



EMPLOYMENT TRIBUNALS

Claimant: Mr Q F Ahlin

Respondent: Nanny Care Services Limited

Heard at: Watford (by video)

On: 19 September 2023

Before: Employment Judge Annand

Representation

Claimant: Mr Ahlin

Respondent: Mr Trambo, Counsel

RESERVED JUDGMENT

1. The Respondent's application for an extension of time to submit a Response is granted.
2. The Rule 21 Judgment, dated 22 May 2023 and sent to the parties on 14 June 2023, is revoked.
3. The Respondent's Response has been accepted.
4. The Respondent's application for an extension of time to bring a claim of breach of contract is refused.
5. Case management directions, including the date of the Final Hearing, are enclosed.

REASONS

1. By Claim Form presented on 6 March 2022, the Claimant brought a claim for breach of contract and unlawful deduction from wages. The Claimant had previously contacted ACAS for early conciliation purposes. The dates on the early conciliation certificate are 10 January 2022 and 15 February 2022.

2. In his Claim Form, the Claimant set out that he had been contacted by Ms Zarah Abdullahi, the Director of the Respondent, and asked to open, register, and manage a domiciliary care setting in Slough. He was employed from 1 September 2020 as the Registered Manager. In his employment contract it was agreed he would be paid £40,000 per annum, as well as £8,000 for the commissioning of the setting. It was also agreed he would be entitled to 30% of all of the profits, which in his Claim Form he estimated to be £7,000. The Claimant set out that he had completed the compliance documents, successfully registered the company with the CQC, recruited staff and succeeded with a bid for the commissioning of care with Slough Borough Council.
3. The Claimant stated in his Claim Form that during his time with the Respondent, Ms Abdullahi failed to pay him his full salary, and said she would pay him later. The Claimant stated that he was unhappy with the way Ms Abdullahi, her children, and her cousins behaved recklessly and acted in breach of the health and social care regulations. On 7 December 2021, the Claimant resigned. The Claimant alleges that on 8 December 2021, he went to his office and was ambushed by four people, including Ms Abdullahi and her son, Ayub Dirscher. He said he was illegally detained, assaulted, and that the building manager and security guards had to force entry to allow him to leave as the door was being blocked by Ms Abdullahi and her relatives. The Claimant said the police were notified of the events and the police case is on-going.
4. On 24 March 2023, a copy of the Claim Form was sent to the Respondent's office and the Respondent was notified that a Response would be required by 22 April 2022. The Respondent did not submit a Response within the time limit.
5. On 18 August 2022, the Respondent's solicitor emailed the Tribunal a draft Response Form, draft Grounds of Resistance, and an application for an extension of time to submit a response, and a number of supporting documents.
6. The application for the extension of time, which was drafted by Counsel, was based on the fact that Ms Abdullahi was not present in the country from 13 February to 22 June 2022 due to her father's ill health. The application does not state that Ms Abdullahi was not aware of the claim, only that she could not respond to it because she was abroad.
7. In the application, the Respondent also sought permission to extend time to bring a claim for breach of contract against the Claimant.
8. One of the documents provided in support of the application was a Statutory Declaration from Ms Abdullahi. The Declaration contained a statement of

truth, was signed, and the signature was witnessed by a solicitors' firm in Hounslow. The Statutory Declaration was dated 12 August 2022. In the Statutory Declaration, Ms Abdullahi set out that she travelled overseas between 13 February 2022 to 22 June 2022 to attend to her father who was ill and subsequently suffered a life-threatening road traffic accident when he was on his way to hospital in Addis Ababa, Ethiopia (p65). Ms Abdullahi said she travelled to Ethiopia on 20 June 2022, she then travelled with her father to the UK on 22 June 2022, and her father was admitted to Wexham hospital on 23 June 2022. He was transferred to a hospital in Oxford for emergency treatment. In the Statutory Declaration it noted, "We received the court letter late because it was help [sic] in office reception for long time. And when we received I was not able to respond in time due to the circumstances mentioned above."

9. With the application were two medical documents, one from Daryeel General Hospital in Kismayo in Somalia showing that Mohammed Abdullahi Guled was admitted to hospital on 15 February 2022. He was discharged on 27 February 2022 (p70). The second letter confirmed Mohammed Guled was admitted to Wexham Park Hospital on 9 July 2022 and discharged after 6 days on 15 July 2022 (p71-75). The letter confirms that previously Mr Guled had been treated for injuries caused by a road traffic accident including having a burr hole decompression on 2 July 2022.
10. In the draft Grounds of Resistance submitted with the application, the Respondent accepted the Claimant was employed as a Registered Care Manager. It states the Claimant was recruited by Ms Abdullahi on 1 October 2020. An unsigned contract of employment is attached to the draft Grounds of Resistance. In the Grounds of Resistance, it states that under the terms of the contract the Claimant was entitled to an income of £40,000 per year and could achieve a bonus of a maximum of £7,000 if he achieved certain key performance indicators, including a Good CQC rating, 1000 hours for the first year of service, an employee satisfaction score of above 90% and clients reporting a good experience through the Quality Assurance system.
11. In the draft Grounds of Resistance submitted it states the Claimant had been paid all of the wages that were owed to him. It is also alleged that once the Claimant resigned and was informed on 8 December 2022 that it was his last day at work, he became angry, caused a data breach by taking company documents, assaulted Ms Abdullahi, and caused criminal damage. The Respondent disputes the Claimant was entitled to claim £8,000 for the commissioning of services. It notes he was paid his salary over the period of time when he made the CQC application. The Respondent denies the Claimant was contractually entitled to 30% of all profits, and notes he was only entitled to a bonus of up to £7,000 if certain performance objectives were achieved.

