

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100226/17

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Held in Glasgow on 19 April 2017

Employment Judge: Ian McPherson

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Miss Geraldine Neill
99 John Street
Larkhall
Lanarkshire
ML9 2EU

Claimant
In Person

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121 Care At Home Limited
c/o Yvette Gilmour
25 The Lairs
Blackwood
Lanarkshire
ML11 9YW

Respondents
Represented by:
Mrs Yvette Gilmour -
Director

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The judgment of the Employment Tribunal is that:-

(1) Having heard submissions from the claimant, and from the respondents' representative, the Tribunal, in terms of **Rule 48 of the Employment Tribunals Rules of Procedure 2013**, converted the listed Final Hearing into a Preliminary Hearing;

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(2) Further, having heard both parties, the Tribunal **granted** the respondents' opposed application made at this Hearing, under **Rule 20 of the Employment Tribunals Rules of Procedure 2013**, for an extension of time for presenting a response and, having done so, the Tribunal **allowed** the

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E.T. Z4 (WR)

ET3 response submitted late for the respondents at this Hearing to be accepted by the Tribunal, and the case to proceed as defended;

- 5 (3) Instructs the clerk to the Tribunal to serve a copy of the now accepted ET3 response on the claimant, and on ACAS, when issuing this Judgment to both parties;
- 10 (4) Further, the Tribunal **orders** the claim and response to be listed for a one day Final Hearing before Employment Judge McPherson, sitting alone, at the Glasgow Employment Tribunal, on **Tuesday, 9 May 2017, commencing at 10.00 am**, noting that this date was agreed at this Preliminary Hearing as being mutually convenient for parties, and listing the case for full disposal, including remedy if appropriate, noting that as the claim is defended, and outstanding payments claimed as owed are denied by the respondents, who
- 15 dispute that the claimant was an employee at the material time, the claimant will be required to lead her evidence and her witnesses first, followed by evidence from the witnesses for the respondents;
- 20 (5) **Reserves** to that Final Hearing for determination any outstanding preliminary issue arising as to whether or not the claimant was an employee of the respondents as at the dates of employment stated in the ET1 claim form; and
- 25 (6) Finally, the Tribunal **orders** that parties shall comply with the Case Management Orders set out below at paragraph 34 of the Reasons below.

REASONS

Introduction

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1. This case called before me on the afternoon of Wednesday, 19 April 2017, at 2.00pm, for a Final Hearing, further to Notice of Final Hearing issued by the Tribunal to both parties on 9 February 2017.

2. Following ACAS Early Conciliation between 9 November 2016 and 10 December 2016, the claimant, who is representing herself, presented an ET1 claim form to the Employment Tribunal, on 2 February 2017, complaining that the respondents owed her notice pay, holiday pay, and arrears of pay, and, in the event that her claim before the Tribunal was to be successful, the claimant sought compensation only. She did not, however, detail the amount of compensation that she was seeking, nor explain how she had calculated that sum.
3. Her claim was accepted by the Tribunal on 9 February 2017, and a copy of the claim was served on the respondents, requiring them to lodge an ET3 response at the Glasgow Tribunal Office by 9 March 2017. In that Notice of Claim, it was explained, to the respondents, that if their response was not received by 9 March 2017, and no extension of time had been agreed by an Employment Judge before that date, then they would not be entitled to defend the claim, and, where no response was received or accepted, an Employment Judge might issue a Judgment against them without a Hearing and they would only be allowed to participate in any Hearing to the extent permitted by an Employment Judge.
4. Further, the Notice of Claim, and Notice of Final Hearing, sent to both parties by the Tribunal, on 9 February 2017, stated that the claim would be heard by an Employment Judge sitting alone, and that one hour had been allocated to hear the evidence and decide the claim, including any preliminary issues. As the figures for the calculation for the claim were not set out in the claim, the letter from the Tribunal further directed that the claimant must send to the respondents within 14 days details of the amount claimed and how it was calculated, and a copy of that calculation should be brought to the Hearing.
- No Response – Further Information Required from the Claimant**
5. On 15 March 2017, Employment Judge Murdo Macleod noted that no response to the claim had been received, and while it may therefore have

5 been possible to issue a Judgment without the need for a Hearing, Employment Judge Macleod considered that there was insufficient information to issue a Judgment at that stage, and he therefore required the claimant to provide a schedule setting out the sums sought under each of her heads of claim, together with a breakdown showing the basis upon which those sums were sought, and to do so by 31 March 2017, to allow a Judgment to be considered.

