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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108761/2021 (V)

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Heard by CVP on 26 November 2021

Employment Judge L Wiseman

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Mrs Nadia Zeyani

**Claimant
Represented by:
Mr K McGuire -
Advocate**

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Kunti & Kunti Ltd

**Respondent
Represented by:
Ms R Mohammed -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Tribunal decided the claim was presented late and that it was not just and equitable to extend the time limit. A Tribunal does not accordingly have jurisdiction to determine the claim.

REASONS

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1. The claimant presented a claim to the Employment Tribunal on 25 March 2021 in which the claimant indicated she was bringing a claim of discrimination because of the protected characteristic of pregnancy. The claimant alleged she had been entitled to furlough payments and when she questioned her employer about this, she was told “we don’t know when we can open and you are pregnant and won’t be coming to work”.

2. The respondent entered a response in which it asserted the claim was timebarred, failing which the reason for the termination of employment was because the business had to close and did not know when it would reopen.
3. The hearing today was to determine whether the claim had been presented in time, and to determine the claimant's application (made by email of 2 September 2021) to amend the claim to introduce a complaint of automatically unfair dismissal (because of pregnancy) and payments in respect of notice, wages and holiday pay.
4. I heard evidence from the claimant and from Ms Neepa Mehta, Director of the respondent. I was also referred to a number of documents. I, on the basis of the evidence before me, made the following material findings of fact.

Findings of fact

5. The respondent business is a hairdresser and beautician.
6. The claimant started working for the respondent in August/September 2020.
7. The respondent was required to close on 24 December 2020 for a period of lockdown. Ms Mehta and the staff knew this would be a longer period of lockdown than previously, although at that time no-one knew just how long the period of lockdown would last.
8. The claimant's employment with the respondent ended. The respondent maintained the claimant's employment terminated on 31 December 2020. The claimant maintained her employment ended on 11 February 2021. The claimant did not work during January or February 2021 and received her P45 on 11 February 2021.
9. The claimant was pregnant at the time of the termination of her employment and gave birth on 26 April 2021.
10. The claimant contacted ACAS on 16 March 2021 and received an early conciliation certificate on 25 March 2021. The claimant presented a claim to the Employment Tribunal on 25 March 2021.

11. The claim was rejected on 30 March 2021 because the name on the early conciliation certificate was different to the name on the claim form. The letter of rejection sent to the claimant on 30 March 2021 informed the claimant that if she wished to apply for a reconsideration of the decision, she had a period of 14 days in which to do so.
12. The claimant made an application for reconsideration on 22 June (page 19) but this was rejected on 24 June (page 20) because the application for reconsideration did not correct the defect previously notified to the claimant.
13. The claimant sought help from a friend and, on 28 June (page 23) made an application for the decision to reject the claim to be reconsidered.
14. The claimant was advised, by letter of 1 July, to send a new (or amended) claim form to accompany the application for reconsideration. The claimant did so on 2 July. The application for reconsideration was granted on 6 July 2021 and the claim accepted at that date.
15. 15. The claimant was advised by letter of 8 July that it appeared her claim had been accepted out of time.

Credibility and notes on the evidence

16. The claimant accepted in cross examination that she had received advice from a Citizens Advice Bureau regarding making a claim, and that she had received advice from them and ACAS regarding the time limits for doing so.
17. The claimant told the Tribunal that she had not received the letter dated 30 March 2021 from the Tribunal office, informing her the claim had been rejected. She contacted the Tribunal office on 18 June to enquire about her claim and when informed that it had been rejected, she wrote on 22 June to ask for that decision to be reconsidered. The claimant told the Tribunal that she had not contacted the Tribunal office earlier because she had “not wanted to put pressure on them as [she] knew that due to Covid, things were under pressure. Plus [she] gave birth to her child during Ramadan and did not feel well enough”.

18. The claimant accepted the name and address on the letter of 30 March had been correct, and that she had not experienced any difficulties with receiving mail to that address.

19. I did not find the claimant's explanation that she had not received the letter of
5 the 30 March to be entirely reliable (for the reasons set out below).

The application to amend the claim

20. The claimant's representative, by email of 2 September 2021, made an application for leave to amend the claim. Ms Salmond, the claimant's representative, confirmed the claim set out in the original claim form was one
10 of direct discrimination on grounds of pregnancy. The application to amend sought to introduce claims of (i) automatic unfair dismissal for reasons of pregnancy; (ii) payment of notice; (iii) unlawful deduction of wages and arrears of pay; (iv) holiday pay and (v) failure to provide a written statement of employment particulars.