12. In the draft Grounds of Resistance, the breach of contract claim made by the Respondent against the Claimant is set out in the following terms:

“The Claimant’s breaches of contract and/or loss have occurred in the following ways:

- a) Breach of data by removing company documents;
- b) The act of assault, as above, is an action of gross misconduct;
- c) Breach of Clause 13 and Clause 14.4 by refusing to handover equipment upon demand including an iPhone, 2 Laptops, Login Details of key company software and communication emails;
- d) Breach of contract caused by telephoning vulnerable service users (of the Respondent Company) after resignation thereby causing loss to the Respondent;
- e) Breach of contract and/or committing bad faith by calling the Respondent’s website provider (after resignation) resulting in the website being down for more than a week;
- f) Causing loss to the Respondent by the disruption caused (as above) resulting in a loss of business. The Respondent’s office as closed for two days because there were no telephone services and this put vulnerable services users at risk;
- g) Breach of contract by going beyond than his contractual obligations. Whilst the Claimant was employed as a manager. He often performed outside of his job title and description. The Claimant would often misrepresent to clients and business clients that he owns the Respondent Company;
- h) Breach of contract by accessing confidential documents such as contractual documents, access to critical business continuity software, control of corporate communication;
- i) Breach of contract by not carrying out his role as an employee, as per Clause 3, in that he did not devote his time to the job. It is averred that the Claimant spent most of his time developing his company, Hippo Care Limited;
- j) Failure to uphold his duties and role as a Registered Care Manager;
- k) the Respondent made a loss of £20,588 for the Year Ending 31 March 2021 (see Appendix 10); and
- l) The loss assessed as a result of the actions caused by the Claimant amount to £88,610.48 (see Appendix 11).”

13. Included in the documents that were appended to the draft Grounds of Resistance was the Claimant’s resignation letter dated 7 December 2021 (Appendix 4). The letter states that the Claimant resigned because Ms Abdullahi and her son’s involvement in the day to day management of the service was putting the clients in danger. The Claimant noted Ms Abdullahi was asking him to do things that were illegal in health and social care management in respect of staff recruitment, staff rotas, and staff allocation.

He noted that Ms Abdullahi was trying to use her relatives as staff without proper vetting. He also raised the delay and non-payment of staff in the previous month. In respect of his own income he noted, "We have agreed a salary of £40,000 per year and 30% of the profit, then you say you don't have money now. You ask me to accept part of the money and you will pay me the rest later. Please can you come so we can do the accounting so you can pay me the balance of what you own [sic]".

14. Also appended to the draft Grounds of Resistance, at Appendix 6, was a chart setting out the Claimant's payroll information from October 2020 to December 2021. The gross monthly salary is set out as being £3,333.33 per month. The net pay is £3,028.37 for October 2020, £3,028.37 for November 2020, £2904.77 for December 2020, £2570.17 for January 2021, £2570.37 for February 2021, and £2570.17 for March 2021. The Respondent calculates this as coming to a total of £16,672.22 for the financial year 2020/2021.
15. From April 2021 to December 2021, the net pay is set out as being £2,571.97 per month, which the Respondent calculates as coming to a total of £23,147.73 for the financial year 2021/2022.
16. On the following page of Appendix 6, the Respondent sets out a list of payments made to the Claimant. The payments do not match the net payment details in the payroll information (i.e. it suggested the Claimant was paid 4 separate payments in September 2020 of £300, £500, £1000, and £209.50, and £1,000 on 18 October 2020 and £1,000 on 10 November 2020 etc). However, the Respondent suggests the total payments made to the Claimant come to £13,509.50 for the financial year 2020/2021 and £23,020.00 for the final year 2021/2022. On another page in Appendix 6, titled "Wages Reconciliation" it is suggested the Claimant was also paid £2,825.10 in cash in the financial year 2020/2021. In respect of the year 2021/2022, the document suggests the total owed comes to £22,134.87 and that he was paid £23,020.
17. Also appended to the draft Grounds of Resistance, at Appendix 9, was an email to Ms Abdullahi from the Community Manager at Porter Building, where the Respondent's offices were located. The email was sent on 9 December 2021, and referred to events that occurred on 8 December 2021. The email referred to the "screaming and banging" that had gone on, and noted, "The way you and your visitors handled this problem was unacceptable. Especially when the security and we were trying to open the door and you were holding the door from the inside and not letting us in to take everyone out in safety." It is noted in the email that a window was cracked and that it would need to be replaced and that Ms Abdullahi would be invoiced for the repair. The email also referred to "Unauthorised visitors of yours getting hold of your access fobs and managed to get into the

second floor and enter Spaces premises without authorisation from the Center staff” and “Dangerous behaviour and violence in your office from your team and your visitors.”

