



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102033/2020

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Held via telephone conference call on 17 July 2020

Employment Judge S Cowen

10 **Mr J Fyfe**

**Claimant
In Person**

15 **Arcadis Human Resources Limited**

**Respondent
Mr Ridley -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Respondent's application to file and serve an ET3 after the time limit for doing so, was allowed. The ET3 presented by the Respondent with the application shall be accepted by the Tribunal, as received on 16 July 2020.

REASONS

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1. The Claimant brings claims for breach of contract and age discrimination (see separate preliminary hearing case management order). A final hearing was listed for today, as no ET3 had been received by the Tribunal. However, the Tribunal received an application on 16 July 2020 and EJ McLean ordered that the final hearing be converted to a telephone preliminary hearing to hear the application. The Respondent wishes to resist these claims, but filed an ET3

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outwith the 28 day period and applies for extension of the time limit

2. The Claimant represented himself and the Respondent was represented by Mr Ridley, a solicitor who was instructed in the afternoon of 15 July 2020. He immediately contacted the Tribunal to place himself on record, request copies

of the ET1 and indicate that the Respondent wished to defend the case and apply for an extension of time to do so.

3. A written application and draft ET3 were sent to the Tribunal on 16 July 2020.
4. In the hearing Mr Ridley set out that the Respondents were not aware of the claim until 2.20pm on Wednesday 15 July 2020 when they received an email from the Claimant serving documents for the final hearing today. They immediately instructed him and he then contacted the Tribunal as outlined above. The Respondent asserted that their post room had been open and operational throughout lockdown, albeit with a skeleton staff. They had no record of any notification of a claim being received by the Respondent. Mr Ridley also asserted that enquiries had been made of the Respondent's in house legal department who had not received any such notice, nor any scanned correspondence (as would be the usual process).
5. The Respondent asserted that the balance of prejudice in this application lay with the Respondent who would be precluded from defending what may be a substantial claim. Whereas the Claimant would not have been placed in a worse position than present.
6. The Claimant opposed the application, saying that the Respondent had been aware of the ACAS process, so knew to look out for a claim and that they had no evidence to prove that the Respondent had not received the notification. He also said that he had had contact with a member of the Respondent's HR team to ask for payslips etc so they ought to have been aware that something was happening. As to prejudice, the Claimant said that he will now need to instruct a lawyer.
7. The Tribunal considered and referred the parties to the decision in Grant v ASDA Stores [2017] ICR DI 7., where Simler J referred to the earlier case of Kwik Save v Swain [1997] 1 ICR 49 EAT, which gave guidance on the approach to be adopted by tribunals in exercising their discretion in an application for an extension of time under the Employment Tribunal Rules (in that case the 1993 version). Mummery J gave guidance at pages 54 to 55:

5 *"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 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 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."*

8. The Tribunal took into account the timing of this claim and concluded that this application comes at a time which has been unprecedented. The ET1 in this case was received during the initial phase of Covid-19 lockdown, when many individuals, companies and organisations were adjusting to new working practices. The Tribunal sent the notification of the claim to the Respondent who said they had a functioning post room throughout the lockdown period.

There is no evidence to suggest this is false or mistaken. It cannot be known where or why the notification was not received. However the explanation provided by the Respondent is reasonable in the circumstances and thus the Tribunal accepts that they did not receive the notification of the claim, due to the difficulties which were prominent around the initial phase of lockdown.

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9. The Respondent was not aware that a claim had been issued in the Tribunal until the Claimant emailed the Respondent on 15 July 2020 to serve his evidence prior to a final hearing. At that point the Respondent acted swiftly and without delay to notify the Tribunal of the problem and of their interest in the case.

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10. The Tribunal considered the balance of prejudice in this matter and concluded that whilst the Claimant would not now succeed on a 'default judgment' basis, it would still be open to him to prove his case at a later date. If the Respondent were precluded from participating, they may stand to have judgment against them in relation to serious matters. The Tribunal considered that the overriding objective and interests of justice meant that an extension should be allowed and the ET3 accepted.

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11. The Tribunal went on to consider the remainder of the preliminary hearing and gave orders for the further conduct of this case which can be found in the Orders and Notes on the Preliminary Hearing

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Employment Judge: S Cowen
Date of Judgment: 20 July 2020
Entered in register: 31 July 2020
and copied to parties

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