6. The claimant did not do so, by the date fixed for compliance of 31 March 10 2017, and, accordingly, on 5 April 2017, the Tribunal Office wrote to the claimant stating that no reply had been received to the Tribunal's letter of 15 March 2017, and directing that she should reply by 12 April 2017. Thereafter, by email to the Tribunal, on 6 April 2017, the claimant attached a Schedule of Loss as requested by Employment Judge Macleod. In total, it 15 sought various sums, for various heads of loss, with a grand total of **£18,255.89**.

7. On 6 April 2017, following instructions from Employment Judge Frances Eccles, the Tribunal wrote again to the claimant, stating that, with reference 20 to her Schedule of Loss intimated on 6 April 2017, Employment Judge Eccles had directed the clerk to the Tribunal to advise the claimant that certain sums claimed required further explanation, and therefore the case would proceed to the Final Hearing scheduled for Wednesday, 19 April 2017 at 2.00pm.

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Final Hearing before this Tribunal

8. When the case called, shortly after 2.00pm, the claimant was in attendance, 30 unrepresented, and without any witnesses. The respondents were not present, nor represented. Indeed, the respondents not having entered a response, and so not being entitled to participate in the Final Hearing, except to the extent that might be permitted by me as the allocated Employment Judge, it was not anticipated that the respondents would be attending. In the

event, shortly after the Hearing had started, I was advised, by the clerk to the Tribunal, that a representative was in attendance for the respondents, and she wished to be heard by the Tribunal.

5 9. By that stage, I had received, from the claimant, a bundle of assorted documents, together with a further copy of her Schedule of Loss as previously intimated to the Tribunal, on 6 April 2017. The claimant advised me that while she had intimated her Schedule of Loss to the Tribunal, she had not copied it to the respondents, despite the terms of the Notice of Claim
10 dated 9 February 2017, but she understood, from a telephone conversation the previous day, with a Kirsten Allan, at ACAS, that ACAS had contacted Mrs Yvette Gilmour, at the respondents.

10. The bundle of assorted documents produced by the claimant has been
15 placed on the case file, and they comprise her Schedule of Loss; a letter dated 9 August 2016; various documents relating to bank charges and default notices; an employment rota; her payslips for January and February 2017; a document relating to nursery fees for her daughter; and further documents relating to her credit card; these documents, she explained to
20 me, being produced to vouch her claim for financial loss sustained by her which is attributable to the matter complained of, being an alleged unlawful deduction from wages by the respondents.

Respondents appear at Final Hearing

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11. At this stage, shortly after 2.10pm, Mrs Yvette Gilmour was brought into the Hearing room, and she explained that she is the owner and Director of the respondent company, and that she has been so busy working that she had not opened mail from the Tribunal, but, the previous week, she stated that
30 she had an HR company going to defend the claim. In answer to my request for further clarification, she stated, having looked at her mobile phone, with my permission, that she had made contact with an Emma O`Leary, at ELAS Employment, Charles House, Manchester, as a result of which a gentleman,

whose first name was Govie, but whose surname she could not recall, had met with her, last Monday or Tuesday, and she had signed paperwork for ELAS Employment to be HR representative for her company.

5 12. Mrs Gilmour further advised me that she had discussed with ELAS Employment her defence to this claim, but she stated that she had been advised by ELAS Employment that it was too late, and they did not have a representative to appear for her at this Hearing. She further advised that she had spoken the previous day to a Christine Hall, at ACAS, and that she had
10 been advised by Ms Hall to phone the Employment Tribunal, and get this Hearing postponed.

13. She further advised me that she had telephoned the Glasgow Tribunal Office, at around 4.30pm the previous afternoon, and having spoken
15 originally to a gentleman, that call was cut off, and she then had a subsequent telephone conversation with a young woman, but she was unable to detail the names of the Tribunal personnel with whom she had spoken. I pause to note that there was nothing on the case file to suggest there had been any contact by, or on behalf of the respondents, at any stage
20 in the course of this claim proceeding at the Tribunal.

14. Further, Mrs Gilmour also advised me that Christine Hall at ACAS had told her that the claim was for around £18,000, and Mrs Gilmour stated that she wanted to defend the case, but she did not have a written defence with her,
25 and she would need to sit down with the HR company now instructed, at ELAS Employment, and defend the case, or else she would just face the fact that she would have to shut her business down, if Judgment was awarded against the respondents.