18. Appendix 10 contains the Respondent’s accounts for the year ending March 2021. The Accounts indicate the Respondent did not make any profit in the financial year ending March 2021.
19. Appendix 11 contains a Schedule detailing the financial basis of the Respondent’s breach of contract claim against the Claimant. The Respondent seeks to claim £251 for an Iphone, £300.49 for a Laptop, £430.99 for a second Laptop, £2,500 for window damage, £15,000 for the office being closed for 5 days, and £70,128.00 for the loss of business arising from the Claimant calling service users.
20. Although the Respondent made the application to extend time for the submission of a Response on 18 August 2022, they did not receive a response from the Tribunal.
21. On 14 June 2023, the Tribunal sent the parties a Rule 21 Judgment, which had been made on 22 May 2023. A Rule 21 Judgment was made because the Respondent had not submitted a Response to the claim in time. The judgment noted, “The respondent made unlawful deductions from the claimant’s wages and is ordered to pay the claimant the sum of £18,448.12. The respondent must also pay the claimant a further £7,000 as compensation for breach of contract.”
22. On 3 July 2023, the Respondent spoke to a member of the Tribunal staff and learned of the Rule 21 Judgment. The Respondent’s solicitors said they had not received a copy of the Judgment.
23. On 26 July 2023, a hearing was listed for 18 September 2023. The Notice of the Hearing stated that at the hearing an employment judge would decide whether to grant an extension of time for (1) the Respondent’s response and (2) the Respondent’s employer’s contract claim, and to make any further case management orders.

The hearing

24. I was provided with a bundle of documents for the hearing consisting of 233 pages. The bundle contained a document titled ‘Form of Authority’. This gave Lawise Solicitors authority to act on Ms Abdullahi’s behalf in defending the Claimant’s claim. It was dated 14 June 2022 (p123).
25. At the start of the hearing, I indicated that I had read the majority of the bundle I had been provided with but would need a further 30 minutes to

complete my reading. I asked Mr Tramboo if he intended to call Ms Abdullahi to give evidence or whether he intended to make submissions on the basis of the paperwork I had been provided with, including the Statutory Declaration, which I was willing to treat as a witness statement. Mr Tramboo said that he would take instructions from his client during the reading break.

Adjournment application

26. After the reading break, Mr Tramboo said he wished to call Ms Abdullahi to give evidence but said she would need an interpreter. I explained that was not something that could be arranged immediately and asked if he was requesting a postponement so that an interpreter could be arranged. He confirmed that he was requesting an adjournment on that basis. When asked why an interpreter had not been requested prior to the hearing, he explained it had not previously been envisaged that his client would be called to give evidence and the primary focus had been on appealing the Rule 21 Judgment to the Employment Appeal Tribunal.
27. When I asked the Claimant for his views on the Respondent's request for the hearing to be adjourned so that an interpreter could be arranged for Ms Abdullahi, the Claimant stated that he did not believe that an interpreter was required. He said that throughout his employment with the Respondent, the Claimant and Ms Abdullahi had both spoken to each other only in English. He said she was fluent in English and an interpreter was not needed. He said the Respondent was just seeking to delay matters further.
28. Mr Tramboo confirmed that it was not being suggested that Ms Abdullahi could not speak English, but it was being said it would be preferable if an interpreter was present.
29. I decided not to adjourn the hearing before Ms Abdullahi had started giving her evidence so that an interpreter could be arranged. In reaching this decision, I considered the over-riding objective and in particular the further delay that would occur if the hearing were to be adjourned. The Claim Form was submitted in March 2022, and the application to extend time was submitted over a year ago in August 2022. If the application to extend time to submit a Response were to be granted it was likely to be a further six months before a final hearing would be held. If this hearing were to be postponed it is likely it would be several months before it could be re-listed which would put back the final hearing even further. However, I explained to Mr Tramboo and Ms Abdullahi that I would keep my decision under review as she was giving evidence. If it became apparent that she was having difficulty understanding the questions or giving her evidence, then I would revisit my decision if necessary. I did keep the decision under review, and although at times, Ms Abdullahi needed to have a question re-phrased, or

asked for something to be repeated, at no point did I consider it was necessary to stop and adjourn in order for an interpreter to be arranged.

