EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001603/2024

Held in Glasgow via Cloud Video Platform (CVP) on 30 June 2025

Employment Judge L Wiseman

Ms R Spalding	**Claimant** **In Person**
Balmore Leisure Ltd	**Respondent** **Represented by:** **Mr C Ocloo - Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that the respondent's application for an extension of time to enter a Response is refused.

REASONS

1. This hearing was a preliminary hearing to determine the respondent's application for an extension of time to present a Response.

2. The claimant presented a claim to the Employment Tribunal on 2 October 2024 alleging she had been unfairly dismissed and that payments in respect of holiday pay and wages were due to be paid.

3. The respondent did not enter a Response.

4. A final hearing took place on 7 January 2025. The respondent did not appear for the hearing. The tribunal decided the claims were successful and made an award of compensation, all as set out in the Judgment dated 7 January 2025.

5. The claimant obtained an Extract of the Award and instructed Sheriff Officers to enforce the award.

6. The respondent, in response to the Sheriff Officers, instructed Peninsula who wrote to the tribunal on 8 April 2025 to make an application under Rule 21 for an extension of time to present a Response and to have the Default Judgment set aside.

7. The tribunal heard evidence from Ms Kirsty Macarthur, Director of Balmore Leisure Ltd and Warrior Fitness (Scotland) Ltd. The tribunal was referred to a small number of documents. The tribunal, on the basis of the evidence before it, made the following material findings of fact.

Findings of fact

8. The claimant presented a claim to the Employment Tribunal on 2 October 2024.

9. The claim was sent to the respondent on 4 October 2024, noting that a response had to be submitted by 1 November 2024 at the latest.

10. The claim was served at the correct address and was received by the respondent.

11. Ms Macarthur, Director, had been absent from the business for a period of two years due to maternity leave, nursing her husband and bereavement leave following his death. Ms Macarthur returned to work 2 days per week in early 2024. Ms Macarthur relied heavily on the claimant and a Ms Elizabeth Glasgow during her absence and following her return to work.

12. The claimant was employed as a Manager and worked initially for Warrior Fitness (Scotland) Ltd.

13. Ms Macarthur and the claimant had discussions on 5 May 2024 regarding the future of Warrior Fitness because Ms Macarthur wanted to move in a different direction. Ms Macarthur had established Balmore Leisure Ltd and she offered the claimant a pay rise, training for her next level qualification and a contract of employment confirming that as from 5 May 2024 she was employed by Balmore Leisure Ltd. The claimant accepted the contract.

14. The claimant resigned on 8 July 2024 and brought her claim against Balmore Leisure Ltd because she understood she had been employed by them.

15. The respondent received contact from ACAS regarding the claimant's claim. The respondent received the claimant's claim. Ms Macarthur understood that Ms Glasgow had contacted "the tribunal" regarding the claim because the respondent's position was that the claimant was employed by Warrior Fitness (Scotland) Ltd and not Balmore Leisure Ltd. Page 50 of the respondent's documents was a screen shot showing a telephone number (for "the tribunal") and confirmation that on the 29th October 2024 there had been an outgoing call made to that number.

16. The respondent relied on an email (page 50) which had been sent by Warrior Fitness to Ms Macarthur on 1 November 2024. The email attached an email which had been sent to "the tribunal". The email was entitled "FTAO Glasgow Tribunals Centre" and referred to a call with a staff member who advised that an email be sent to clarify the claimant's details. The email went on to say that the claimant had not ever been employed by Balmore Leisure Ltd, but had been employed by Warrior Fitness Scotland Ltd. It was stated that *"for this reason we are unable to complete the ET3 which has the wrong details"* and concluded with a paragraph stating *"can you advise the proper steps going forward, which will allow me to complete an ET3".*

17. Ms Macarthur did not understand there to have been a response to the email.

18. Ms Macarthur acknowledged subsequent correspondence from the tribunal had been received, for example, confirming the date for the hearing, but she assumed the hearing would not proceed because the claim was against the wrong company.

19. Warrior Fitness Scotland Ltd had a registered address at 100 Auchinairn Road, Bishopbriggs, G64 1NQ, but in June 2023, it relocated to 304 Glentanar Road, G22 7XS which is the same address as Balmore Leisure Ltd.

20. Ms Macarthur intends to wind up Warrior Fitness Scotland Ltd and although the company is still active at Companies House, it has not traded for several months.

Respondent's submissions

21. Mr Ocloo noted this was an application to set aside the Judgment dated 7 January 2025 and sent to the parties on 14 January 2025. The basis of the application was that the claim had been brought against the wrong company.

22. Mr Ocloo regretted that it had not been possible to call Ms Glasgow as a witness, but she was in Spain. He invited the tribunal to find Ms Macarthur a credible witness.

23. Ms Macarthur had returned to work after an absence of two years and became aware of the claim in November 2024. The Judgment had been issued in January 2025 but the respondent had only become aware of this when Sheriff Officers tried to enforce the Judgment.

