EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102920/2023

Held via Cloud Video Platform (CVP) in Glasgow on 31 October 2023

Employment Judge I McFatridge

Ms Helen Robinson	**Claimant** **Represented by:** **Mr N Robinson - Father**
The Alchemy Experiment	**Respondent** **Represented by:** **Mr R Haugh - Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. the respondent's application for an extension of time to submit an ET3 is granted;

2. the respondent's ET3 dated 14 July 2023 is accepted as submitted within the period of extended time.

REASONS

Introduction

1. The claimant submitted a claim to the Tribunal on or about 7 May 2023. She made claims of unfair dismissal and unlawful discrimination on the grounds of disability. On 15 May 2023, the notice of claim was posted to the respondent at the address given above. The respondent was due to submit their response by 12 June 2023. The respondent did not submit a response within the statutory period.

2. A preliminary hearing was due to take place on 10 July 2023. On or about 18 June 2023, the claimant submitted her preliminary hearing agenda. She

copied this to the respondent using the email address "denisfhoulihan@gmail.com".

3. On 4 July 2023, the respondent's representative contacted the Tribunal to advise that the respondent had not received the notice of claim and was seeking copies of the claim documents so that they could respond to the claim and also asked for an extension of time. The respondent's representative was advised that no application under rule 20 could be considered until a draft response was received by the Tribunal. In the meantime, the preliminary hearing fixed for 10 July 2023 was postponed. On 14 July 2023, the respondents lodged a formal application for an extension of time under Rule 20 together with a draft ET3 response. The claimant's representative indicated that the claimant strongly objected to the extension of time. A preliminary hearing was fixed in order to deal with the issue of whether or not the respondent's rule 20 application for an extension of time should be granted or not. The preliminary hearing took place on 31 October 2023 and both parties made representations. These are summarised below.

Respondent's submission

4. The respondent's representative confirmed the respondent's position that the original tribunal documents had simply not been received by the respondent's management. They had discovered the existence of the claim on or about 3 July 2023 when they contacted ACAS. They had contacted the Tribunal a short time thereafter and had produced their application for an extension of time and ET3 response. With regard to the issue of whether they should have been made aware of the claim from the email correspondence sent on or about 18 June 2023. The respondent's representative advised that the email address used was Mr Houlihan's personal email address and was one which he did not monitor on a day to day basis. It was not the email address which he normally used for dealing with management issues involving the Alchemy Experiment business.

5. The Alchemy Experiment is the trading style of a business owned by Mr Houlihan. It comprises an exhibition space with an associated coffee shop.

It has six employees. It is mainly managed by Mr Houlihan's son Pierce. Pierce does not have much management experience. He is not regularly in the building. The respondent's representative made reference to the well known case of Kwik Save Stores Limited v Swain as setting out the general approach which a tribunal should take to applications for extension of time. He also referred to the reported employment tribunal decision of Mrs Goodarzidavan v Duncan Lewis, a case heard at first instance before the Watford Employment Tribunal on 11 May 2022 (case number 3305834/2021). While this is of course not binding on the employment tribunal, it provided an example of a situation where the tribunal has granted an extension of time of over six months.

6. The respondent's representative indicated that the ET3 response provided a full defence to the claims being made. There would be considerable prejudice to the respondent if they were not permitted to defend their claim. As was set out in the case of the Kwik Save Stores case, there was a real risk of them being punished for a wrong they had not committed. The respondent's representative made reference to the overriding objective. It was clear that the delay had been caused due to the fact the original tribunal notice of claim had not arrived. This was not a case where there was a procedural abuse or intentional delay. They had responded to the tribunal as soon as they became aware of matters. The respondent's representative referred to documents he had lodged confirming that none of those involved in managing the company including himself had received the notice of claim and indeed the original notice of claim documents had still not turned up.

7. The respondent's representative also dealt with many of the complaints made by the claimant's representative in their correspondence with the Tribunal. They denied that they had a history of failing to meet commitments. At this point, the respondent's representative sought to go into some detail in relation to the various allegations made but it appeared to me that many of these allegations were essentially factual matters which went to the root of the case and could only be determined by the Tribunal after hearing evidence. It is the respondent's general position that in this case, there was a satisfactory

explanation for the delay. The defence clearly had merit and provided a statable response to all of the claims being made. There were factual disputes between the parties but no doubt these could be dealt with at a hearing.

8. Whilst there had been some delay, the delay was minimal and any prejudice to the claimant was more than outweighed by the prejudice which would be caused to the respondent if the respondent were not permitted to defend the claim.

