



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss H Abell

v

Lash and Nail Boutique Limited

Heard: By CVP/on the papers

On: 15 February 2023

Before: Employment Judge JM Wade

Appearance:

For the Claimant: No attendance

For the Respondent: Ms K Trueman, director

JUDGMENT

The claimant's claims are dismissed pursuant to Rule 47.

REASONS

1 Firstly, let me wish the claimant and her new baby well. One reason to dismiss this claim today is because if it is allowed to continue it will simply add to the strain on her at a time when she least needs it. It will also hang over Ms Trueman. The facts and principles which have led me to exercise my discretion under Rule 47 to dismiss the claim are set out below.

2 The claimant, a hairdresser, presented her claim on 15 November 2022 asserting employment ended on 31 May 2022. She had an ACAS certificate indicating conciliation from 4 October to 15 November 2022. That is too late for all claims apart from redundancy, which has a six month time limit. She alleged in her claim form that employment started on 10 March 2020 and with an age of 37 at the time of dismissal her redundancy claim, if it were to succeed, would mean an award of two weeks' pay. She also pursued notice pay and holiday pay.

3 The claim form was sent out by post on 8 December 2022. Ms Trueman told me today that the postal address used was her home address. The return date for the response form was 5 January 2023 and a notice of hearing was included for today's hearing, which is nine weeks from the sending out of the claim.

4 On 13 January 2023 the respondent completed a response on line, and on 19 January 2023 the Tribunal emailed the parties rejecting the response because it had been presented late. The claim form and response form were not, therefore, read by an Employment Judge or Legal officer at the Rule 26 stage, and no time limit issues for the claims were detected.

5 On the same date at 14.10 the respondent wrote to say "the company is the

lash and nail boutique and I did respond in the time frame given so I would like this to be looked at again please". That email was not referred to a Judge. At 14.29 the respondent wrote again, "I can't understand why the response has been rejected due to timing when I responded as soon as I received the email. Could this please be altered as I disagree with the decision you have made and if not tell me what I need to do next". That email was also **not** referred to an Employment Judge, nor was it copied to the claimant.

6 The claim details said: "the salon closed due to my employer not paying her rent after months of notice. She ignored the notice given and also didn't inform her staff that the business was going to be closed."

7 The response said: "the owners of the building changed the locks on me without me knowing because we had a falling out about when they owned the business and the tax they still owed on the company. Holly worked for the company prior to me taking over and continued to work from there after I'd had the locks changed on me. She got a new key for the salon off of the previous owners and continued to work from there self employed using all salon products until she found a new place of work. Which she then went straight to Milandas up the road so never had a day out of work. She also diverted the salon phone to her mobile and carried on gaining all salon clients and running her business as usual. I left the salon phone diverted to her mobile and didn't cut it off."

8 The claimant was asked to provide details of the sums she claimed because the position was, the response had been rejected and a Rule 21 Judgment may be given. On 2 February 2023 the claimant said, her "weekly wages changed each week as her hours were never the same." Further, "the money owed is my months redundancy that I wasn't given when Kelsey closed the salon without giving me any notice. I hadn't taken any holiday days while working at [] so I was also entitled to holiday hours. I was only paid some hours on top of my wages so there is also holiday entitlement outstanding".

9 On 13 February at 10.05 the claimant said: "Hi [] unfortunately I won't be able to log on to google chrome on the 15th feb at 2pm will this be ok?" The Tribunal responded with technical advice and a reminder of Rule 92. At 15.58 she said – "the reason I am not responding to the email which includes Kelsey Trueman is because as you can imagine it hasn't been very nice to be in contact with since the salon closed and after some nasty messages from her I don't wish her to know my business nor read any messages I may send to yourselves. I have let you know I won't be able to log on for the hearing on 15 February as I will be in hospital."

10 The claimant was then directed to provide evidence of the reasons why she could not attend if she was seeking a postponement. At 8.13am on 14 February 2023, again not copying the respondent, she said she hadn't given two different reasons. "I am going into hospital today to have my baby so tomorrow won't be convenient for me to log in to google chrome for the hearing".