24. Mr Ocloo referred to the case of ***Kwik Save Stores Ltd v Swain 1997 ICR 49*** and submitted the respondent had a good defence to the claim because it was not the employer. Mr Ocloo further submitted that even if there had been a TUPE transfer from Warrior Fitness Scotland Ltd to Balmore Leisure Ltd, the tribunal should still hear evidence prior to reaching a decision, particularly regarding the constructive dismissal claim. The balance of prejudice lay with the respondent.

Claimant's submissions

25. The claimant submitted that she had tried to resolve matters with the respondent, but they had continually ignored her attempts to make contact, and they had also ignored the attempts of Citizens Advice and ACAS to make contact. This had caused the claimant financial and emotional stress.

26. The respondent had not responded to anything within the time limits set. The address for correspondence was correct and there had not been any explanation why correspondence had been ignored. The respondent simply

had not engaged with the process. The claimant had paid to have Sheriff Officers enforce the Judgment.

27. The claimant submitted the respondent's application was too late. There had been a complete disregard and disrespect for the process and it would be unjust to allow the application.

Discussion and decision

28. I firstly had regard to the terms of Rule 21 of the Employment Tribunals Rules 2024. Rule 21 provides that a respondent may make a written application to the tribunal for an extension of time for presenting a response. The application must set out the reasons why the extension is sought and be accompanied by a draft response, or an explanation why that is not possible.

29. The claimant objected to the respondent's application and in the circumstances the Employment Judge directed that a hearing be arranged to determine the respondent's application.

30. I next had regard to the respondent's letter of 8 April 2025 setting out their application for an extension of time (page 41). The letter set out the reasons for the delay as being (i) the tribunal was informed that it was not the correct respondent and that the respondent had not employed the claimant; (ii) the respondent was informed that its comments had been noted on the tribunal file; (iii) the respondent was unaware that it was still obliged to file a response to the claim; (iv) the respondent was unaware that judgment had been entered into in default against it and only became aware of this upon receipt of a Charge for Payment of Money issued by a Sheriff Officer on the 19 March 2025 and (v) the respondent sought legal advice and has prepared a response to the claim as soon as reasonably practicable.

31. I was referred to the case of ***Kwik Save Stores Ltd v Swain 1997 ICR 49*** which made clear that in exercising my discretion to extend time I must take 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. The factors which a tribunal should consider include the

employer's explanation as to why an extension of time is required; the balance of prejudice and the merits of the defence.

32. I had regard to the respondent's explanation why an extension of time was required. The respondent placed reliance on the email sent by Ms Glasgow to "the tribunal". I noted the respondent produced (page 49) a screen shot of phone call made on 29 October 2024 at 10.59 to the tribunal, which lasted 6 minutes. This was followed, on page 50, by the email sent from the Warrior Fitness email account to Ms Macarthur, attaching an email entitled "FTAO Glasgow Tribunals Centre".

33. The difficulty with this evidence was threefold: (a) Ms Glasgow was not present to give evidence regarding these documents; (b) there was no record of the respondent's email on the tribunal's file and (c) the email entitled "FTAO Glasgow Tribunal Centre" did not include the header details and so it was not possible to ascertain the address, or to whom, it had been sent.

34. The second point relied upon by the respondent was that it was informed the comments had been noted on the file. I had the file checked and noted the respondent's email was not on the file and there was nothing on the file to support the position that comments had been noted. Furthermore, I am aware that a respondent contacting the tribunal's administration to inform them they are not the correct employer/respondent, would be advised to complete and return the Response with that information.

35. The third point relied upon by the respondent was that it was unaware it still had to complete a Response. I acknowledged this point, but I balanced it against the fact the respondent continued to receive correspondence from the tribunal regarding the claim and the forthcoming hearing and it took no action to either seek advice or make contact with the tribunal again.

36. The fourth point relied upon by the respondent was that it was unaware judgment had been entered against it and only learned of this when Sheriff Officers were instructed by the claimant to enforce the award. I had difficulty accepting this evidence in circumstances where the address for the respondent was correct, contact had been made by ACAS and the respondent

had received the claim and notice of the final hearing. Further, Ms Macarthur provided no evidence that postal deliveries were unreliable. In the circumstances I found this aspect of Ms Macarthur's evidence lacked credibility.

37. The fifth point relied on by the respondent was that the respondent had sought legal advice and prepared a Response as soon as was reasonably practicable. I noted the Charge issued by the Sheriff Officers was dated 19 March 2025 and it was some three weeks later that the respondent's representative wrote to the tribunal.

38. I concluded, for the reasons stated, that the respondent's reasons for delay were, at best, weak and lacked credibility. I considered that even if the respondent had made contact with the tribunal and been advised that their position had been noted, the respondent understood, from subsequent correspondence, that the case against the respondent was proceeding. The respondent had an opportunity to make contact with the tribunal again or to seek legal advice regarding their position: they did neither. Ms Macarthur told the tribunal that she simply assumed the hearing would not proceed because the respondent was not the employer. I did not consider this to be a sufficiently good reason to take no action.