9. The claimant's representative indicated that the respondents had not provided any explanation as to why the notice of hearing had not been received by them. They made the point that it had been sent out by the Tribunal in the usual way and appeared to have been sent to the correct address. The claimant's representative went on to indicate that the respondent's arrangements for collecting mail sent to the address of The Alchemy Experiment were not ideal. They made the point that Mr Pierce Houlihan was not always present. The mail was dropped behind a glass door and if none of the managers were in, staff would put it on a surface to be collected later. He questioned whether any steps were taken to prevent the mail being intercepted by customers or others.

10. The claimant's representative was critical of the respondent for not checking the email address they had used. He pointed out that this had been the email address which had been used during the grievance and disciplinary process. The claimant's representative questioned Mr Haugh's assertions relating to his lack of experience of employment tribunals. He appeared to suggest that Mr Haugh had more experience and he was prepared to admit to. He made reference to what he considered to be the respondent's failure to deal with matters timeously in the past. At this point, I again interrupted and reminded him that many of these matters appear to be strongly disputed by the respondent and I was not in a position to try the case during the preliminary hearing. The claimant's representative was also critical of the fact that the respondents in their ET3 had made reference to certain medical information relating to the claimant of which it was disputed. He were critical of the fact

that the claimant's grievance appeal apparently sent on 11 May 2023 had not been dealt with. They made the point that much of the correspondence in the case had taken place by email rather than through the Royal Mail and it appeared to them strange that the respondent's failure to receive one document by mail had an effect.

Discussion and decision

11. I agreed with the respondent's representative that the Tribunal's approach given in the case of Kwik Save Stores Limited v Swain [1997] ICR 49 EAT is still correct. Whilst the employment tribunal case which he cited is not binding, I did find that the discussion of the authorities in that case including Grant v Asda [2017] ICR D17 and Thornton v Jones UKEAT/0068/11/SM to be helpful.

12. With regard to the reasons for delay, I had some sympathy with the position of Mr Haugh, the respondent's representative. Essentially, all that he could say was that the respondent's had not received the documentation. He was not in a position to say why the documentation had not been received. It may be that it was not delivered by the Royal Mail at all. It may be that it was delivered to an adjoining business and not passed on. It may indeed be the case that it was delivered but for some reason never came to the attention of management. For whatever the reason, the respondent's position was that they had not received the notice of claim and this was the reason that the claim had not been responded to within the statutory period. The claimant's approach appeared to be that the respondents should suffer consequences for not having a suitably robust system for dealing with incoming mail. I did not accept this criticism. The claimant's representative appeared to be proceeding on the basis that I should find the respondent to be at fault for not receiving the ET1. This approach is not justified. All that can be said is that they did not receive it. This was not a case like the Goodardizavan case where it could be established that the ET1 had been delivered by royal mail and that the respondent's own internal processes had been at fault. All that could be said was that the ET1 had not arrived. The Tribunal generally sends out notices of claim by ordinary mail. Whilst it is uncommon, it is not unheard of

for documents to not arrive. I did not consider that it was appropriate to criticise the respondents in this case without having any justification for doing so other than that they had not received the documentation.

13. I also found the claimant's argument that the ir allegation that the respondent had been slow in dealing with the things in the past to be unhelpful. I considered it highly unlikely that any employer would risk the disastrous consequences of deliberately not responding to an employment tribunal claim purely in order to delay matters for a few weeks. I accepted that the factual background was that the ET1 had not arrived.

14. The claimant's representative was also critical of the respondents for not realising that there was an employment claim outstanding given that there had been an ACAS conciliation process and that they had sent an email to Mr Houlihan as early as 18 June 2023. Again, I did not consider this criticism to be justified. Whilst they were aware the claimant was unhappy and had started acas conciliation there was nothing they could do until they received the notice of claim. It was not for them to chase matters up and check if a claim had been made.

15. With regard to the email, I accepted Mr Haugh's explanation. Once again, the claimant was critical of this but at the end of the day people use different email addresses for different things and neither I nor the claimant were in any position to dispute the assertion being made. In any event, I accepted the respondent's position that even if Mr Houlihan had checked his emails and noted that the respondent had completed his agenda, all this would have done was put him on notice that there was something going on. The agenda document itself does not contain any statement in relation to the dates by which matters required to be complied with or refer to the ET3 response not having been lodged. I accepted that it was not until around 3 July 2023 when the respondent's representative contacted ACAS and they became aware of the position. I considered that they took reasonable steps thereafter to lodge the response. They needed to see the claim form before they could loidge a response. They lodged the response within a few days of receiving the

documents. In the normal course they would have had up to 28 days to complete this process and they did so on this occasion in a much shorter time.

