Case Number: 3305960/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms K Slawik	v	Al-Shifa Trading Limited

Heard at: Watford, by Cloud Video Platform **On**: 21 June 2022

Before: Employment Judge Hyams, sitting alone

Representation:

For the claimant: Ms Katarzyna Krupinska, representative (a friend of the claimant)
For the respondent: Ms Arianna Barnes, of counsel

RESERVED JUDGMENT ON A PRELIMINARY POINT

1. The claimant's claim for unpaid wages is outside the jurisdiction of the employment tribunal. That is because it was made outside the primary time limit period of three months (extended as applicable by any period of early conciliation) and it was reasonably practicable to make it within that period.

2. The claimant's claim of discrimination because of pregnancy or maternity is within the tribunal's jurisdiction despite having been made outside that primary period. That is because it is just and equitable to extend time for the making of the claim.

REASONS

Introduction and overview

1 The claimant's claim form which was allocated the case number 3305960/2021 was the subject of the above determinations. A previous claim form was presented. That previous claim form was (in the circumstances which I describe below) allocated case number 3300382/2021. I refer to the latter claim form as

"the first claim form", and to the one which was the subject of the above determinations as "the second claim form".

2 The first claim form was made well within the primary time limit and after an early conciliation certificate had been issued by ACAS in respect of the claims made in the claim form. However, the claim form was (in the circumstances which I describe below) rejected because the name on the ET1 claim form of the respondent was not that of the respondent on the early conciliation certificate.

3 The claimant's evidence was that she did not know about that rejection until 20 April 2021. The second claim form was certainly issued on that day. That claim form was out of time in respect of all of the claims made in it unless time was extended for each of those claims.

4 There was a preliminary hearing in relation to the claims made in the second claim form on 6 January 2022. It was conducted by Employment Judge ("EJ") Manley. In paragraph 1 of her record of that hearing, EJ Manley wrote this:

> "This matter requires a preliminary hearing for jurisdictional issues. It has been listed for one day before an employment judge at Watford Employment Tribunal, Radius House, 51 Clarendon Road, Watford, WD17 1HP to start at 10am or so soon thereafter as possible on Tuesday 21 June 2022. The issues that the preliminary hearing will be, as far as is just, the following:
>
> 1) Whether the claim has been presented in time, including the question of whether it was not reasonably practicable to present the unlawful deduction of wages claim in time and whether it is just and equitable to extend time for the pregnancy/maternity discrimination claim if the claim was presented late;
>
> 2) Whether the claimant was employed by the respondent between April 2019 until November 2020 under section 83 Equality Act 2010 to allow her pregnancy/maternity discrimination claim to proceed;
>
> 3) Whether the claimant is a worker for the respondent as defined by section 230(3) Employment Rights Act 1996 to allow her unlawful deduction of wages claim to proceed;
>
> 4) Any necessary case management issues should the claim or part of it proceed."

5 I conducted that one-day hearing. During it, I heard oral evidence from the claimant and Ms Krupinska, her representative. They were both cross-examined by Ms Barnes. In what follows below, any statement about the factual

position is a finding of fact made by me by reference to the documents before me and after hearing that oral evidence.

The first claim form

6 The first claim form was presented on 12 January 2021. In it, the claimant claimed by ticking the relevant boxes on page 6 of the ET1 claim form that she had been discriminated against "on the grounds of pregnancy or maternity" and that she was owed "holiday pay" and "other payments". The claimant and Ms Krupinska worked together in compiling and presenting the claim form. The claimant relied on Ms Krupinska as her representative as Ms Krupinska had previously made a claim to an employment tribunal. Ms Krupinska had no legal expertise. The claims would all have been made in time if they had been presented on or before 5 March 2021. The claimant relied on Ms Krupinska to help her in part because the claimant was (as she told me, and I accepted) somewhat distracted by her pregnancy and then (after it was born) her new baby.

7 During the first part of 2021, there was a highly restrictive lockdown in place, in response to the Covid-19 public health emergency. Ms Krupinska said (and I also accepted) that she and the claimant thought that there would be greater than usual delays as a result of that lockdown.

