tribunal, in **Grant v Asda [2017] UKEAT/0231/16/ BA,** and reported at **[2017] ICR D17**, the full terms of which extracts I reproduce here for ease of reference:

> "16. ***Rule 20*** *of the* ***ET Rules*** *provides as follows:*
>
> ***"(1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall 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.

(2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.

(3) An Employment Judge may determine the application without a hearing.

(4) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside."

17. Again, unlike its predecessor, ***Rule 20*** *permits an application for an extension of time after the time limit has expired. Rule 20 is otherwise silent as to how the discretion to extend time for presenting an ET3 is to be exercised. Guidance on the approach to be adopted by tribunals in exercising their discretion was given in* ***Kwik Save Stores Ltd v Swain*** *[1997] ICR 49 EAT, a case concerning a respondent's application for an extension of time under the* ***Employment Tribunal Rules 1993****. Mummery J gave guidance at pages 54 to 55:*

"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 prejudice will the other party suffer is 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 in granting the extension of time, but it is not always decisive. There may be countervailing factors. It is this process of judgment that often renders the

exercise of a discretion more difficult than the process of finding facts in dispute and applying them to 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 factor identified by Sir Thomas Bingham MR in Costellow v Somerset County Council [1993] 1 WLR 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."***

> *18. The approach set out by Mummery J was subsequently adopted in relation to the **2004 Rules** in **Pendragon plc (t/a CD Bramall Bradford) v Copus** [2005] ICR 1671 EAT. In our judgment, it applies with equal force to the **2013 Rules**. So, in exercising this discretion, tribunals must take account of all relevant factors, including the explanation or lack of explanation for the delay in presenting a response to the claim, the merits of the respondent's defence, the balance of prejudice each party would suffer should an extension be granted or refused, and must then reach a conclusion that is objectively justified on the grounds of reason and justice and, we add, that is consistent with the overriding objective set out in **Rule 2** of the **ET Rules**.*

29 While **Rule 20(3)** provides that an Employment Judge may determine a **Rule 20** application without a Hearing, I explained to both parties that, as both were in attendance, and consistent with the Tribunal's overriding objective, under **Rule 2**, to deal with cases fairly and justly, including avoiding delay, and saving expense, it would be appropriate to proceed, at this Hearing, to consider the respondent's **Rule 20** application to the Tribunal at this Hearing.

30 The claimant stated that, having had the opportunity to read the respondent's proposed ET3 response, she wanted her case to go ahead at this Hearing, as she has been trying since 15 September 2018 to set this out with Mrs Duffy, and as such, she objected to Mrs Duffy being allowed to defend the case at this late stage.

Respondent's Submissions

31 In reply, Mrs Duffy, the respondent, stated she was happy to address me on the factors identified in the case law, and she did not require an adjournment

before doing so, as she has had months to think about this case. She stated that, once she had received the Notice of Claim letter, from the Tribunal, on or about 7 or 8 November 2018, she took everything to the Citizens Advice Bureau along with "***other stuff",*** as they were dealing with debt matters which she had, and about a debt pack for her florist business.

32 She openly and frankly conceded that she had never been to a Tribunal before, and as such "***I don't have a clue***". She recalled going to the Citizens Advice Bureau ("CAB") around the end of November 2018, and certainly before the date the ET3 response was due on 3 December 2018, of which date she stated she was aware, having read the Tribunal's Notice of Claim letter of 5 November 2018.

33 Further, the respondent stated that, as indicated in her e-mail of 17 December 2018 to the Tribunal, she had been to the CAB, and later got a letter from them saying that they were not able to assist her, due to some conflict of interest, but they did not say what that conflict was, and she had assumed that they were acting for the claimant.

34 She stated she had that letter from the CAB, but she did not have it with her at this Hearing, as she had brought along no documents for consideration by the Tribunal. Thereafter, Mrs Duffy spoke of "***everything went haywire***", over the Christmas period, and the CAB office was shut.

35 She also referred to ACAS bring in contact with her, which she thought must have been from the end of September 2018 or may be after she had received the claimant's recorded delivery letter of 15 September 2018, a copy of which the claimant had provided to this Tribunal in her bundle of documents lodged at the start of this Hearing.

