

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102056/2017**

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**Held in Glasgow on 20 December 2017**

**Employment Judge: Susan Walker (sitting alone)**

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**Mrs C Morgan**

**Claimant  
In person**

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**Vivienne and Scott McKendrick**

**Respondents  
Represented by:  
**Mr McKendrick****

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the application for an extension of time to  
30 present a response is refused and the Judgment issued under rule 21 is confirmed.

**REASONS**

**Introduction**

35 1. The claimant has brought a complaint of failure to pay accrued holiday pay  
against the respondents. The claim was served on the respondents on 30  
June 2017. The respondents were advised that if a response was not  
received by 28 July 2017 they would not be entitled to defend the claim  
(unless an application was made to extend that period). No response was  
40 received and a Judgment was issued without a Hearing under Rule 21 of the  
Employment Tribunal Rules of Procedure on 8 August 2017 which ordered

**E.T. Z4 (WR)**

the respondents to pay to the claimant £631.40 by way of accrued holiday pay.

5 2. This respondent applied for reconsideration of that Judgment on 28 September 2017 and this Hearing was listed to consider that application and also to consider whether the response, which was received on 6 November 2017, should be accepted.

10 3. At the start of the Hearing, the Judge explained to parties that she would consider first whether the response should be accepted late. If it was accepted, then the decision made under rule 21 would be set aside under the ET Rules of Procedure. If the response was not accepted, then she would go on to consider whether, notwithstanding that, the Judgment should be confirmed, varied, or revoked.

15 4. Following discussions with the parties, it was clear that the respondents' main defence was that they were not the claimant's employer, contending that she was employed by a limited company "Dairy Day Care Limited" which is now dissolved. Mr McKendrick accepted that the claimant was due payment for  
20 accrued holiday pay from her employer (whoever that is). However, the sum is disputed.

25 5. The Judge asked whether, as parties were present, they wished her to determine the claim if she decided that the response should be accepted? It was agreed that if the response was accepted, the Judge would consider the preliminary issue of whether the respondents were the claimant's employer. However, she would not consider the merits of the claim (the amount of holiday pay due), as Mr McKendrick considered his wife would have to attend for that purpose. A further Hearing would be required for that.

30 6. Both sides lodged documents. Mr McKendrick and the claimant gave evidence.

**Findings in fact**

7. The Tribunal made the following relevant findings in fact:-

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(i) The claimant was employed in a business (using a neutral term) called Dairy Day Care.

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(ii) The business of Dairy Day Care was a children's nursery regulated by the Care Commission. Mrs McKendrick was the person principally involved in running the business and the "named person" for regulatory purposes.

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(iii) Mrs McKendrick decided to take a step back and return to teaching.

(iv) Mr McKendrick telephoned the claimant, on the recommendation of a friend, to discuss the possibility of her becoming the manager of the nursery.

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(v) The claimant met initially with Mr McKendrick and subsequently with both the respondents. It was explained that Mrs McKendrick would remain the named person but that the claimant would be managing the nursery under supervision from Mr McKendrick.

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(vi) The claimant was appointed as manager with effect from 13 february 2017. Her letter of appointment said she was appointed with "Dairy Day Care" as a Nursery manager. In a number of paragraphs the contract refers to "the Company". For example, "The Company may require you to vary the pattern of your working hours".

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(vii) Her payslips state her employer as "Dairy Day Care".

(viii) In her P60, in the box headed "your employer's full name and address", it states " Dairy Day Care".

(ix) She was paid from a bank account in the name of Scott McKendrick.

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(x) She was supervised mainly by Scott McKendrick.

(xi) There were some documents on the premises which referred to "Pop Pop Promotions Limited". This was a previous company name of Dairy Day Care Limited but the claimant was not aware of this.

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(xii) Notepaper used by the business did not mention a limited company but referred to "Dairy Daycare Centre".

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(xiii) The claimant resigned with effect from 23 June 2017.

(xiv) The business ceased trading shortly after the claimant's resignation. The respondents were heavily involved in that process.

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(xv) The respondents were on holiday during part of the period between the claim being served and the date a response was due to be provided.