Witness evidence

30. As Ms Abdullahi's Statutory Declaration was short, Mr Tramboo was permitted to ask her additional questions to explain the situation more fully. Ms Abdullahi explained that in February 2022 she had travelled to Somalia because her father was unwell. He went into hospital. Whilst she was in Somalia, her father was travelling to Ethiopia for medical treatment, and was involved in a car accident. He was taken to hospital in Ethiopia, and she then travelled to Ethiopia. Together they then travelled back to the United Kingdom on 22 June 2022. Her father was admitted to hospital in Wexham due to a brain bleed in June. He was transferred to a hospital in Oxford for treatment before being released from hospital. He was then re-admitted in July 2022 when he had further symptoms of another brain bleed.
31. When asked by Mr Tramboo what happened to her business in her absence, she said it was "lost". She said it was closed and she did not have access to her office. The reason for this she said was because the Claimant had called her clients after he had left, and she had lost business so she could not afford to pay the rent for the office. She said over the period February to June 2022 she did not have access to the office to collect her post as she had not paid her rent.
32. When asked when she saw the Claimant's Claim Form for the first time, she said she could not recall but she thought it was sometime in August. When asked if she had seen the claim before then, she said no.
33. When the Claimant started his cross examination of Ms Abdullahi he said that Ms Abdullahi's son had sent an email to the Tribunal in April 2022. Ms Abdullahi maintained she had not seen the Claim Form until August 2022. The email the Claimant was referring to was not in the bundle and so he moved on to ask other questions. In response to the questions asked by the Claimant, Ms Abdullahi repeatedly accused the Claimant of being a liar. Even when asked to focus on answering the question, she continued to repeatedly respond by accusing the Claimant of being a liar.
34. After approximately 10 minutes of cross examination, the Claimant said he had found the email sent by Ms Abdullahi's son to the Tribunal regarding the Claimant's claim in April 2022. He read it aloud. It was clearly relevant to the issue to be determined in the hearing and had been sent from the Respondent's business email address to the Tribunal on 28 April 2022, 6 days after the Respondent's Response was due. The Claimant had been forwarded a copy by the Tribunal as he had not been included in the original email. It was clearly a document which both sides should have disclosed

and included in the bundle before the hearing had started. As a result, I asked the Claimant to email a copy to the Tribunal and to Mr Tramboo so that we could read it. We took a short break so that this could be done.

35. Once the hearing resumed, I explained to Mr Tramboo that I would ask the Claimant to finish his cross examination of Ms Abdullahi but not ask any questions about the email. I explained to Mr Tramboo I would then ask Ms Abdullahi the questions I had for her, but I would not ask any questions about the email. I explained that once her evidence had concluded and she had been released from giving evidence, I would take a further break, so that Mr Tramboo could take instructions from his client about the email of 28 April 2022. He could then decide if he wished to recall her to deal with the email or whether he wished to address the issue of the email in submissions.
36. When the Claimant's cross examination of Ms Abdullahi was complete, I asked her some questions, including in relation to her answer that her business was shut down or closed from February to June 2022. I asked if that meant she did not employ any staff over that period. She said no one was working in the office but she did continue to have 2 to 3 carers working for her who continued to look after one client. I asked if those carers were in touch with her while she was abroad and she said they were and they contacted her by phone.
37. After Ms Abdullahi had finished giving her evidence, we took a break. After the break I asked Mr Tramboo if he wished to recall his witness to deal with the email of 28 April 2022. He confirmed that he did. When he recalled Ms Abdullahi he asked her who had access to the company email in April 2022, to which Ms Abdullahi said the Claimant did. When asked if she had access to the email address at that time, she said she could not recall. It became apparent that it was being suggested that the Claimant had written the email.
38. The email in question was sent on 28 April 2022 from email address nannycare@nannycarelimited.co.uk to Watford Employment Tribunal. The subject of the email was the case number of the Claimant's claim. The email stated as follows:

"I'm writing this email in regards to a claim made against Nannycare services. Our Director that handles this case is currently not in the country, they are abroad visiting their family that is very ill. Can you please allow us sometime to get back to you on this matter? As of now I'm not currently sure when our director will be back but I will update you with an email as soon as I get back word. Rest assured I will try and contact the director and let them know.

Many thanks, Ayub.”

39. When I asked Ms Abdullahi about the email she said she did not believe it was “true” as the Claimant had access to the email inbox. When asked how the Claimant would know that she was away visiting her father who was unwell, she could not give a satisfactory answer. When asked why the Claimant would email the Tribunal pretending to be Ms Abdullahi’s son asking for more time for the Respondent to reply to his claim, she replied she did not know.

Submissions

40. Mr Tramboo indicated in his submissions that he would address two possible scenarios. The first scenario being where the Tribunal accepted the email of 28 April 2022 had been sent by the Claimant, and the second scenario, being the situation if this was not accepted. When asked what possible motive the Claimant could have for sending an email, pretending to be the Ms Abdullahi’s son, in order to ask for more time for the Respondent to reply to his own claim, Mr Tramboo’s response was that there was obvious animosity between the parties. He then suggested that it was “not known” what authority Ms Abdullahi’s son had to respond to matters for the Respondent in any event. He noted that regardless of this issue, what underpinned the whole delay was the fact that Ms Abdullahi was out of the country from 13 February 2022 to 22 June 2022. Mr Tramboo went on to say there was no prejudice to the Claimant if the Respondent’s response were to be accepted. He also noted that I needed to consider the merits of the Grounds of Resistance, and he noted all the claims were denied.