36 The respondent advised me that she did not reply to the claimant's letter of 15 September 2018, because she did not have an insolvency reference number. She recalled telling the claimant that before the shop, at 171 High Street, Dumbarton was shutting which she recalled was on 10 or 11 September 2018, after she had cleared the shop out and given the keys back

to the landlord, a Campbell Gillies after he demanded that, in light of rent arrears, she pay up, or get out.

37 Mrs Duffy stated that she recalled getting a letter from the Tribunal, on 18 December 2018 and she really thought she had filled in and returned the ET3 response but, given the terms of her e-mail, as read to her from the casefile by the Judge, the respondent accepted that she had obviously not sent it in to the Tribunal office.

38 Further, the respondent accepted that she had not corresponded with the Tribunal office since her e-mail on 18 December 2018, and, while she explained, she thought it odd that she had not heard from the Tribunal, since she thought she had sent in her ET3 response, she phoned on Tuesday, 15 January 2019, at around 9.15am, and spoke to a female, whose name, she could not recall, who confirmed that the case was on, and at 10am, and she did not ask that Tribunal clerk anything further, as "***there had been a lot more going on".***

39 When I asked Mrs Duffy to be more specific, rather than make the generalised statement that there had been "***a lot more going on***", in recent months, she then stated that she was going to have to go to Court about her divorce, and that "***a whole host of things were all coming to a head***".

40 In a quickfire delivery, she then referred to her landlord wanting her out of the shop, having to deal with phones, electricity and bins, during the shop clear-out, and, at that stage, she became upset, when stating that she had been in contact with her solicitor about divorce proceedings in Glasgow Sheriff Court.

41 When I offered the respondent an adjournment, in order that she might reflect, and compose herself, before continuing, she declined the opportunity for an adjournment, and stated that she wanted to ***"crack on".*** She then proceeded to detail the background to her divorce proceedings against her husband, Gavin Duffy, sometime in October or November 2018, leading to Adairs, Solicitors, Dumbarton, raising proceedings on her behalf at Glasgow Sheriff Court, for a court date, on some Wednesday, in November 2018.

42 The respondent became somewhat emotional in relating this matter, and advised me that she had withdrawn her claim for divorce against her husband, as he had put her daughter up against her as a witness, and she then proceeded, again with some emotion, to relate, and recount to me, difficulties with her landlord, having to close the shop, around the end of September 2018, after receiving a "***pay up or get out***" text message from her landlord, Campbell Gillies.

43 Thereafter, Mrs Duffy related how, as a sole trader, she had been operating the florist business from the premises at 171 High Street, Dumbarton, from the time of dissolution of Glasgow Flowers Ltd, up to and on or around 10 or 11 September 2018, when the shop was cleared out, and she returned the keys to the landlord.

44 She spoke of having to borrow rent money off her sister, and having to pay outstanding rent arrears to Mr Gillies, but acknowledged that this was not a factor in the period November/December 2018, or January 2019, the period under review as regards what had, or had not happened in the period between 5 November 2018, when the Notice of Claim was served on her, and the date of this Hearing, when she had completed at the Tribunal office an ET3 response.

45 Further, and again with a degree of emotion, the respondent then referred to her nana, who had brought her up, and she was therefore more like a mum to her, and how she was advised, through her sister, from around mid-November 2018, that the care home in which her nana resides is closing down, and she is to be moved to another residential establishment sometime around the middle of February 2019.

46 The respondent further advised me that another factor to be taken into account, was the fact that she owes around £7,000, to the Flower Market at Blochairn, and they want a payment plan from her, for repayment of that debt, and she stated that that is a matter which has been ongoing since September 2018, albeit only through correspondence, and phone calls, but as yet, no court proceedings against her for the unpaid debt.

47 Having heard the respondent's explanation for the delay in her lodging her ET3 response form, I then asked her to address the matter of prejudice to her, if she was not allowed to lodge her ET3 response late, and so defend the claim, as also the matter of prejudice to the claimant, if I were to allow her **Rule 20** application.

48 In reply to my enquiry of her, about this factor for my consideration, Mrs Duffy stated that she thought the claimant would lose her claim before the Tribunal, and she was sorry that she could not really think of any prejudice to her, if she was not allowed to defend the claim, as she wished to do.