15 Claimant's submissions

21. Mr McGuire noted the application for reconsideration of the decision to reject the claim had been determined on 6 July 2021. The claimant had been notified of her dismissal on 11 February, and therefore the claim was out of time by some weeks on the face of it. Mr McGuire acknowledged there was a dispute
20 regarding the effective date of termination of employment and acknowledged that was not a matter for determination today.

22. Mr McGuire referred to section 123 (1)(b) Equality Act which sets out the time limit and the just and equitable extension. He also referred to the case of ***Thompson v Ark Schools 2019 ICR 292.***

23. Mr McGuire submitted there were three points to take into account which supported it being just and equitable to extend the time limit in this case. Those points were:-

(a) the claimant had acted quickly after the 11 February, but had been caught out by putting different names on the early conciliation certificate

and the claim form. The claimant contacted the Tribunal in June and was told, at that time, that the claim had been rejected. The claimant responded to that quickly.

5 (b) The claimant was pregnant and gave birth in late April. There was also a lockdown situation because of Covid and the Tribunal was under pressure.

10 (c) Prejudice was an important consideration in discrimination cases. If the claim was allowed to proceed, the respondent would still be able to defend it. Mr McGuire submitted that on the face of it, looking at the text messages, there was a strong prima facie case.

23. Mr McGuire invited the Tribunal to exercise its discretion to allow the claim to proceed.

15 24. Mr McGuire, in respect of the application for leave to amend the claim, referred to the **Selkent** case, and acknowledged the application sought to introduce new claims, albeit they were based on the same facts. He also acknowledged the claims were being brought out of time and accordingly there was a need to consider whether time should be extended.

20 25. Mr McGuire submitted it had not been reasonably practicable for the claimant to have brought these claims in time because she had a limited understanding of the type of claim which could be brought. She had not had the benefit of legal advice when making the claim. The claimant had subsequently sought legal advice and the application for leave to amend had been made quickly thereafter.

26. Mr McGuire invited the Tribunal to allow the application to amend the claim.

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Respondent's submissions

27. Ms Mohammed noted the claim had been presented on 25 March, and rejected on 30 March. The letter rejecting the claim had been sent to the claimant at the correct address, and the claimant had accepted there had been no issues with the post. Ms Mohammed suggested the claimant had received the letter but had not acted to respond to it until much later in June. Ms Mohammed submitted the explanation put forward by the claimant for the delay were not acceptable: the Tribunal office had not been closed or under unreasonable pressure. The claimant had had every opportunity to make contact but had failed to do so.
28. Ms Mohammed acknowledged the claimant had given birth in late April, but submitted this was not a reasonable excuse for delay in circumstances where there had been no incapacity or inability to communicate.
29. The claimant had then made an application for reconsideration but this had been rejected. A further application for reconsideration was made but rejected because she had not accompanied this with a new claim form. The claimant was given an opportunity to provide the new claim form. Ms Mohammed questioned how many bites of the cherry the claimant was to be given.
30. Ms Mohammed submitted the claimant could have obtained legal advice at any point, but had not done so until later in the process.
31. Ms Mohammed submitted, with regard to the application for leave to amend the claim, that the claimant could have obtained legal advice when making her claim, but she had not done so and the application to amend the claim should not be allowed.

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Discussion and Decision

Timebar

32. I firstly had regard to the terms of section 123 Equality Act which sets out that a claim must be presented to the Employment Tribunal within the period of

three months beginning with the date of the act complained of. However, section 123(1)(b) allows a claim to be brought within such other period as the Employment Tribunal thinks just and equitable.

5 33. There is a dispute between the parties regarding the effective date of termination of employment but this only impacted on the timebar issue to the extent that if (as the respondent asserted) the claimant's employment terminated on 31 December 2020, it could not be said (as suggested by Mr McGuire) that the claimant had acted quickly to make her initial claim on 25 March 2021.

10 34. The issue in this case is that the claimant's claim (presented on 25 March) was rejected because the employer's name on the early conciliation certificate did not match the employer's name on the claim form. The claimant was informed of the decision to reject the claim form by letter of 30 March.

15 35. The claimant had a period of 14 days in which to seek reconsideration of the decision to reject the claim. She did not make an application for reconsideration until 22 June. This was rejected on 24 June. A further application for reconsideration was made on 28 June and the claim was accepted on 6 July.

20 36. The claimant's representative accepted (regardless of the effective date of termination) that the claim had been made out of time and he invited the Tribunal to exercise its discretion to allow the claim to proceed because it would be just and equitable to do so.