41. In his submissions, the Claimant said the Respondent’s position was ludicrous. He pointed out it made no sense for him to pretend to be Ms Abdullahi’s son in an email to request additional time for the Respondent. He noted he did not even have access to the email account at that time. He stated the Respondent had a history of falsifying documents and referred to a copy of a contract of employment which they had submitted, but which was not his signed contract, but a contract they had doctored. He noted that the Respondent was trying to draw out and delay matters for as long as possible.

The relevant law

Extension of time for the Respondent’s Response

42. Under Rule 20(1) of the Tribunal Rules which are contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations, an application for an extension of time for presenting a

response must be presented in writing and copied to the claimant and set out the reasons why the extension is sought.

43. If the time limit for presenting the response has already expired, the application must also be accompanied by a draft of the response that the respondent wishes to present or otherwise by an explanation of why that is not possible.
44. If the extension is allowed, any judgment issued in accordance with Rule 21 will be set aside and the respondent's response will be accepted.
45. Rule 20 does not specifically set out a test that a tribunal should apply when considering an application. However, the overriding objective set out in Rule 2 requires a Tribunal to deal with cases fairly and justly. A previous version of the Rules required the Tribunal to consider if it was 'just and equitable' to extend time. The EAT's decision in *Kwik Save Stores Ltd v Swain and ors* [1997] ICR 49, EAT, set out the correct test for determining what was 'just and equitable'. The EAT stated 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'. In particular, the EAT held that, when exercising a discretion in respect of the time limit, a judge should always consider the employer's explanation as to why an extension of time is required, the balance of prejudice, and the merits of the defence.
46. In the EAT's opinion, the more serious the delay, the more important it is that the employer provide a satisfactory and honest explanation. A judge is entitled to form a view as to the merits of such an explanation. In terms of the balance of prejudice, the Tribunal had to consider whether the employer, if its request for an extension of time were to be refused, suffer greater prejudice than the complainant would suffer if the extension of time were to be granted. In terms of the merits of the defence, if the employer's defence is shown to have some merit in it, justice will often favour the granting of an extension of time, otherwise the employer might be held liable for a wrong which it had not committed.
47. In *Pendragon plc (trading as CD Bramall Bradford) v Corpus* [2005] ICR 1671, EAT, applying *Kwik Save*, the EAT found that an employment judge had erred when refusing to set aside a default judgment issued as the result of the employer's failure to comply with the time limit for submitting a response. Even though the judge had not been satisfied that a good reason existed for the delay in putting in the response, he had erred by not considering the other factors identified in *Kwik Save*, including the merits of the defence.

Extension of time for breach of contract claim

48. Article 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that an employer may bring proceedings before an employment tribunal for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) as long as it arises or is outstanding on the termination of the employment of the employee against whom the claim is made and that employee has already brought proceedings under the Order in an employment tribunal against the employer.
49. Rule 23 of the Tribunal Rules 2013 states that an employer's contract claim must be made as part of the response, 'presented in accordance with rule 16'. Rule 16 also provides that the response must be presented to the relevant tribunal office within 28 days of the date that the copy claim form was sent to the respondent by the tribunal. Therefore, under the Rules, an employer's contract claim must be presented to the employment tribunal within the 28-day time limit that a respondent has to present its response. However, under Article 8(c)(i) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order, an employer has six weeks beginning with the day it 'received' a copy of the claim form from the tribunal within which to present an employer's contract claim. Under Article 8(c)(ii), where an employment tribunal is satisfied that it was not reasonably practicable for the claim to be presented within that period, it can extend time to allow the respondent to submit its claim within such further period as the tribunal considers reasonable. Under Article 10, there is a statutory limit of £25,000 on the amount of damages that can be awarded.
50. Under Rule 23 of the Tribunal Rules, an employer's contract claim, or part of it, may be rejected on the same basis as a claimant's claim may be rejected under rule 12. An employer's contract claim, or part thereof, may be rejected if it contains 'substantive defects'. That is the claim, or part, is one which the tribunal has no jurisdiction to consider (rule 12(1)(a)), or the claim is in a form which cannot sensibly be responded to, or is otherwise an abuse of the process (rule 12(1)(b)).
51. The onus of proving that presentation in time was not reasonably practicable rests on the party seeking the extension: "That imposes a duty upon him to show precisely why it was that he did not present his complaint" - *Porter v Bandridge Ltd* [1978] ICR 943, CA. Even if a party satisfies a tribunal that presentation in time was not reasonably practicable, the tribunal must then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable'.
52. In *Palmer and anor v Southend-on-Sea Borough Council* [1984] ICR 372, CA, the Court of Appeal concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does

not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. In *Asda Stores Ltd v Kauser* EAT 0165/07 the EAT explained: "the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."