8 In box 8.2 of the first claim form, this was said (and only this):

> "I started a grievance as I was discriminated by manager once I informed about my second pregnancy. My manager tried to cut my hours, so I raised dispute, however that led to further damage. He tried to cut me off parking so I would not be able to travel to work as I had to drop my child to nursery before getting into workplace. Once I informed ACAS my employer started to claim I am not employed while I had verbal contract and also written statement of employment as he served it to my bank when applying for mortgage.
>
> I believe my employer is trying to avoid legal responsibilities and he did not take my grievance into account as the behaviour I was exposed to by my manager who is actually my employers son could lead to disciplinary action against manager. There is conflict of interests for my employer to deal with my dispute. He also had not paid me Statutory Sick Pay once I started Acas Conciliation. I have been very distressed with situation so I am not undertaking work as I am worried of further discrimination. There is also outstanding holiday pay as since first pregnancy I did work less hours so I was not aware of my entitlement."

9 In box 9.2 of the claim form, the claimant claimed "Compensation tor my loss of income, maternity pay guarantee as I am due in May, any holiday and other payments owed and discrimination award."

10 The claimant's representative was stated to be Ms Krupinska. The early conciliation form named as the respondent Al-Shifa Trading Limited, and stated the address of the respondent as "Priory Pharmacy, 2 Priory Road, High Wycombe HP136SE".

11 The name of the respondent on the claim form was "Shabbir Jogiat", whose address was stated to be "2 Priory Pharmacy, High Wycombe, Bucks HP136SE".

12 The claimant and Ms Krupinska both received an email from the tribunal on 12 January 2021 in the following terms (the copy which was before me was sent to Ms Krupinska's email address, but the claimant told me on 21 June 2022 that she had been sent and received a copy of it as well):

> "Claim number: 332015248500
>
> Kamila Slawik
>
> Thank you for submitting your claim to an employment tribunal.
>
> ---
>
> WHAT HAPPENS NEXT
>
> We'll contact you once we have sent your claim to the respondent and explain what happens next.
>
> At present, this is taking us an average of 25 days.
>
> Once we have sent them your claim, the respondent has 28 days to reply.
>
> ---
>
> SUBMISSION DETAILS
>
> Claim submitted: 12 January 2021
> Tribunal office: Watford
> Contact: watfordet@justice.gov.uk, 01923 281 750".

13 On 26 January 2021, Ms Krupinska was sent by the tribunal a letter in the following terms:

> "Your claim form has been referred to Employment Judge R Lewis who has decided to reject it.
>
> The Judge's reasons for this decision are that, although you have given an early conciliation number in section 2 of the claim form, the name of the prospective respondent on the early conciliation certificate is not the same as the name of the respondent on the claim form.

> I enclose some explanatory notes called 'Claim Rejection - Early Conciliation: Your Questions Answered'. They include information about applying for reconsideration of the decision to reject your claim."

14 It was Ms Krupinska's evidence that she had not received that letter at the time it purported to have been sent (i.e. either by email on 26 January 2021 or in the post shortly after that day). I concluded that she had not received it at that time, if only because of the circumstances in which she certainly did receive it and what she did on the day that she did in fact receive it. She received it with an email which was sent to her on 20 April 2021, which she was sent by the tribunal staff at Watford after she had telephoned the office to find out what had happened to the claim that had been presented and acknowledged on 12 January 2021. The email of 20 April 2021 was sent at 10:36 and was in these terms:

> "Dear Katarzyna Krupinska,
>
> Thank you for getting in touch with the Employment Tribunal.
>
> Unfortunately claim 3300382/2021 Kamila Slawik v Shabbir Jogiat was rejected, a letter was originally sent out on the 26th January 2021. I have attached the letter which details why the claim was rejected.
>
> Kind regards".

The second claim form

15 Ms Krupinska then on that day filed a new claim form, which was then given the number 3305960/2021 (i.e. the second claim form). The same early conciliation number was given on it, but this time the name of the respondent was "Al-Shifa Trading Ltd", whose address was stated to be "2, Priory Road, High Wycombe, Bucks HP136SE." That claim form contained some slightly different details of the claim. In box 8.2 of the new claim form, this was said:

> "I started grievance as I was discriminated by manager once I informed him about second pregnancy. My manager tried to cut my hours, so I raised dispute, however that led to more problems. He tried to cut me off parking so I would not be able to travel to work as I had to drop my child to nursery before getting into workplace. Once I asked ACAS for help to resolve disputes my employer started to claim I am self employed while I had verbal contract and also written statement of employment as he provided it to me just before returning to work after maternity I took prior.
>
> My employer is not dealing with my grievance as the manager involved is his son.
>
> I also has not been paid SSP once I started ACAS conciliation. There is also outstanding holiday pay as I have not taken any since first pregnancy

> as there was not as much allowance as I have worked less hours until my son started nursery."

16 In box 9.2 of the claim form, there was almost the same content as that which was in box 9.2 of the first claim form. The content of the second box 9.2 was this: "Compensation for loss of income, maternity pay and any other payments owed and discrimination award."