16. At the end of the day, whilst I felt it important to make these points in order to refute many of the arguments put by the claimant, the reason for delay is only one of the matters which I require to take into account. The most important consideration set out out in the overriding objective is the interest of justice. I am required to balance the relative prejudice to the parties in granting or not granting the application.

17. With regard to the balance of prejudice in this case, I consider that the points made by the respondent's representative were well made. It is absolutely clear from the terms of the application and the response that there are a number of substantial factual disputes in this case. The respondent's position is that the claimant did not lodge a grievance. The claimant's representative disputes this. They say that a grievance process did take place. The respondent's position is that following her resignation, the claimant put in a document entitled 'background' which the respondents elected to treat as a grievance and that they then carried out a formal grievance process. It appeared to me that if anything turns on this then this is a matter which would require to be dealt with at a hearing. There was no doubt in my mind that the response as set out by the respondents provides a stateable defence to the claims. By this, I do not mean that the respondents are bound to succeed. All I mean is that if they are in a position to prove the facts which are set out in their response, then there is a reasonable possibility that they will be successful in defending the claim.

18. This is therefore one of these cases where there would be considerable prejudice to the respondent if they were not permitted to defend the claim. They run the risk of a finding being made against them and potentially having to pay substantial damages in a situation where, if they are correct in their contentions, they have done nothing wrong. On the other hand, I considered that whilst there was some prejudice to the claimant as a result of the delay, the delay caused if the respondent is permitted to defend the claim is likely to be relatively slight. The main delay caused so far has been the delay from 14

July 2023 when the respondents submitted their application to 31 October 2023 when the application has been dealt with. I entirely accepted that given the claimant's medical position, she would find the delay stressful but in my view, the prejudice to the claimant is far outweighed by the prejudice to the respondent and indeed to the interests of justice if the claim is required to proceed from now on as undefended. The claimant also loses the windfall benefit of being able to succeed without the necessity of proving her claim at a hearing. I did not consider that this weighed strongly in the balance of prejudice to the respondent.

19. Taking all of the above matters into account and proceeding in the way set out in the case of Kwik Save Stores v Swain, I considered that there is little doubt that in this case, it is appropriate to exercise my discretion to extend time. I therefore grant the respondents an extension of time to lodge their response and direct that the secretary accepts the response lodged on 14 July 2023.

Further procedure

20. I consider that in this case, the appropriate next step is for a preliminary hearing to take place for case management purposes. In advance of this, the respondent should complete an agenda in response to the agenda prepared by the claimant. This procedural hearing will look at the claims being made and determine whether there are any preliminary issues which require to be dealt with first and make arrangements for a further hearing of the case. A date listing stencil should be sent to the parties with a view to listing this preliminary hearing as soon as possible.

21. During the course of the hearing, the respondent's representative confirmed that "The Alchemy Experiment" is not a body with its own legal personality. It appears that The Alchemy Experiment is simply a trading style adopted by Mr Houlihan. It therefore appears to me that the correct designation of the respondent in this case is "Dennis Houlihan trading as The Alchemy Experiment". My understanding is that initially the ET1 was drafted using similar words but this was altered on the basis that the ACAS certificate which

had been obtained simply referred to The Alchemy Experiment. In advance of the preliminary hearing, the claimant's representatives may wish to consider whether any order obtained against "The Alchemy Experiment" is likely to be enforceable and may wish to consider whether or not to apply to amend the name of the respondent so as to show the correct legal body. If they do wish to apply to amend in this way then they require to write to the Tribunal formally seeking amendment and copy this application to the respondent.

22. Since the date of the hearing the claimant's representative has written on two occasions to the tribunal seeking to raise further matters. I appreciate that he is not experienced or trained in tribunal procedure but I must reiterate that this is entirely inappropriate. In one of the letters he states that he believes from previous correspondence with the respondent that in fact the owner of the business is Pierce Houlihan and not his father. It may be that if the claimant is considering seeking to amend the claim to refer to the correct legal entity that he may wish to apply to the tribunal for an order that the respondent confirm the identity of the legal personality which trades as "The Alchemy Experiment." before he does so.

23. In the second letter the claimant criticises the respondent for not giving the claimant copies of the legal authorities he was relying on prior to the hearing. The claimant's representative conflates the need to lodge evidentiary documents in advance of the hearing with providing copies of cases that are to be relied upon. There is absolutely no requirement to provide cases in advance.

24. The claimant also seeks to argue again the point regarding the email address. which I have dealt with above.

Employment Judge: **I McFatridge**
Date of Judgment: **06 November 2023**
Entered in register: **07 November 2023**
and copied to parties