39. I next had regard to the timing of the respondent's application for an extension of time. I noted the Judgment dated 7 January 2025 had been promulgated and sent to the parties on 14 January 2025. The respondent's representative wrote to the tribunal on 8 April 2025 making an application for an extension of time to present a Response and "set aside the Default Judgment".

40. The respondent's application dated 8 April was made outwith the time limit of 14 days from the date on which the Judgment was sent to the parties (which was 14 January 2025). I noted two points in respect of this: first, that the tribunal has power in terms of rule 5(7) of the Tribunal Rules 2024 to extend any time limit specified in the Rules and second, that no evidence was given to explain why the respondent had not acted earlier. I acknowledged there was reference in Mr Ocloo's submission to the respondent only becoming

aware of the Judgment when the Sheriff Officer's served a Charge on 19 March 2025, but there was no evidence to support that submission. Further, I concluded (above) that the suggestion the respondent received certain correspondence from the tribunal, but not others, lacked credibility.

41. I next considered the balance of prejudice in this case. Mr Ocloo invited the tribunal to find the balance of prejudice lay with the respondent because it had not employed the claimant. I considered there was some difficulty with that position because Ms Macarthur acknowledged she had given the claimant a contract of employment with the respondent on 5 May. She explained that the claimant had not signed and returned a copy of the contract and for that reason she considered it had not come into existence. I took from this that there was no dispute between the parties that the claimant was given a contract of employment to commence employment with the respondent on 5 May 2024.

42. Mr Ocloo, in his submission, referred to a possible transfer of an undertaking from Warrior Fitness to the respondent. There was no evidence regarding this matter but it cast further doubt on the respondent's position that the respondent was not the employer.

43. The claimant, in her submission, invited me to find the balance of prejudice lay with her because she had tried to resolve matters without the need to make a claim and she considered the issues had been caused by the respondent's failure to engage with the process.

44. I, in considering the balance of prejudice, acknowledged on the one hand that for the respondent to have a Judgment against them when they have not had their defence heard is a significant factor. However, I considered this was more than balanced by the fact the respondent was aware of the claim, aware of the proceedings, had an opportunity to respond/take advice and did not do so. The respondent, essentially, ignored the situation. I considered this conclusion was supported by Ms Macarthur's response to one of the claimant's questions at this hearing. The claimant asked why there had been no response to her numerous attempts to make contact to try to resolve

matters. Ms Macarthur replied *"I responded when I felt I needed to".* I considered this response illuminated the respondent's approach to this claim. In the circumstances I concluded the balance of prejudice lay with the claimant who had endeavoured to make contact with the respondent and who had reasonably taken all steps required of her.

45. I lastly considered the merits of the defence put forward by the respondent in the draft ET3. The respondent's principal position was that it had not employed the claimant. The respondent asserted the claimant had been employed by Warrior Fitness (Scotland) Ltd throughout the period of her employment. The Response acknowledged that Ms Macarthur had sought to open a new business (the respondent) but had experienced delays and only began trading in February 2025. It asserted all income and expenditure ran from Warrior Fitness Scotland Ltd until February 2025, notwithstanding that Ms Macarthur had been hoping to "transfer" everything long before but had been unable to do so. It was acknowledged in the Response that on 5 May 2024 Ms Macarthur sent the claimant a contract to change her employment to the respondent company. However, the claimant refused to sign a contract to transfer to the respondent and in any event, such a transfer was postponed as the respondent had not commenced trading.

46. I noted there was no dispute between the parties regarding the fact the claimant was initially employed by Warrior Fitness (Scotland) Ltd and that on 5 May 2024, she had been offered a contract of employment with Balmore Leisure Ltd. The contract was not produced for this hearing. The claimant accepted the offer. I could not accept the respondent's position that because the claimant did not sign and return the contract of employment, it did not come into existence. I also could not accept Ms Macarthur's suggestion that the contract had been sent to the claimant simply for future reference.

47. I acknowledged the pay slips produced for this hearing (page 54 – 59) were from Warrior Fitness (Scotland) Ltd; however I did not consider this detracted from the offer of a contract of employment with the respondent.

48. I concluded, given the claimant was offered a contract of employment with the respondent, that the respondent's defence lacked merit.

49. I next stood back and had regard to all of the points set out above. I concluded, for the reasons set out above, that the reasons for the respondent's delay in entering a Response were weak and lacked credibility; that the balance of prejudice lay with the claimant and that the defence lacked merit. I decided, for these reasons, to refuse the respondent's application for an extension of time to enter Response. The effect of this decision is that the Judgment dated 7 January 2025 remains live and may be enforced by the claimant.

Date sent to parties **11 July 2025**