30 15. Mrs Gilmour accepted that she had received the Notice of Claim from the Tribunal, enclosed with the letter of 9 February 2017, including the blank ET3 response form, for completion and return, but that she had done nothing with it, and she further advised that, due to stupidity on her part, she did not

really know what the Employment Tribunal was all about, and she had not looked into it, nor dealt with the correspondence from the Tribunal. By way of explanation, she stated that she worked 7 days per week, from 6.30am, sometimes not getting back home until around 11pm, and that she simply does not have time to do things.

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16. Stating that she knew that this would sound like lunacy, Mrs Gilmour further stated that she sought a postponement of this Hearing to let her get her HR company in to deal with her defence to the case now, and she further added that the claimant had never worked for her, on the dates claimed, and that what the claimant had stated about her employment was "**100% wrong**". Finally, while she was aware of the amount sought in the claimant's Schedule of Loss, from her telephone conversation with Ms Hall at ACAS, she advised me that she had not seen the claimant's detailed Schedule of Loss.

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17. At that stage, as the claimant had spare copies with her, I invited the claimant to supply Mrs Gilmour with a copy of the Schedule of Loss, and the documents she had produced to the Tribunal. I then invited the claimant to make a response, to the submissions that had just been made to me by Mrs Gilmour, on behalf of the respondents.

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Claimant's Reply to Respondents' application for Postponement

18. In a short, but robust, reply to Mrs Gilmour's application for postponement of the listed Final Hearing, the claimant stated that Mrs Gilmour claims she did not have an HR company to represent her, but, the claimant stated, nor did she, and she had had to look for a new job, pay her mortgage, and look after her 3 year old daughter.

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19. She accepted that, in her ET1 claim form, at Section 5.1, she had given her start date of employment as 15 August 2016, and her end date as 10 October 2016, yet the Schedule of Loss, intimated to the Tribunal on 6 April

2017, showed the dates as 18 May 2015 to 15 August 2016. She further stated that she understood Mrs Gilmour had had two previous HR companies working for her in the past, and that a previous manager had taken her to the Employment Tribunal for unpaid wages in June/July 2016. She stated that she opposed Mrs Gilmour's application for a postponement of the listed Final Hearing.

20. At this stage, having heard from both Mrs Gilmour, and the claimant in reply, I referred both parties to the terms of the Tribunal's overriding objective, under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, which provides that the Tribunal is to deal with cases fairly and justly, and that dealing with a case fairly and justly includes, so far as practicable, (a) ensuring that the parties are on equal footings; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility of the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.

21. Further, **Rule 2** also provides that the Tribunal shall seek to give effect to the overriding objective in exercising any power given to it by the Rules, and parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

22. Further, I also advised parties, and read *verbatim* from a bench copy of "Butterworths Employment Law Handbook", the terms of **Rule 20 of the Employment Tribunal Rules of Procedure 2013**, providing for applications for extension of time for presenting a response. Specifically, I read the terms of **Rule 20(1) and (2)**, as follows:-

"(1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reason why the extension is

5 *sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and if the respondent wishes to request a Hearing this shall be requested in the application.*

10 *(2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.”*

Rule 20 application by Respondents

15 23. While **Rule 20(3)** provides that an Employment Judge may determine a **Rule 20** application without a Hearing, I explained to both parties that, as both were in attendance, and consistent with the Tribunal’s overriding objective, under **Rule 2**, to deal with cases fairly and justly, including avoiding delay, and saving expense, Mrs Gilmour might wish to give consideration to whether or not she sought to make a **Rule 20** application to the Tribunal at
20 this Hearing.

24. It then being around 2.50pm, and Mrs Gilmour having requested a quarter of an hour adjournment, to allow her to draft a **Rule 20** application, and complete and submit the ET3 response, providing details of her grounds of
25 resistance, I stated that I would allow a period of 30 minutes, and if further time was required, then she should liaise with the clerk to the Tribunal who would seek my further instructions. I then adjourned proceedings, and I retired to my chambers.

30 25. Thereafter, the Tribunal clerk brought to me, in chambers, a 1 page, handwritten **Rule 20** application, drafted by Mrs Gilmour, together with a completed ET3 response form, on behalf of the respondents, defending the

claim, and setting out the facts on which the respondents will rely to defend the claim.