11 Despite the Tribunal's repeated emails telling the claimant to copy correspondence to the respondent she has routinely not done so. Nor did she apply for a postponement of this hearing in December, when it must have been plain to her that it would be difficult to attend due to imminent birth. In these circumstances I directed a letter to the effect that the hearing would proceed and I may give a decision on the papers. In addition, there was before the Tribunal the unaddressed application, in effect, for an extension of time for the defence on which the claimant has not had the opportunity to comment.

12 Ms Trueman's reason for not submitting the response in time is that, in effect, she put her head in the sand initially; then she was away from her home address over Christmas; and then she was simply not quick enough; she was apologetic today and is clearly at the very earliest stages of trying to understand what it means to run a

business.

13 I informed Ms Trueman that I would reach decisions on reading the papers. It is clear that the claimant's Regulation 14 holiday pay complaint and notice pay complaint are presented outside the three month time limit unless she can show it was not doable to present earlier. She is not entitled to an ACAS extension on those because she did not contact ACAS within the applicable time limit. It is also likely, on the facts that are likely to emerge, that she can prove no loss in relation to the failure to give notice because she continued working. There is little hardship to her, then, in me dismissing claims which are out of time, and which, even if she could say it was not reasonably practicable for them to be submitted earlier, that the notice pay claim has little or no value.

14 As to the redundancy payment claim, if the facts emerge as the papers suggest, there has been a transfer of the business of the respondent to the claimant consequent on the lock out by the landlord. The claimant obtained control of the premises through new keys, operated from it, used its products and looked after its customers. In those circumstances a Tribunal is likely to find that in all the circumstances, any liability for a redundancy payment transferred to the transferee, namely the claimant herself, or possibly the landlord, depending on their communications. It is likely the landlord will need to be joined as a party to this case if it continues.

15 I recognise that justice involves the opportunity for a fair hearing and that the claimant has not attended today for a good reason – a new baby. Nevertheless if she had contacted the Tribunal much sooner she could have re-arranged to a convenient time and date, and in that sense she has had the opportunity for a fair hearing.

16 I have a discretion to dismiss a claim when a party does not attend. In exercising that discretion I take into account the reason for non attendance, but also bear in mind stewardship of the Tribunal's resources, and the costs and time of the parties, and the strain on them of these proceedings. The alternative to dismissal in this case is to issue a strike out warning, or deposit orders in connection with the holiday pay and notice pay claims (for time limit reasons), and the same in respect of the redundancy payment claim because of the impact of the Transfer of Undertakings (Protection of Employment) Regulations 2006 on liability for that payment, taking into account the matters above. There would also be the need to join the landlord.

17 On balance I consider it fairer and more proportionate to everyone to dismiss this claim today. If, having read carefully about the difficulties in her claim, the claimant wishes to seek reconsideration, then she can make an application. That application will only succeed if she can address the fundamental problems of time limits and continuing to use the salon premises etc – the TUPE point. If she can suggest she has an arguable case on these matters and seeks a hearing, then that will need to be arranged at a time in the future when she can participate, and so can the landlord, and with directions for the exchange of relevant communications between all the parties. That will mean delay to some months ahead. She will also need to demonstrate and understand that complying with Rule 92 and copying the respondent in on any correspondence to the Tribunal is not an option, it is mandatory. Any further correspondence which is not so copied (by either claimant or respondent) will be rejected. It is simply not fair. This is put far better by others in the following passage:

18 *“ communication from one party to the ET without copying the other party should almost never occur and requires specific justification in accordance with the Rules , as the Lord Judge LCJ said at paragraph 7 of his judgment in Mohamed v The Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2010] EWCA Civ 158 :*

"7. It is an elementary rule of the administration of justice that none of the parties to civil litigation may communicate with the court without simultaneously alerting the other parties to that fact. ..."

*Other than in the case of [Rule 32](#) , the **ET Rules** provide in [Rule 92](#) to the same effect. Unfortunately, there are cases where [Rule 92](#) is not observed.*

83. The impropriety is particularly serious where the party communicating unilaterally with the Tribunal is represented while the other party is not. Communications going the other way, from the Tribunal to one side and not the other, require specific justification and very careful thought indeed, especially when the party omitted from the communication is the unrepresented one. There is a real risk of undermining confidence in the impartiality of Judges and the administration of justice if that principle is not scrupulously observed.

Employment Judge JM Wade

Dated: 15 February 2023

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