49 If her application for an extension of time were to be allowed, and her ET3 response accepted, she stated that she did not recognise that there would be any prejudice to the claimant, and she again expressed the view that, she thought, the claimant would lose, and then added that she thought the claimant is owed some money, but not as much as she thinks.

50 Mrs Duffy added that she did not know if she owed the claimant any money, because while the shop in Dumbarton was shut, her business is still running, and the claimant had not spoken to her, and there had not been an opportunity for them to discuss matters.

51 She also advised me that, when the claimant asked her for her P45, she simply gave it to her, and she accepted that the copy P45 produced by the claimant, in her bundle of documents, issued on 5 September 2018, confirmed the claimant's date of leaving her employment as 31 August 2018.

52 By way of further explanation of her position, the respondent stated that the claimant had been employed by her, on the basis of 16 hours per week, starting on 23 November 2016, and that her employment before that date, with a William Bell, was through Glasgow Flowers Ltd.

53 She disputed there was any liability on her part to the claimant before 23 November 2016, as at that stage, the claimant's employer was Glasgow Flowers Ltd, as shown on the claimant's payslips. From November 2016, Mrs

Duffy stated that she was a sole trader, and she had employed the claimant in her own right, and not through any company.

54 The respondent further advised me that, as she sees matters, the claimant left her employment, and while she tried to speak to the claimant, she stated that she did not write to her terminating her employment, indeed, she did not write to her at all, nor did the claimant send her anything by way of a resignation, albeit, the respondent advised me, she understood the claimant had been looking for another job since February 2018.

55 When I asked Mrs Duffy whether, in the period of her sole trading of Caulfield Flowers, she had issued the claimant with any written particulars of employment, or contract of employment, Mrs Duffy stated that she had not, and that she did not know that that was a legal obligation on her as an employer.

56 She agreed that the claimant's earnings, while employed by her, were at the rate of £110 per week, which was a net sum, as she advised that, although the claimant was on PAYE, she did not earn enough, to have those deductions, and she further confirmed that, as per the claimant's P45, produced in the claimant's bundle at the start of this Hearing, the total pay paid to the claimant in the period 6 April to 31 August 2018 was £2,383.75.

57 As regards the business of Caulfield Flowers, the respondent advised me that she now runs that from her home address, in Alexandria, being the address on her ET3 response form, and that, when it operated from 171 High Street, Dumbarton, there was only two staff, namely herself, and the claimant. She stated that she continues to run the business, but it is now run through the website, and Facebook page, as per the copy documents lodged by the claimant in her bundle.

58 Further, the respondent advised that she had worked with the claimant in the High Street shop for some 7 years, and that the claimant had been a Florist for some 20 plus years. She referred to how she had been running the business for only some 7 years, and, when asked if she was familiar with the

Transfer of Undertaking Regulations ("TUPE") the claimant stated that she did not know what that was, or its implications.

59 Mrs Duffy further stated that the claimant had only been her employee from November 2016, when she was running the business as a sole trader, and, as such, she contests the claimant's claim for 7 weeks' notice, and redundancy payments, as she has not been the claimant's employer for the period stated by the claimant in her ET1 claim form, being from 12 January 2011. She queried whether the claimant should not be suing William Bell for anything more than the period when she was the claimant's employer.

60 Further, Mrs Duffy accepted that the claimant is due 2 weeks' holiday pay, amounting to £220, but she disputed the claimant's claim for notice pay, and redundancy pay, and as such stated that those disputed matters required to be determined by the Tribunal, at a defended hearing.

61 She did not accept that she owed the claimant the sum of £990, referred to in the claimant's e-mail to the Tribunal of 11 December 2018 and, if she was liable for redundancy pay, then it should only be what she owes for the period of her sole trader employment of the claimant, and she was insistent that she has never once done anybody out of money that they are due.

62 Mrs Duffy stated that, at best, she owed the claimant £440, being £220, for the agreed holiday pay and £220 for notice pay, but stated that the claimant had never been made redundant by her, she did not terminate her employment, and that the claimant's job as a Florist was there for her to come back to, but the claimant left, she asked for her P45, and so Mrs Duffy issued it to the claimant.