- 5 26. On my instructions, the **Rule 20** application, and completed ET3 response form, were copied by the clerk, and a copy provided to the claimant who, in turn, prepared a 3 page, handwritten, documents entitled “**Opposition to Deferment**”, a copy of which was provided to Mrs Gilmour, and to myself, for consideration.
- 10 27. I have placed Mrs Gilmour’s **Rule 20** application, the completed ET3 response form, and the claimant’s opposition, on the case file, and it is not necessary, for the purposes of this Judgment, to repeat their terms in detail, for they are available on the case file, and they have, in any event, been copied to each of the parties at this Hearing.

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Oral Judgment on opposed Rule 20 application

- 20 28. Having carefully considered, in chambers, during the adjournment, the oral and written submissions made on behalf of both parties, I announced orally, on resuming the Preliminary Hearing, after my private deliberation, that I was granting the **Rule 20** application, and allowing the case to proceed as defended.
- 25 29. In orally delivering my Judgment, I read, *verbatim*, from a Note written up in chambers, during my private deliberation, as follows:-

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“Having carefully reflected on the parties` competing submissions, oral and written, and having considered Mrs Gilmour`s Rule 20 application for an extension of time to lodge an ET3 response late, defending the claim, I have decided to convert today`s listed Final Hearing into a Preliminary Hearing, in terms of my case management powers under Rule 48 of the Employment Tribunal Rules of Procedure 2013, being satisfied

that the Tribunal is properly constituted (as an Employment Judge sitting alone) for the purpose.

5 *Further, I am satisfied that neither party is materially prejudiced by the change, having regard to the Tribunal's overriding objective, under Rule 2, to deal with the case fairly and justly, including avoiding delay and saving of expense.*

10 *As such, rather than postpone the listed Hearing, and refuse to allow the respondents to participate when they have appeared, Mrs Gilmour has explained the reason for the delay in lodging an ET3 response, and set out her reasons why the extension of time is sought under Rule 20, and she has presented a completed ET3 setting out her grounds of resistance.*

15 *During the adjournment, having considered the judicial guidance available to me, from the Judgment of Mr Justice Underhill, Employment Appeal Tribunal President, in Thornton -v- Jones [2011] UK/EAT/0068/11, and balanced the relevant factors of the*
20 *length of the delay, the prejudice to each party if the extension of time is either granted or not granted, as well as the merits of the respondents` defence, as set out in the ET3 response produced today, I am satisfied that it is in the interests of justice to allow the respondents` opposed Rule 20 application, for the phrase*
25 *`the interests of justice` means justice to both parties.*

30 *Having done so, I order that the case be listed for a Final Hearing for full disposal, including remedy if appropriate, on a date to be assigned by the Tribunal, having heard from both parties as to their availability. Due to the lateness of the hour, it now being 4.00pm, and the case only allocated one hour for this Hearing, it would not have been possible, within the allocated Hearing date, to have heard and concluded evidence from the claimant, and so*

the case would, at best, have gone part heard, and needed to be relisted at a later date.

5 *Further, having granted the respondents` Rule 20 application, I allow the response submitted late for the respondents, at this Hearing, to be accepted by the Tribunal, and the case to proceed as defended, and I instruct the clerk to the Tribunal to serve a copy of the now accepted ET3 response on the claimant, and ACAS, when issuing my written Judgment to both parties.*

10 *While I recognise that the claimant will be disappointed by this ruling, for she had hoped to attend today and present her evidence in support of the Schedule of Loss, intimated on 6 April 2017, to what she understood to be an undefended claim, I draw to her attention that had I proceeded, and awarded Judgment to the claimant, the respondents would likely have thereafter sought Reconsideration of that Judgment under Rule 70, and so the Judgment would then need to be revisited.*

20 *That too is a consideration in me deciding that, to avoid delay, and save expense, this Rule 20 application is best dealt with at this Hearing, and the merits, or otherwise, of the claimant`s case, and the respondents` defence, can be assessed by an Employment Judge at a Final Hearing on a date to be afterwards fixed by the Tribunal, having regard to both parties` respective availability.*

30 *On account of the events at today`s Hearing, I also put the respondents on notice that, at the Final Hearing, the Tribunal will wish to be addressed by the respondents` representative on whether the respondents` conduct of their defence to these Tribunal proceedings has been vexatious, abusive, disruptive, or otherwise unreasonable, whereby the Tribunal might consider*

making a Costs Order or a Preparation Time Order in favour of the claimant, in terms of Rule 76(1)(a), and the Tribunal will also consider, at that Final Hearing, whether it is appropriate to make a Costs Order in favour of the claimant, under Rule 75(1)(b), in respect of the Tribunal fees paid by the claimant to bring and conduct the claim against the respondents before the Employment Tribunal.