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(xvi) The respondents did not believe that the claimant was employed by them and believed that she was bringing a claim against them directly as a way of getting payment when the company had ceased trading.

(xvi i) The respondents did not attempt to respond to the claim until they were confronted by Sherriff Officers seeking to enforce the Judgment.

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Relevant law

8. Rule 20 of the 2013 Rules of Procedure provides that a Judge may grant an extension of time to present a response to a claim, even when the time has passed. If such an extension is granted, any Judgment issued under rule 21 is set aside.

9. Rule 20 does not state the criteria to be applied by the Judge in making this decision. The Judge therefore has to exercise discretion in accordance with the overriding objective in Rule 2 which is to *“deal with cases fairly and justly”*.

10. Cases decided under the previous rules of procedure where the test was whether it was “just and equitable” to extend time are of assistance. In **Kwik Save Stores Ltd v Swain and others 1997 ICR 49**, the Employment Appeal Tribunal (“EAT”) said that *“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”*.

11. In particular, the EAT said that a judge should always consider the following:

- The employer’s explanation as to why an extension is required. The more serious the delay, the more important it is that the employer provide a satisfactory and honest explanation.
- The balance of prejudice. Would the employer, if its request is refused, suffer greater prejudice than the claimant would suffer if the extension of time were granted?
- The merits of the defence.

Discussion and decision

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Should an extension of time be granted to present a response?

12. I firstly considered the explanation for the delay. The respondents accept that the claim was received by them. Mr McKendrick said that he had attempted  
10 to email a response on the last day as they had been on holiday and he did not want to leave it to the post. He said that several days later he received notification that it had not been delivered. He did not produce any evidence of this. I do not accept that explanation. There was no further attempt to present a response. It would be expected that someone receiving such  
15 notification would promptly take steps to resubmit the response with an explanation for the delay. It would be expected that the evidence of the attempt to present the claim on time would be provided.

13 Even if there had been an attempt to email a response as alleged by Mr McKendrick, that would only explain the initial failure. There was no further  
20 attempt to contact the Tribunal and present the response. The respondent took no action when a Judgment was issued against them. The letter that accompanies the Judgment states clearly that the respondents may apply for reconsideration of the Judgment within 14 days or may appeal. The respondent did neither of these things. It is not suggested that they did not  
25 receive any of the documentation. On the balance of probabilities, I do not accept the respondents made any attempt to provide a response until the Sherriff officers appeared to enforce the Judgment. I consider they simply ignored the claim.

14. Why did they do so? I accept that the respondents were preoccupied with  
30 the wind up of the Dairy Dare Care business and that they are out of pocket as a result. I accept they are, no doubt, under stress as a result. There also

5 appears to be some personal animosity in this case. I make no comment about whether that is justified. However, that does appear to have been a factor in why the claim was simply ignored by the respondents and why the holiday pay was not paid at the time. The respondents also appear to believe the claimant claimed against them in a personal capacity only because the business had ceased trading.

15. In my view, there has been no satisfactory explanation provided for the delay in submitting a response to the claim.

10 16. Turning to the merits of the proposed defence, a person's employer is determined not by what the employer thought nor what the employee thought but what would a reasonable person have understood was the position to be. It will be relevant what was said or done and any paperwork that was provided at the time of contracting. In the case of ambiguity, it may be relevant to consider the context in which the agreement was made.

15 17. I accept that the respondents genuinely believe that the claimant was not employed by them and was employed by a company "Dairy Day Care Limited". However, on the evidence presented to me, that is unlikely to succeed as a defence. No paperwork has been provided which mentions that entity at all. Mr McKendrick suggests it is clear that the claimant was  
20 employed by "the business" known as Dairy Day Care. That is true but that is not the point. Someone can be employed by a "business" but in the absence of a corporate entity, they will be employed by an individual or individuals trading under that name. A trading name is not an entity that can enter into a contract.

25 18. There is nothing in the evidence presented to me that would alert the claimant to the fact that she was employed by a limited company (with the risks that that entails). She was approached by Mr McKendrick to manage a nursery called "Dairy Day Care" and that, on the face of it, was a business that had previously been run by Mrs McKendrick. The claimant was told that Mrs  
30 McKendrick would remain the named person for the purposes of the Care

Inspectorate but otherwise she was stepping back and the claimant was to manage the business supervised by Mr McKendrick.