17 Ms Krupinska said that she had not seen the letter dated 26 January 2021 until 21 June 2022. That was because she said that it was not attached to the email of 20 April 2021 the text of which I have set out in paragraph 13 above. I found that difficult to believe. Ms Krupinska said that she had viewed the email on a Samsung tablet, and I doubted that the enclosure would have been hidden by the software on that tablet. She said that she was able to see it when she viewed it on the Windows laptop which she had borrowed from a friend for the purposes of the hearing of 21 June 2022.

The relevant law

18 Rule 12 of the Employment Tribunals Rules of Procedure 2013 ("the 2013 Rules") provides (and provided at all material times):

> "(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be ...
>
> > (f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.
>
> (2A) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made an error in relation to a name or address and it would not be in the interests of justice to reject the claim."

19 Paragraph (2A) used (until 8 October 2020, when SI 2020/1003 came into effect) to contain the words "a minor" where there is now the word "an" before the word "error". There is a small series of cases concerning the impact of rule 12(2A) as it stood with the word "minor" qualifying the word "error". It is discussed in paragraphs PI[290.31]-[290.36] of *Harvey on Industrial Relations and Employment Law* ("*Harvey*"). The cases include the decisions of the Employment Appeal Tribunal ("EAT") in *Giny v SNA Transport Ltd* UKEAT/0317/16 and *Chard v Trowbridge Office Cleaning Services Ltd* UKEAT/0254/16 (4 July 2017, unreported). The approach of Kerr J in the latter case was described helpfully in this way in paragraph PI[290.36]:

> "In considering the correct approach to the interpretation of r 12(2A), Kerr J rejected a literal interpretation, which involved a two-stage test of

deciding, first, whether an error is minor, and, second, only if it is, whether it is in the interests of justice to reject the claim. He did so on the basis that it is 'too purist' an approach; is inconsistent with the overriding objective; and risked causing injustice (para 68). Instead, he preferred to read the rule:

> 'as indicating that the "interests of justice" part of the rule is a useful pointer to what sort of errors ought to be considered minor. To put the point another way, minor errors are ones that are likely to be such that it will not be in the interests of justice to reject the claim on the strength of them.'

In *Chard* the employment judge, having concluded that the error was not minor, did not go on to consider the interests of justice point at all."

20 The absence now of the word "minor" in rule 12(2A) was in my view of considerable significance.

21 Rule 13 of the 2013 Rules was also significant. It was at all material times in these terms.

> "(1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either—
>
> (a) the decision to reject was wrong; or
>
> (b) the notified defect can be rectified.
>
> (2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and if the claimant wishes to request a hearing this shall be requested in the application.
>
> (3) If the claimant does not request a hearing, or an Employment Judge decides, on considering the application, that the claim shall be accepted in full, the Judge shall determine the application without a hearing. Otherwise the application shall be considered at a hearing attended only by the claimant.
>
> (4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified."

22 As for the legal tests to be applied when considering whether time should be extended for making a claim, they were the well-worn ones of whether it was (so far as relevant) reasonably practicable to make the claim within the primary time limit (which applied to the claim for unpaid wages by reason of section

23(4) of the ERA 1996) and whether (applying section 123(1)(b) of the EqA 2010) it was just and equitable to extend time for making the claim. In applying the first of those two tests, I took into account the case law referred to in paragraphs PI[190]-[196], PI[222]-[228], and (although these were less important, they were nevertheless helpful by way of background where there is a postal error) PI[231]-[231.04] of *Harvey*. In the latter passage, I found the following extract from paragraph PI[231.02] to be particularly helpful here:

> "A litigant cannot simply post the ET1, hear no confirmation of its safe arrival, and then sit back and rely on a 'not reasonably practicable' extension some days, weeks or months later. This was the scenario in *Capital Foods Retail Ltd v Corrigan* [1993] IRLR 430 where an unfair dismissal complaint was posted by the claimant's solicitors five weeks before the expiry of the time limit. There was no acknowledgment of receipt by the tribunal, nor was the document returned by the Post Office. Three months after the time limit had expired, the solicitor realised that something was amiss and sent a copy of the claim to the tribunal. The tribunal accepted the solicitor's evidence as to the posting of the original claim and granted an extension of time on the ground that it was not reasonably practicable for it to have been presented in time. The EAT, however, reversed the decision, and dismissed the complaint. It held that it was not sufficient for the solicitor simply to rely on the presumption that what is posted will be delivered, for reliance on that presumption must itself be shown to be reasonable. The 'not reasonably practicable' test is only satisfied if the claimant or their advisers can show that they have taken all reasonable steps to see that the claim was received in time, and this includes checking the position if no reply has been received. In the circumstances, as the solicitor had not carried out any such check to ensure that 'the conduct of business was taking a normal course', it could not be said to have been reasonably impracticable for it to have presented the claim in time."