63 Mrs Duffy further stated that she was aware that, if you make an employee redundant, then you need to offer them something to keep them on, and she accepted that the claimant, as formerly employed by her, as a sole trader, was employed to work at the shop at 171 High Street, Dumbarton, and that that shop had ceased trading on 10 or 11 September 2018, and thus there was no job for the claimant at that location from that date.

64 That said, the respondent went on to state that she had not written to the claimant, explaining that she did not get a chance to do so, as her landlord was throwing her out of the shop, and she wanted to discuss matters with the claimant, but had been unable to do so as the claimant was taking her nephew into hospital.

65 Mrs Duffy also advised me that, as she saw things, the claimant was not made redundant by her, nor fired, nor sacked, and whatever you call it, it was simply a case that the claimant had asked for her P45, and she had provided it to the claimant. She stated that she was contesting liability for the claims brought by the claimant, and if liable, for the amount of claims that the claimant was pursuing, and that she wanted to defend the case, as she had advised the Tribunal in her email of 17 December 2018.

Claimant's Reply

66 Having heard from Mrs Duffy, as respondent, I then invited Miss Harkins, the claimant, to address me, and explain the terms for her objections to the respondent's application for an extension of time.

67 Having listened to the respondent's oral submissions to me, Miss Harkins started by stating that she still objected to the application for an extension of time, and as regards the explanation, and excuses provided by Mrs Duffy, the claimant stated she felt the respondent still had plenty of time to get an ET3 in on time, by 3 December 2018, if she had been to the CAB in November 2018.

68 While she had not wanted matters to progress as far as the Tribunal, which is why she had written to the claimant herself on 15 September 2018, the claimant was insistent that, at no point, was she offered a job by Mrs Duffy, as she had later found out that, while the Dumbarton shop had ceased trading, Mrs Duffy was still trading, but from her home address.

69 She had received no response from Mrs Duffy, in reply to her letter of 15 September 2018, and as such she had gone to ACAS, for early conciliation, and thereafter to this Employment Tribunal.

70 While accepting that Mrs Duffy had been "***going through a bad time***", the claimant stated that so was she, and that Mrs Duffy knows what this is doing to her and that was to be seen from the terms of Mrs Duffy's text message to her, on 23 November 2018, as produced in her bundle of documents, where the respondent had stated to her ***"the gloves are off".***

71 In further explanation of her objections, Miss Harkins stated that if Mrs Duffy was allowed to defend the claim, that would prejudice her as claimant. She stated that she wanted the matter dealt with at this Hearing, as it was causing her stress and upset.

72 While she had now got a part-time job, from the start of December 2018, she is staying at home with her mother, and her son, and not having been paid sums due from Mrs Duffy, she had had to get a loan to go on holiday to Florida for a holiday booked the previous year.

73 Since her employment ended at the florist, the claimant stated that she had signed on for Jobseeker's Allowance, after 5 September 2018, but that had now stopped, once she started in her new part-time job.

74 As regards prejudice to Mrs Duffy, as respondent, if her response was not allowed, and she was not allowed to defend the claim brought against her, Miss Harkins stated that she could not see any prejudice to the respondent, and she really did not know how to respond to this matter, other than to say that she wanted this whole thing to be over.

75 Further, Miss Harkins stated that she does not think that Mrs Duffy has got a genuine excuse for not putting in her defence before this Hearing. She did not accept that she had left Mrs Duffy's employment, and while she accepted that she had not received any letter from the respondent, sacking her, only her P45, she stated that Mrs Duffy had advised her to sign on, as she herself had had to do, and try to get a job.

76 Miss Harkins also stated that Mrs Duffy had never told her that she would be working from her house, and that there would be a job for her there. She denied that she had resigned from Mrs Duffy's employment, and stated that if

she had been told there was still a job for her, then she would gladly have taken that.

77 However, added the claimant, when Mrs Duffy was clearing out the shop, she had told her not to come in, and she described being "***devastated"*** by what had happened. She had worked for Caulfield Florist for some 20 plus years, and the respondent had kept her on for the last 7 years, when she was her boss, and her employer, and, originally, it was the respondent and her husband, who ran the florist shop, until they split up, and it was then Mrs Duffy as a sole trader.