5 19. The claimant was paid from an account in the name of Mr McKendrick. Her payslips and contract of employment refer to "Dairy Day Care". Her tax documents refer to "Dairy Day Care". In addition, although the claimant did not refer to it for that purpose, she provided me with an invoice sent to her on 13 June 2017 on notepaper of "Dairy Daycare Centre" which was from "Vivienne McKendrick, Nursery Owner".

10 20. The only contrary evidence was the reference in the contract of employment to "the Company". However, that term was not defined and could equally be understood as a reference to the business of Dairy Day Care. The claimant herself volunteered that some documents around the premises referred to "Pop Pop Promotions Limited" which is a previous name of Dairy Day Care Limited. However, there was no reason for the claimant to connect that to a  
15 limited company that could be her employer.

21. Mr McKendrick suggested that it was a requirement of the Care Commission that the nursery was operated by a limited company and the claimant would know that. No evidence was presented about that and I accepted the claimant's evidence that she was unaware of such a requirement.

20 22. On the face of it a defence that the claimant was not employed by the respondents has merit. However, in reality, having heard the evidence about that matter, I do not consider that defence would be likely to succeed and therefore is not a factor that weighs significantly in favour of an extension of time.

25 23. As for the amount of holiday pay, the respondents concede the claimant is due something. However, the respondents suggest that the claimant also owes them money. The draft response specifically refers to fees due in respect of the claimant's own son and alleges that procedures were not followed which cost Dairy Day Care a "huge financial loss". I can make no



comment about the validity or otherwise of these allegations. However, there is no breach of contract claim made by the claimant and so the employment Tribunal would not be able to consider any counterclaim made by the respondents. These matters, even if proved, would not be relevant in defending a claim for holiday pay.

24. Mr McKendrick referred to an issue about training days which the respondent says were unauthorised and which would impact on the claimant's holiday entitlement. That is disputed by the claimant. That would be a potentially relevant defence to a claim for holiday pay. However, having reviewed the proposed response, this argument does not seem to feature at all in it. I can only consider the draft response as presented at this time.

25. I have to assess the relative prejudice to the parties in my decision. For the respondent, if I refuse the extension of time, they will lose the opportunity to defend the claim. However for the reasons set out above, I do not consider their defence is likely to succeed. If I allowed the extension, I would then make a finding that the claimant was employed by the respondents on the evidence I heard so there is no real prejudice.

26. As for the argument that the amount of the award is too high, the response as currently drafted does not provide any basis for reducing the award. If I were to allow the response to proceed, the claimant will suffer further delay in payment of an award, part of which at least, she has an undisputed entitlement to. It is already over 6 months since she left her employment when any accrued holiday pay should have been paid. She has lodged a claim, been granted a Judgment and has had to instruct Sherriff officers when the Judgment was not paid. If I allowed an extension of time, she will then have to wait for a further Hearing which is likely to be several months. Then, she will have to wait 42 days before she can instruct Sherriff Officers again if the award remains unpaid. The balance of prejudice it seems to me favours the application being refused.

27. Taking all of the above into account, the respondent has provided no satisfactory explanation for the delay in responding, the only potentially relevant part of the defence has little merit on the evidence and the balance of prejudice favours the claimant, I consider that dealing with the case “fairly and justly” requires me to refuse the application for an extension of time to present a response.

28. I then considered whether the Judgment that has been issued should be confirmed, varied or revoked, notwithstanding there is no response. The test is whether it is in the “interests of justice” to do so (Rule 70). I did consider whether I should vary the Judgment so that the Tribunal could consider as of new the amount of the award (while leaving the Judgment on liability in place). However, this would require a process for amending the response to include the matters that the respondent now raises. If granted, there would then have to be a further Hearing. I consider that the delay that this would involve in payment to the claimant outweighs the prejudice to the respondent in having an opportunity to reduce the amount of the award to a limited extent. I therefore confirm the Judgment already issued on 8 August 2017.

Employment Judge: Susan Walker  
Date of Judgment: 21 December 2017  
Entered in register: 22 December 2017  
and copied to parties