



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103651/2020

Held on 22 February and 8 March 2021

(By Telephone Conference Call)

Employment Judge: R Gall

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Miss H Mustafa

**Claimant
In Person**

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Maguire Solicitors

**Respondent
Represented by:
Ms D Alexander –
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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1. The Judgment of the Tribunal is that the time for presentation of form ET3 is extended to enable Form ET3 to be accepted and the claim will proceed as defended.
2. As stated at the Hearing, in terms of Rule 62 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, written reasons will not be provided unless they are asked for by any party at the Hearing itself or by written request presented by any party within 14 days of the sending of the

written record of the decision. No request for written reasons was made at the Hearing. The following sets out what was said, after adjournment, at the conclusion of the hearing. It is provided for the convenience of parties.

REASONS

- 5 1. This Preliminary Hearing (“PH”) took place by telephone conference call, initially on 22 February. The PH involved the claimant, Ms Mustafa, the respondents’ solicitor, Ms Alexander and a director of the respondents, Mr Hussain.
- 10 2. The telephone line connection on 22 February was not particularly reliable in that it proved difficult to connect with Mr Hussain. It was also difficult in that whilst Ms Mustafa did not “drop off” the call, she could not at times hear others on the call and could not be heard by others on the call. It was decided to try to take evidence from Mr Hussain, checking now and again that Ms Mustafa could hear the evidence. It was agreed however that if there was any issue in
15 that regard or with any other party then the PH would cease and resume at a later date. The later set down was 8 March 2021. The PH concluded that day.
- 20 3. I heard evidence on 22 February from Mr A Hussain. He completed his evidence in chief and was heard by Ms Mustafa as he gave that evidence. Cross examination started. After approximately 5 minutes of cross examination the connection to Ms Mustafa went silent. I asked her to resume her questioning, however she could not be heard. I was uncertain whether she could hear me. It seemed to me that there was no alternative but to halt the PH. That was what happened. I was satisfied that M Mustafa had been able to hear all of the evidence in chief and clearly had been able to conduct
25 cross examination until the time when the PH was halted.
4. The PH resumed on 8 March 2021 as mentioned. The questions asked thus far in cross examination, including the last question asked, were repeated. Evidence resumed, with a reminder to Mr Hussain that he remained under affirmation. Evidence was completed. Submissions were made.

5. The respondents had lodged a file of documents for the hearing. Mr Hussain did not refer to any of the documents in evidence.

6. The claim was completed by the claimant with the respondents' address being stated to be 171 Elderslie Street Glasgow. It was presented to the Tribunal on 7 July 2020 and service was sent to the respondents at that address on 15 July 2020. It was not returned to the Tribunal. In terms of the Tribunal Rules, service was therefore properly effected. I did not accept the submission for the respondents that service was effected only in November 2020. This is therefore an application made in terms of Rule 20 of the Rules.

7. Although the respondents had traded from 171 Elderslie Street, they had however moved from there in June of 2019. Since that time they had traded from 1 West Regent Street, Glasgow. When the claimant worked for the respondents she worked at 1 West Regent Street. In August of 2020, the respondents moved from 1 West Regent Street to 2 Clarendon Place in Glasgow.

8. I accepted evidence from Mr Hussain that mail redirection was put in place for each office move. I also accepted that while there had been awareness on the part of Mr Hussain that the claimant was contemplating a claim, the first time he became aware of there being a claim made was when he received an email from the Tribunal on 26 October 2020.

9. When he became aware of the claim, Mr Hussain took immediate steps to instruct solicitors. They made contact with the Employment Tribunal on 26 October. They sought, and on 9 November were sent, the claim form and letter which accompanied service of that form.

10. On 11 November the respondents presented form ET3 with a request for it to be accepted. The claimant opposed that application. Submission of form ET3 was therefore very soon after the existence of the claim was discovered by the respondents.

11. In determining this question I have to have regard to the terms of the defence. I have to be satisfied that there appears to be a stateable defence. I accept that the defence as set out is stateable. It remains to be seen whether the claim will be successful or not. That is not what I have to consider today.
- 5 12. In determining whether it is in the interests of justice to permit or refuse extension of time to enable form ET3 to be accepted, I have to have regard to the balance of prejudice to each party if on the one hand form ET3 is accepted and the claim becomes defended, or if on the other hand it is not accepted. I properly have regard to the reason why no defence was initially
10 made and to the time which has passed between the time for lodging form ET3 and the time when this was done.
13. The claim was confirmed by Ms Mustafa as being one in which she claims that she was dismissed because she had asked for terms and conditions of employment, a written statement of her employment particulars, to be issued
15 to her. She states that she asserted a statutory right. Dismissal followed because she had taken that step. Ms Mustafa confirmed, both on 22 February and on 8 March, that although her claim form mentioned discrimination, she did not in fact allege that discrimination had occurred.
14. If the application by the respondents is refused there is substantial prejudice
20 to them. The claim will be undefended. Whilst they may be able to participate in the remedies hearing, liability will be determined without any participation by them.
15. If the application is permitted, there will be prejudice to the claimant. She will be faced with a defence to the claim. The case will take longer to proceed to
25 a hearing as it is defended. If her claim is sound, however, she will obtain her remedy, albeit in the face of a defended claim, with consequent delay and potential additional expense.
16. I bear in mind that the application by the respondents was made when the time which had passed after form ET3 ought to have been lodged was not
30 particularly lengthy. It was due by 12 August and was presented 11