37. I, in considering whether it would be just and equitable to allow the claim to proceed, noted the following factors should be put into the balance:

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- the claimant's position that she did not receive the letter of the 30 March from the Tribunal informing her that her claim had been rejected;

- the claimant's position that she had not contacted the Tribunal until June, to follow up on her claim because she thought Tribunals were under pressure;
- the fact the claimant gave birth in late April and
- 5 • the fact it is appropriate to have regard to the checklist used by civil courts when exercising discretion, and to put into the balance the prejudice each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case and in particular (where appropriate) to the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has co-
10 operated with any requests for information, the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain
15 legal advice once she knew of the possibility of taking action.

38. I next considered and balanced each of the above points. The claimant delayed from 30 March until 28 June in exercising the right to correct the error on the claim form and seek reconsideration of the decision to reject the claim form. This delay meant the claimant's claim form was not accepted until 6
20 July. The claimant advanced three reasons for the delay. Firstly the claimant told the Tribunal that she did not receive the letter of 30 March informing her the claim form had been rejected. I, in considering this explanation, noted the claimant accepted her address noted on the claim form and used in the correspondence dated 30 March from the Tribunal office was correct (page
25 16). I also noted the claimant confirmed she had no problems with receiving post. I have to balance what the claimant has told me, with the fact that of all the letters sent by the Tribunal office to the claimant, the only one said not to have been received was the (important) letter of 30 March.

39. I acknowledged items can go missing in the post, but I felt it was curious and
30 coincidental that the only letter to have allegedly gone missing in this whole

process was the important letter of the 30 March. I concluded this explanation was not entirely reliable.

40. Secondly, the claimant told the Tribunal that she did not contact the Tribunal office earlier than late June because she thought they would be under
5 pressure with Covid. This is nothing more than an erroneous assumption made by the claimant. The Tribunal office has been open throughout the pandemic. The fact the claimant's claim form was presented on 25 March, processed, rejected and the letter notifying the claimant of that decision issued on 30 March demonstrated the rate at which work was being
10 processed notwithstanding the pandemic. Further, a phone call to the Tribunal office would have easily established the position.

41. The claimant's representative also referred, in his submission, to there being a lockdown situation because of Covid, and the Tribunal accepted this was correct. However, the representative made no submission how this may have
15 impacted on the claimant's ability to contact the Tribunal and accordingly I attached no weight to this point.

42. Thirdly, the claimant gave birth in late April. The claimant said she had had a caesarean section and had given birth during Ramadan. There was nothing beyond this statement to support or demonstrate the claimant was unable to
20 act earlier than late June.

43. I also had regard to the issue of whether the claimant acted promptly following the termination of her employment which is clouded by the dispute regarding the effective date of termination of employment. If, as the claimant maintains, her employment ended on 11 February, then it is arguable the claimant acted promptly by presenting her claim on 25 March. If however, as the respondent
25 maintains, she was dismissed on 31 December, then presenting the claim on 25 March could not be said to be acting promptly.

44. I also took into account the fact that if the claimant did receive the letter dated 30 March, she did not act promptly to deal with the application for reconsideration. Further, even if the claimant did not receive that letter, it is
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still arguable the claimant should have acted sooner to check on the progress of her claim.

5 45. I lastly had regard to the prejudice to each party if I decide to allow, or not allow, the claim to proceed. If I decide not to allow the claim to proceed, the claimant will lose the opportunity to present her case of discrimination. If I decide to allow the claim to proceed, the respondent will have an opportunity to defend the claim, albeit the prejudice to them lies in the time and expense of having to do so.

10 46. I, having considered each of the above points, balanced on the one hand my conclusion that the claimant's position that she did not receive the letter of 30 March was not entirely reliable because it was just too coincidental and convenient that the letter was not received. I also could not accept the claimant's explanation that she thought Tribunals would be under pressure, because that was simply an erroneous assumption made by the claimant.
15 Further, the claimant gave birth on the 26 April, but there was no evidence to suggest this had caused her to be unable to act prior to late June. On the other hand, I balanced this with my conclusion the balance of prejudice lay with her. I considered the issue of the claimant acting promptly was neutral in the circumstances.

20 47. I next asked myself whether it would be just and equitable in the circumstances to extend the time limit for presenting the claim. I considered that even if the tribunal accepted the claimant did not receive the letter of 30 March, there is a period of 8 weeks, following the birth of her child on the 26 April, until the 18 June, when there is no adequate explanation for why the
25 claimant did not act sooner.

48. I, in those circumstances, decided the claimant had failed to show that it would be just and equitable to extend the time limit to allow her claim to proceed.

I decided the claim had been presented late and that it was not just and equitable to extend the time limit.

49. In the circumstances of having decided the claim was presented late and a Tribunal does not have jurisdiction to determine the claim, I did not proceed to determine the application to amend the claim.

5 Employment Judge: Lucy Wiseman
Date of Judgment: 03 March 2022
Entered in register: 03 March 2022
and copied to parties

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