Ignorance of facts

53. Ignorance of a fact that is fundamental to the right to bring a complaint may render it not reasonably practicable to present the claim in time. Therefore, the discovery of new relevant facts can be a ground for an extension of time. In *Machine Tool Industry Research Association v Simpson* [1988] ICR 558, CA, the Court of Appeal held that in a case like this a party must establish three things:

- a. that his or her ignorance of the fact(s) relied upon was reasonable
- b. that he or she had reasonably gained knowledge outside the time limit that he or she reasonably and genuinely believed to be crucial to the case and to amount to grounds for a claim, and
- c. that the acquisition of this knowledge was, in fact, crucial to the decision to bring the claim.

Ill-health

54. A debilitating illness may prevent a party from submitting a claim in time. However, this will usually only constitute a valid reason for extending the time limit if it is supported by medical evidence, which support the party's illness and demonstrates that the illness prevented the party from submitting the claim on time. However, medical evidence showing that the claimant was struck down by illness at the relevant time will not necessarily be conclusive where that evidence is contradicted by the claimant's own actions during that time (*Chouafi v London United Busways Ltd* [2006] EWCA Civ 689, CA)

55. In *Schultz v Esso Petroleum Co Ltd* [1999] ICR 1202, CA, the Court of Appeal accepted that illness may justify the late submission of claims. The Court emphasised that the test is one of practicability - what could be done - not whether it was reasonable not to do what could be done.

The Tribunal's conclusions

(1) Extension of time to present the Respondent's Response

56. Following the guidance in the case of *Kwik Save Stores Ltd v Swain* and *ors*, I considered the employer's explanation as to why an extension of time was required, the balance of prejudice, and the merits of the defence.

The employer's explanation

57. The Respondent's explanation as to why an extension of time was required was that Ms Abdullahi was not present in the country from 13 February 2022 to 22 June 2022 due her father's ill health.

58. I accepted the evidence presented to me that during this period Ms Abdullahi travelled out of the country to see her father who was suffering from ill health. I was not presented with documentary evidence which supported her contention that she was out of the country for the whole of this period. She provided evidence of having two separate single entry visas for Somalia, which appeared to show her exiting Somalia on 1 March 2022 and again on 3 May 2022 (p67). Her movements over the period of 13 February to 22 June 2022 were not described in detail. Her Statutory Declaration stated, "I travelled overseas between 13 Feb 2022 and 22 June 2022 to attend my father who was ill and subsequently suffered life threatening road traffic incident on his way to hospital in Addis Ababa, Ethiopia". In her oral evidence, she said the two stamped dates (1 March 2022 and 3 May 2022) showed her entry into Somalia and her departure. If that is correct, then she did not explain where she was between 13 February and 1 March 2022 or between 3 May 2022 and 21 June 2022, when she said she returned to the UK.

59. Based on the evidence I was presented with I accepted that the Claimant's father became ill and was admitted to Daryeel General Hospital in Kismayo in Somalia between 15 and 27 February 2022 (p70). I also accepted that the Claimant's father had a road traffic accident in late June 2022, and that the Claimant travelled with him home to the United Kingdom on 22 June 2022 and that he needed medical treatment at a hospital in Oxford, including a burr hole decompression on 2 July 2022 (p71). I also accepted he was further admitted Wexham Park Hospital on 9 July 2022 and discharged after 6 days on 15 July 2022 (p71-75). As a result, I accepted some of the periods between February 2022 and July 2022 were difficult and stressful time for Ms Abdullahi. I did not however find that Ms Abdullahi's absence from the UK (for whatever period she was absent) meant that the Respondent was unaware of the Claimant's claim for that whole period, nor that she personally was unaware of the claim.

60. On 28 April 2022, six days after the Respondent's Response was due, Ms Abdullahi's son sent an email to the Tribunal. In that email he noted Ms Abdullahi was not in the country and asked for some time to get back to the Tribunal. He noted that he would try to contact Ms Abdullahi to let her know about the claim. I entirely rejected the Respondent's suggestion that this email was sent by the Claimant. I found this to be a wholly implausible argument. I could not see any reason why the Claimant would pretend to

be the Respondent's son in order to request additional time for the Respondent to respond to his claim. The Respondent was not able to come up with any credible explanation as to why he would have done this. I found it highly likely that Ms Abdullahi's son discovered the claim had been made against the Respondent at around the end of April 2022 and that is why he emailed the Tribunal. In light of what he wrote in that email, I also find that he contacted Ms Abdullahi and informed her of the claim on around 28 April 2022. Ms Abdullahi said in her evidence that she kept in contact with the carers she continued to employ in the UK by way of telephone, and therefore I find it highly likely Ms Abdullahi's son let her know about the claim by way of telephone or email.