November. No hearing has taken place. No Judgment has been issued. I am also satisfied that there were good reasons for the delay involved. The claim form had not been received by the respondents. I accepted that this was so. There was a credible explanation as to how this had come about. The claim form had gone to the address supplied by the claimant in the claim form. That, however, was an old address for the respondents, one from which they no longer traded. It was not an address at which the claimant had worked. It was the address then showing on the respondents' web site, however. The respondents had intimated to the Law Society that they had moved to 1 West Regent Street. The claimant did not check the address for the respondents with the Law Society however. She took the address from the respondents' web site. The web page had not been kept up to date. I accepted that the claimant did not supply an old address as a means of trying to avoid the respondents becoming aware of the claim. The respondents indeed did not allege that.

17. In considering the position in the round, I also take account of the fact that during the time in question, lock down was in place. The respondents were not working fully from their office premises. Sometimes mail was delivered to their offices. Some days, however, it was not. Had the claim form been received, it would have been defended by submission of form ET3 within the time permitted for that to occur.

18. Ms Mustafa referred to the case of *Office Equipment Systems Ltd v Hughes* UKEAT/0226/16. That case saw the Employment Tribunal refuse to extend time to permit an ET3 to be presented late. In my view it was significantly different to this case, however. In that case, the respondents had received form ET1, but had not responded within the time permitted. The Tribunal determined that the reason advanced for that failure (inability to obtain instructions due to illness on the part of a director) was factually inaccurate. The director had been well enough to give instructions during the period in question and there were other directors who had also been involved in giving instructions on this matter. The respondents had, in the view of the Employment Tribunal, been guilty of deliberate and intentional default in

failing to lodge the response. There was also an issue as to there being merit in the defence advanced.

19. That was not the position here. The respondents in this case had not received form ET1. It is true that they were aware of the intention to present a claim.
5 The fact is, however, that they did not receive the claim form at time of service as it went to their address, as supplied by the claimant, which was an old address from which they no longer traded. It might be said that they should have had clarity in all places as to their then current trading address. Any failings in that regard are relatively minor and are not sufficient reason, in my
10 view and having regard to all the other relevant elements, to preclude the respondents from defence of the claim.
20. The respondents had mail re direction in place. For reasons which are unknown, the claim form did not make its way to the respondents at their new address.
- 15 21. The respondents did not therefore deliberately fail to respond to the claim or put forward reasons for the failure which were untrue on the evidence I heard. They could not respond to a claim of which they were unaware. When they became aware they responded swiftly. The defence is stateable.
22. In all the circumstances, I have concluded that time will be extended to enable
20 form ET3 to be accepted by the Tribunal.
23. In coming to the view I have, I have had regard to
- (a) the interests of justice,
 - (b) the principles of both *Kwik Save Stores Ltd v Swain 1977 ICR 49* and *Chowles v West 2009WL 6433*, together with the case of *Office
25 Equipment Systems Ltd v Hughes*.
 - (c) The balance of prejudice if form ET3 is allowed or is not permitted
 - (d) The length of delay in submission of form ET3

(e) The reasons for there being no submission of form ET3 within the time limit permitted and

(f) The extent to which there is a stateable defence to the claim.

5 24. Weighing all of the above, I have concluded that it is appropriate for time to be extended enabling form ET3 to be received and the claim therefore to become defended.

10 25. As mentioned, Ms Mustafa has confirmed that she does not make a claim of discrimination. Her claim is that she asserted a statutory right. That right was to obtain a written statement of terms, a statement of initial employment particulars. After seeking this, and as a result of so doing, she was dismissed, she says. Her dismissal is, she says, automatically unfair in those circumstances.

26. The claim will therefore proceed to a hearing.

15 27. Having delivered the Oral Judgment I moved to a case management PH. That is covered in a separate note

20 Employment Judge: R Gall
Date of Judgement: 10 March 2021
Entered in register: 13 April 2021
and copied to parties