78 When the claimant stated that she had received payslips from Glasgow Florist Ltd, but not from the respondent, since November 2016 at least, Mrs Duffy stated that there were payslips there to be printed off, but she had not given them to the claimant, as she alleged that the claimant had told her to keep them. The claimant stated that she could not recall any such conversation.

79 Further, added Mrs Duffy, while her accountant does the week to week books for Caulfield Flowers, she advised that David McLellan, of DMC Services, had not given her any advice about being an employer, or the legal obligation on an employer to give employees itemised pay slips.

80 However, if the claimant would like her pay slips, then Mrs Duffy stated that she could get them printed off and sent to her. Mrs Duffy then gave an undertaking to the Tribunal, and the claimant, that she would send copy payslips to the claimant, within 7 days, probably by recorded delivery, rather than e-mail, but she would advise the claimant, and the Tribunal, that she had done so.

Reserved Judgment and Further Procedure

81 Having heard submissions from both the claimant and respondent in person, I stated that I was reserving my Judgment, on the opposed **Rule 20** application, for an extension of time, and, after a period of private deliberation, a full written Judgment and Reasons would be issued to both parties, within a few weeks.

82 I also indicated that, whatever my decision on the opposed **Rule 20** application might be, the case would need to be re-listed for another day to hear evidence. Accordingly, I stated that I would arrange for the clerk to the Tribunal to send date listing letters to both parties for a Final Hearing on a date to be fixed in **April, May or June 2019**.

83 On my instructions, date listing stencils were issued to both parties, by the clerk to the Tribunal, on 28 January 2019, along with a covering letter from the Tribunal, as regards further procedure, and Case Management directions/Orders, **for return by 8 February 2019**.

Discussion and Disposal

84 Having carefully considered, in chambers, during private deliberation, after this Hearing, which I converted to a Preliminary Hearing, in terms of **Rule 48,** rather than the listed Final Hearing, I have now come to my decision, to grant the **Rule 20** application, and allow the case to proceed as defended.

85 Having carefully reflected on parties' completing oral submissions, and the information available to the Tribunal, in the ET1 claim form, draft ET3 response, and the claimant's bundle of documents, I was firstly satisfied that neither party was materially prejudiced by the change from Final Hearing, to Preliminary Hearing, having regard to the Tribunal's overriding objective, under **Rule 2**, to deal with the case fairly and justly, including avoiding delay and saving expense.

86 As such, rather than postpone the listed Final Hearing, and refuse to allow the respondent to participate when she had appeared, made an application for an extension of time, and lodged an ET3 response, I invited Mrs Duffy to explain the reason for her delay in lodging the ET3 response, to set out her reasons why the extension of time was sought under **Rule 20**, and balance the relevant factors of the reason for, and length of the delay, prejudice to each party if the extension of time is either granted or not granted, as well as the merits of the respondent's defence, as set out in the ET3 response produced by her, and her further oral explanations.

87 Having done so, I am satisfied that it is in the interests of justice to allow the respondent's opposed **Rule 20** application, for the phrase "***in the interests of justice"*** means justice to both parties, and so I order that the case now be listed for a Final Hearing for full disposal, including remedy if appropriate, including any preliminary issues that arise from the respondent's stated grounds of defence, on a date to be assigned by the Tribunal, having ascertained from both parties, by returning completed date listing stencils, with their availability.

88 In coming to this decision, I have taken into account both parties' oral submissions to me, as also the relevant law, as I paraphrased to both parties, at the Hearing, and have reproduced it earlier in these Reasons, and in writing up this Judgment I also refer to the Judgment of another President of the Employment Appeal Tribunal, Mr Justice Underhill, in **Thornton v Jones [2011] UKEAT/0061/11**, which is in similar terms to the case law I cited to parties, and invited their specific comments upon at this Hearing.

89 While, on one view, Mrs Duffy has been very lackadaisical in her approach, she had indicated before this Hearing that she wished to defend the claim, but she failed to lodge her ET3 by 3 December 2018, or by 21 December 2018, and only did so on arrival at this Hearing.