61. Ms Abdullahi's evidence to the Tribunal was that she received the claim in mid-August when she returned to her office. She said she had not seen it before then. This was clearly contradicted by evidence that I was provided with that Ms Abdullahi instructed solicitors to respond to the claim on 14 June 2022 (p123). The Form of Authority document in the bundle was signed by Ms Abdullahi by DocuSign on 14 June 2022. The Form of Authority explicitly referred to instructing Lawise Solicitors in Hounslow to deal with the claim made by the Claimant (p123). Therefore, by 14 June 2022, Ms Abdullahi must have been aware of the Claimant's claim.
62. On Ms Abdullahi's version of events, she was out of the country on 14 June 2022. Yet, she was clearly able to contact Lawise Solicitors and instruct them to represent her in defending the claim. I therefore found that being abroad did not prevent her from dealing with the claim and this could have been done earlier than 14 June 2022.
63. I was not given any explanation as to why, when Ms Abdullahi instructed solicitors on 14 June 2022, the application for the extension of time and the draft Response and Grounds of Resistance were not submitted until on 18 August 2022, a further two months later.
64. Overall, I did not find Ms Abdullahi to be an honest or credible witness. Her evidence about when she discovered a claim had been made against the Respondent was contradicted by documents provided by the Respondent in the bundle, and I found her suggestion that the Claimant had pretended to be her son and sent the email to the Tribunal on 28 April 2022 to be highly implausible. I concluded that she was aware of the claim from around the 28 April 2022 and that she could have instructed solicitors much earlier than 14 June 2022.
65. Ms Abdullahi's evidence was that she was unable to access her office from February to June 2022 as she had not paid her rent. However, it was noted in her Statutory Declaration that her post had been held at the office's reception. I was not told how frequently the Respondent sent anyone to the

office reception to check for post. Clearly Ms Abdullahi's son had received the Claimant's claim, which had been sent by post, by 28 April 2022, but I was not told if he or anyone else had attended the office before then to collect the post, or if not, why not.

66. Overall, I found that the Respondent did not have a good explanation for the delay in responding to the Claimant's claim.

The balance of prejudice

67. I considered the prejudice to each party if the application were allowed or not allowed.

68. **The Claimant** - If the extension of time were permitted, then the Rule 21 Judgment would be set aside. The Claimant would face further delays before his claim was determined. The matters about which the Claimant complains relate to the period September 2020 and December 2021, and his claim was submitted in March 2022. Therefore, by the time of the hearing in September 2023, 19 months have already passed. If the extension of time was permitted the Claimant would be unlikely to have his claim resolved for a further 6 months. I considered if this further delay would be likely to have an impact on the quality of the evidence at the final hearing. The Claimant is claiming that he was not correctly paid a number of payments he was owed. The claim will therefore most likely turn on what the documentary evidence shows about how much the Claimant was paid and how much he was entitled to. This does not appear to be a claim where witness' memories of events will be the key evidence. I therefore concluded that further delay, while regrettable, would be unlikely to impact on the Claimant's ability to have a fair hearing.

69. **The Respondent** - If the extension of time is not permitted then under the Rule 21 Judgment they will be liable to make a payment of £25,448.12 to the Claimant, which they could have successfully defended, in whole or in part, at a final hearing. I consider this to be a greater prejudice to the Respondent than the prejudice the Claimant faces if the extension of time were to be permitted.

The merits of the defence

70. When assessing the merits of the Respondent's Response, as set out in the Grounds of Resistance, I was in the unusual position of having been provided with some of the Respondent's evidence, which had been appended to the draft Grounds of Resistance.

71. The Respondent's application to extend time for submitting the Response stated that "the merits of the defence display a reasonable prospect of

success” and “the merits of the defence display show some merit for resisting the claim” (p63), but these arguments were not elaborated on.

72. The parties were agreed the Claimant was employed on an annual salary of £40,000 per year. The Respondent’s documents appear to show that the payments made each month to the Claimant did not match what he should have been receiving in terms of his net income. However, the parties appear to be agreed on what payments were made to the Claimant by way of bank transfer over the relevant period. The parties therefore disagree about whether the Claimant was underpaid by the Respondent, and if so, by how much. Whether the Respondent’s figures are correct or the Claimant’s figures are correct is not what I am considering at this stage, but it would appear the Respondent’s Response to this aspect of the Claimant’s claim may have some merit. It is possible the Respondent would be able to show the Claimant was owed less than he is claiming. I would not assess the merits as good but would assess them as being reasonable.

73. The Claimant has also claimed £8,000 for commissioning of the service and is claiming 30% of the profits which he estimated as being £7,000. The Claimant produced in his bundle of documents for the Tribunal a copy of a signed contract of employment setting out his entitlement to both a commissioning fee of £8,000 and 30% of the profits. The Respondent produced an unsigned copy of a completely different contract of employment, which makes no reference to a commissioning fee or 30% of the profits. The Claimant claims that the document produced by the Respondent is not a copy of the real contract, which is why it is not signed. Given one is signed, and the other is not, the Respondent’s prospects of success in this respect cannot be described as good or reasonable at this time.