23 In applying the second of the two relevant tests, namely when considering whether it was just and equitable to extend time, I took into account the principles in *Robertson v Bexley Community Centre* [2003] IRLR 434 as explained in *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327, and the judgment of the Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 27, [2021] ICR D5. In paragraph 37 of his judgment in the latter case, with which Moylan and Newey LJJ agreed, Underhill LJ said this:

> 'The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes [in ([1995] UKEAT 413/94]) "the length of, and the reasons for, the delay". If it checks those factors against the list in [*British Coal Corporation v Keeble*

> [1997] UKEAT 496/98, [1997] IRLR 336], well and good; but I would not recommend taking it as the framework for its thinking.'

24 There was one appellate case concerning reasonable practicability which was on what were in one respect similar facts to those of this case. That was *Adams v BT plc* UKEAT/0342/15, [2017] ICR 382. There, Simler P (as she then was) was invited to, and did, apply the reasonable practicability test where the claimant had fallen foul of the then-applicable early conciliation requirements by failing to put the full conciliation number on the claim form. There is now an escape route where the requirement in issue in that case has not been met. That escape route exists as a result of changes made to the statutory regime which were of the same sort as that which has led to the removal of the word "minor" from rule 12(2A). Thus the facts of *Adams* would not now be repeated. In paragraph 30 of her judgment in that case, Simler P said this:

> "I accept that an error in transposing the certificate number onto the form is not something that [the claimant] would necessarily have been focused on to the same degree as other (on the face of it) more critical matters such as ensuring that her name, the respondent's name and the addresses were correctly reflected on the form together with the appropriate claims she wished to make, some of which raised issues of some complexity. Her failure to appreciate that she had made an error is more understandable in the circumstances."

My conclusions

Was it reasonably practicable to make the claim of unpaid wages within the primary time-limit period?

25 Ms Barnes submitted, and I agreed, that the decision in *Adams* could be distinguished, if only because the error on the claim form here was in regard to one of the matters which Simler P had regarded (see the preceding paragraph above) as being "more critical", such "more critical matters [included] ensuring that ... the respondent's name and the addresses were correctly reflected on the form".

26 In fact, that decision could be regarded as no more than a decision on its facts, even though the decision had been made by the EAT.

27 In addition, here the claimant or Ms Krupinska could, and in my view if they had been acting reasonably would, have contacted the tribunal after the period of 25 days referred to in the email which I have set out in paragraph 14 above. If the claimant or Ms Krupinska had done that within a month (28 days or more), or even (allowing for a longer delay than usual because of the Covid-19 lockdown) within 6 weeks, i.e. 42 days, then a new claim form would have been presented by them and it would have been in time.

28 In those circumstances, I was bound to conclude that the claim of unpaid wages was outside the jurisdiction of the employment tribunal.

Was it just and equitable to extend time for making a claim under the EqA 2010?

29 I found several factors to be of particular importance here. The first was that the claimant could have applied for a review of the decision of EJ R Lewis to reject the first claim form. She could have done that under rule 13 of the 2013 Rules, and argued that the "decision to reject was wrong", pointing out that (as it was now clear from the evidence before me) Mr Jogiat, the named respondent in the first claim form, was the directing mind of the company which had been named in the early conciliation certificate. If that had been done then there was in my judgment a very good chance that the decision to reject the claim would have been reversed by EJ R Lewis.

30 In addition, the claimant had relied on her friend, Ms Krupinska, to guide her on the basis that Ms Krupinska had relevant experience in that she had made a claim on her own behalf before, but Ms Krupinska's experience was so limited as to be in the circumstances positively a hindrance rather than a help. As it is often said, a little bit of knowledge can be a dangerous thing. That maxim in my view was applicable here.

31 The claimant did, through Ms Krupinska, then file a new claim as soon as (i.e. on the same day that) she knew that her first claim had been rejected.

32 I was unable to conclude that the new claim was obviously without merit.

33 In all of the above circumstances, I concluded that it was just and equitable to extend time for the making of the claim of a breach of the EqA 2010.

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Employment Judge Hyams

Date: 4 July 2022

Sent to the parties on:

6 July 2022

For Secretary of the Tribunals