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30. Having delivered that oral Judgment to both parties in the resumed public Hearing, neither the claimant, nor Mrs Gilmour for the respondents, sought to clarify its terms, which they both confirmed they had noted and understood, and I thereafter proceeded to discuss logistical arrangements for a Final Hearing as soon as possible.

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31. In issuing this Judgment, and including in it the full terms of the oral Judgment, I do so, in terms of **Rule 62 of the Employment Tribunals Rules of Procedure 2013**, so as to place on record, and make available to both parties in a written format, for ease of reference, the full terms of what I said in delivering my oral Judgment, so that it is available on the casefile should any further need arise, to refer back, at the forthcoming Final Hearing, to the specific terms of my oral Judgment.

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Further Procedure

32. Having heard both parties about likely witnesses and duration of their evidence, I assigned a one day Final Hearing for the Tribunal to hear evidence from both parties and determine the claim. Parties agreed that one full day was sufficient to hear all of the relevant witnesses, identified as follows:-

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(a) **Claimant**

5 Claimant herself, plus previous 3 Managers employed by the respondents, identified as Liam Donaldson, Lorna Watson and Michelle Ralton, plus potentially 2 other Managers whose names the claimant did not have to hand. She estimated 1 hour for her own evidence, and 20 minutes total for her witnesses.

(b) Respondents

10 Mrs Gilmour advised that she would lead evidence from herself, say 1 to 2 hours, plus 2 witnesses to be called by the respondents, identified as Rebecca Watson, Admin office, estimated 20 minutes, and Jack Drummond, electrician, estimated 10 to 15 minutes, to speak to the terms of a conversation between the claimant and Mrs Gilmour around August 2016.

15 33. The date assigned for the Final Hearing was confirmed as mutually convenient to both parties and the Tribunal. Further, I stated that I would issue, as soon as possible, a written Judgment and Reasons, with associated case management orders to regulate further procedure before the Tribunal. This I have now done in this Judgment.

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Case Management Orders for the Final Hearing

25 34. Under **Rule 29 of the Employment Tribunals Rules of Procedure 2013**, I now issue the following Case Management Orders on my own initiative for the purpose of the Final Hearing in these proceedings:-

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1. **No later than 7 days prior to the Final Hearing**, the parties shall provide copies to each other of any documents upon which they intend to rely.
2. The parties shall jointly prepare a single set of documents, in chronological order and with numbered pages, duly indexed, and incorporating all documentary productions intended by both parties to

be referred to at the Hearing, and shall lodge **two copies** of the same with the Tribunal in time for commencement of the Hearing.

5 3. The claimant shall prepare and lodge with the Tribunal, by e-mail, copied at the same time to the respondents' representative, **within the next 7 days from date of issue of this Judgment**, an updated Schedule of Loss, with supporting documentation, setting out:-

10 (a) what the claimant seeks by way of remedy if the claim succeeds;

(b) if the claimant seeks the remedy of compensation, how much is sought in respect of each complaint with a detailed explanation of how each sum is calculated; and

15 (c) if the claimant seeks to be reimbursed any Tribunal fees paid by her to bring her claim, and proceed to Final Hearing, she shall specify in her updated Schedule of Loss, what sums she has paid by way of Tribunal fees, and when.

20 4. **Within 7 days of receipt of this updated Schedule of Loss**, the respondents' representative will indicate to the Tribunal, by e-mail, copied at the same time to the claimant, whether they have any comments or objections to make to the various sums claimed by the claimant and, if so, to explain the basis of their objections, and produce any relevant supporting documents.

IMPORTANT INFORMATION ABOUT ORDERS

30 1. You may make an application under **Rule 29** for this Order to be varied, suspended or set aside. Your application should set out the reason why you say that the Order should be varied, suspended or set aside. **You must**

confirm when making the application that you have copied it to the other party and notified them that they should provide the Tribunal with any objections to the application as soon as possible.

- 5 2. If this Order is not complied with, the Tribunal may make an Order under **Rule 76(2)** for expenses or preparation time against the party in default.
3. If this Order is not complied with, the Tribunal may strike out the whole or part of the claim or response under **Rule 37**.

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Employment Judge: Mr Ian McPherson
Date of Judgment: 21 April 2017
20 Entered in register: 24 April 2017
and copied to parties

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