74. In terms of the argument about the Claimant’s entitlement to 30% of the profits, the Respondent has provided copies of the Company Accounts for the financial year 2020-2021, which indicate the Respondent did not make a profit that year. The sales turnover for the year is indicated as being £35,974. Although the Company’s income for the year 2021-2022 may well have increased significantly as in the Business Assets and Criminal Damage Schedule set out by the Respondent it is noted, “Loss of business caused by Quam actions – we lost business of 3 customers due to Quam direct telephone call to service users with month income £11,688 if it was him we are certain to keep this customers for long period” (p121). The schedule claims £70,128.00 over a six-month period. This suggests that certainly by December 2021, the Respondent’s sales turnover was considerably higher than that declared in the 2020-2021 financial year. In any event, it would appear the Respondent’s argument that the Claimant’s estimate that 30% of the profit was £7,000 was too high may have some merit.

Conclusion

75. Overall, I have weighed each of the various factors I have to consider carefully. While I have not found the Respondent's explanation for the delay to be honest or credible, this is not the only factor I have to consider. I have found that the prejudice the Respondent would face if the extension of time were not permitted is greater than the prejudice the Claimant faces if the extension is permitted. Whilst further delay is undesirable, I have concluded that the Claimant will still be able to have a fair hearing. I have also concluded that while some aspects of the Respondent's defence do not appear to be particularly strong, some aspects of the defence may be reasonable. For these reasons, I have decided to grant the extension of time for the Respondent to submit a response to the claim.

76. At the final hearing, the Employment Judge hearing the case will be able to test the evidence presented, and will reach a conclusion about which contract of employment was the contract agreed between the parties in September 2022.

77. In order to reduce further delay, I have listed this claim for a final hearing on Monday 26 February 2024. The hearing will be held in person at Reading Employment Tribunal. Case management orders will be enclosed with this judgment.

(2) Extension of time to bring a claim for breach of contract

78. Under the Tribunal rules, the Respondent's breach of contract claim was due to be submitted within the Respondent's response, by 22 April 2022.

79. Under the Extension of Jurisdiction Order, the six-week time limit begins with the day on which the employer 'received' a copy of the Claimant's claim from the tribunal. The claim was sent to the Respondent's office on 22 March 2022. Assuming it arrived at the Respondent's offices on around 24 March 2022, then the six-week time limit expired on 5 May 2022. The Respondent's claim for breach of contract was therefore considerably out of time when presented on 18 August 2022.

80. The Respondent's breach of contract claim refers to a number of alleged breaches by the Claimant which do not fall within the jurisdiction of the Tribunal, including claims which relate to the Claimant's actions after the contract ended, and so did not arise or was outstanding on the termination of the employment. Further, the amount claimed far exceeds the amount the Tribunal can award for breach of contract. However, for present purposes, I must focus on whether it was 'reasonably practicable' for the Respondent to have brought the claim in time.

81. As noted above, I have rejected Ms Abdullahi's evidence that she was not aware of the claim until mid-August 2022. Her son emailed the Tribunal on 28 April 2022 asking for an extension of time. I did not therefore consider that this was a situation that was akin to the cases where claimants claim they were ignorant of a relevant fact (which in this case would be the fact that the Claimant had brought a claim against the Respondent).
82. As noted above, I have not been provided with any evidence regarding how frequently the Respondent sent anyone to the office reception to check for post. Even if Ms Abdullahi was abroad, she clearly did have some assistance whilst she was away as it was her son who wrote to the Tribunal on 28 April 2022 from the Respondent's company email address. Although Ms Abdullahi was abroad she was contactable by phone and could have instructed solicitors to submit a claim within that time period. The onus of proving that presentation in time was not reasonably practicable rests on the party seeking the extension, and in this case, I was not presented with evidence which convinced me it was not reasonably practicable for the post to be checked throughout March 2022 or for the breach of contract claim to be have been submitted by 5 May 2022.
83. I also considered if the Respondent submitted the claim for breach of contract within such further period as the tribunal considers reasonable. For the reasons given above I have concluded that the Respondent, and Ms Abdullahi, were aware of the claim from around 28 April 2022. Ms Abdullahi's father was in hospital in February 2022 and then again towards the end of June. She was however able to instruct solicitors to act for her on 14 June 2022. As set out above, I have concluded that she could have instructed solicitors earlier than 14 June 2022. I have not been presented with a credible explanation for the nearly two month delay between 5 May 2022 and end of June 2022.
84. I do accept that the period between the end of June 2022 and 15 July 2022 would have been very difficult for Ms Abdullahi, and that her time would have been consumed travelling with her father back to the UK, visiting him in hospital while he had surgery, looking after him after his release in early July and then dealing with his readmission to hospital from 9 to 15 July 2022. However, I have not been provided with any explanation as to why the Respondent could not have submitted a claim for breach of contract between 15 July 2022 and 18 August 2022.
85. As a result, even if it was not reasonably practicable for the Respondent to have submitted a claim for breach of contract by 5 May 2022, the Respondent did not submit the claim in such further period as I consider reasonable.

86. For these reasons, the Tribunal does not grant the Respondent an extension of time to bring a claim for breach of contract.

Employment Judge Annand

Date: 25 October 2023

JUDGMENT SENT TO THE PARTIES ON

2 November 2023

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FOR THE TRIBUNAL OFFICE

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