90 Such a casual attitude to legal proceedings is not easy to understand, but from the information she provided at this Hearing, I am prepared to accept that Mrs Duffy's failure was not willful, but caused by other things impacting on her life, and thus her ability to deal with her affairs timeously and properly to defend this claim against her at the Employment Tribunal.

91 The claimant wanted her case disposed of at this Hearing, and judgment issued in her favour. The Tribunal's overriding objective, and the interests of justice, require that I do justice to the respondent by allowing her to be heard.

92 In balancing prejudice as between the parties, I take into account that if I refused the late ET3 response, then the respondent would not be able to defend the claims brought against her, and could end up with a judgment

against her , and an order for her to pay disputed sums to the claimant, and that without having had the opportunity to put forward her case in evidence.

93 On the other hand, prejudice to the claimant will be relatively slight, and all that she loses, at this stage, is the loss of a windfall of being able to get an undefended judgment in her favour without having to give evidence, or to argue against the points now raised by the respondent in her late ET3.

94 In these circumstances, I have decided that the prejudice to the respondent outweighs any prejudice to the claimant, and that it is appropriate to let in the late ET3 response, and the merits of parties' respective positions can be adjudicated upon by the Tribunal at a Merits Hearing, after hearing evidence from both parties.

95 I recognise that the claimant will be disappointed by this ruling, for she had hoped to attend at this Hearing, present her evidence, and await the Tribunal's Judgment, on what she understood to be an undefended claim.

96 However, in writing up this Judgment, I take this opportunity to draw to her attention that, even if Mrs Duffy had not appeared and lodged her ET3, and had I proceeded in her absence, and awarded Judgment to the claimant, the respondent would likely thereafter have sought reconsideration of that Judgment under **Rule 70**, and so any undefended Judgment would then need to have been revisited in any event.

97 That too is a consideration in me deciding that, to avoid delay, and saving expense, this **Rule 20** application was best dealt with at this Hearing, and the merits, or otherwise, of the claimant's case, and the respondent's defence, can be assessed by me, or if not available, another Employment Judge (sitting alone) at a Final Hearing on a date to be thereinafter fixed by the Tribunal.

98 What was listed as a one-hour, fast track Hearing in fact lasted around 3 hours. Unfortunately, there was insufficient time available on this Hearing date for me to have given an oral judgement on the opposed **Rule 20** application, and thereafter proceeded to take evidence at a defended Final Hearing. The

now defended claim will be listed at the earliest available date suitable to both parties' availability, and the Tribunal's listing diary.

Closing Remarks

99 It is clear to me that both parties would be assisted by the benefit of some professional, independent advice in dealing with this now defended claim to this Tribunal.

100 I have taken into account that both parties are unrepresented, party litigants, as I am duty bound to do, in terms of the Tribunal's overriding objective under **Rule 2** to deal with the case fairly and justly, including ensuring, so far as practicable, that parties are on an equal footing. It is not, however, for me to act as advocate or representative for either party, for they must each take their own independent advice.

101 While to date the claimant has been acting on her own behalf, since the ET1 was lodged, as she is perfectly entitled to do, as also has the respondent, I encourage both parties to seek out independent and objective advice, whether from an employment law solicitor or other professional adviser, or from a trade union, Citizens Advice Bureau, or *pro bono* voluntary agency (such as the Glasgow Caledonian University or Strathclyde University Law Clinics) providing advice and assistance to individuals involved in Tribunal proceedings.

102 Further, guidance may be available to them from the Citizens Advice Scotland, and the ACAS, websites. Mrs Duffy, as an employer, may wish to consider the online guidance available to employers as regards their legal duties and responsibilities to staff.

103 In issuing this Judgment, I remind both parties that, as per **Rule 3 of the Employment Tribunals Rules of Procedure 2013:**

Alternative dispute resolution

3. A Tribunal shall wherever practicable and appropriate encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement.

104 Given their previous long-standing working relationship, I encourage both parties to use ACAS as a means of resolving their disputes by agreement.

Employment Judge: Ian McPherson
Date of Judgment: 01 February 2019
Entered in register: 01 February 2019
and copied to parties